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CLIENT ALERTS

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Eighth Circuit Holds That a Physician with Staff Privileges Does Not Qualify as an Employee Under the Americans with Disabilities Act or the Rehabilitation Act

On June 9, 2006, the United States Court of Appeals for the Eighth Circuit held that a physician with staff privileges at a hospital does not qualify as an employee under the Americans with Disabilities Act (ADA) or the federal Rehabilitation Act, despite the fact that the hospital exercised a "heightened level of personal control" over the physician (Wojewski v. Rapid City Reg'l Hosp., Inc., 8th Cir., No. 05-2952, June 9, 2006). The court further declined to extend application of the Rehabilitation Act to independent contractors.

The plaintiff, Dr. Wojewski, a cardiothoracic surgeon, had been a member of the medical staff at Rapid City Regional Hospital (RCRH) since 1988, with privileges to admit patients; use the hospital facilities; perform surgery; and utilize RCRH employees, such as nurses, to assist him in surgery. As a medical staff member, Dr. Wojewski was required to provide appropriate patient care, abide by medical staff bylaws, prepare required medical records, abide by ethical principals, participate in continuing medical education, and schedule operating room time. He also agreed to take heart-related emergency calls from the RCRH emergency room.

Dr. Wojewski leased separate office space and maintained his own staff, whom he hired and paid. Dr. Wojewski billed his patients directly and received no remuneration from RCRH. RCRH did not bill patients for Dr. Wojewski's services nor did the hospital pay Dr. Wojewski for his services. Accordingly, RCRH did not issue W-2 or 1099 forms to him. The hospital did not provide him with benefits such as health insurance or medical malpractice insurance.

In 1996, Dr. Wojewski was diagnosed with bipolar disorder and took a leave of absence for treatment. He returned to RCRH's active medical staff in August 2003, subject to conditions outlined in a Letter of Agreement, including periodic meetings with a physician; mandatory vacations; a limit to the time he was on call; participation in therapy; taking prescribed medications and refraining from taking unprescribed

medications; limiting his alcohol intake; submitting to "random biological fluid collection"; submitting to mental, physical, and medical competency examinations; limiting travel; and releasing all medical and other personal information relevant to his impairment. Shortly after his reinstatement, Dr. Wojewski entered a manic phase of his disorder and experienced an acute episode while performing open-heart surgery. Following a hearing, RCRH terminated Dr. Wojewski's medical staff privileges because of concerns for patient safety.

Thereafter, Dr. Wojewski filed a complaint in federal district court, seeking relief under the Rehabilitation Act and Titles I and III of the ADA, alleging wrongful termination of staff privileges. The district court granted RCRH's motion for summary judgment on the Rehabilitation Act claim and the claim under Title I of the ADA, finding Dr. Wojewski was not an employee of RCRH, but rather was an independent contractor and therefore was not covered by either law. The district court also dismissed Dr. Wojewski's claim under Title III of the ADA, finding that he was not covered under that law because he was not a client or customer of RCRH. Dr. Wojewski appealed.

During the pendency of the appeal, Dr. Wojewski died. As a result, his claim under Title III of the ADA became moot because Title III only provides for injunctive relief. The lawsuit was continued by his estate, which argued that under the ADA, Dr. Wojewski should be deemed to have been an employee of the hospital because (1) as a practical matter Dr. Wojewski was completely dependent upon RCRH for his livelihood and (2) the heightened level of control and authority RCRH exercised over him as a result of the Letter of Agreement converted their relationship into one of employer–employee. The Court of Appeals for the Eighth Circuit rejected these arguments and agreed with the district court that Dr. Wojewski was an independent contractor and therefore not entitled to relief under the ADA. The court applied the test used by the Supreme Court in *Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) and reasoned that, notwithstanding the existence of the Letter of Agreement, "because of the overarching demands of the medical profession, the tension in professional control between doctors and hospitals for medical services rendered at hospitals is not, we believe, a reliable indicator of whether the doctor is an employee or an independent contractor at the hospital." The court reasoned that the agreement represented reasonable steps by RCRH to ensure patient safety and avoid professional liability, not an attempt to control, as an employer, the manner in which Dr. Wojewski performed operations.

The court also rejected the estate's claim that Dr. Wojewski was entitled to protection under the Rehabilitation Act even though he was an independent contractor. The court refused to extend coverage of the Rehabilitation Act to independent contractors, reasoning that, as under the ADA, the Rehabilitation Act only applies to employee–employer relationships.

The *Wojewski* decision is significant in that the court held that doctors who are not employees of the hospital cannot sustain claims under the ADA or Rehabilitation Act, even where the hospital exercises a "heightened level of personal control" over the doctor. The decision is beneficial to hospitals because it allows hospitals to take greater steps to ensure patient safety and avoid liability, while being protected against wrongful termination claims under the ADA or Rehabilitation Act. Hospitals, however, should be aware that this case was decided under federal law, and state laws may provide doctors with greater protection.

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Please feel free to contact Maxine Neuhauser in the firm's Newark office at 973/639-8269 or mneuhauser@ebglaw.com if you have any questions or comments. Daniel R. Levy, an associate in the Labor and Employment Department, assisted in the preparation of this Alert.