Federal Government Enforcement Actions

The Disability Rights Section of the Civil Rights Division of the United States Department of Justice enforces titles II and III of the Americans with Disabilities Act and enforces title I of the Act against public employers. The Equal Employment Opportunity Commission enforces title I of the ADA against private employers. This outline covers their enforcement actions and technical assistance efforts since our last Conference in 2016.

Department of Justice Enforcement Actions

December 11, 2017

Advanced Plastic Surgery Solutions reached an agreement with the U.S. Attorney's Office for the Northern District of Georgia to resolve allegations that it violated title III of the ADA by refusing to operate on a patient because of her HIV status.

A woman tried to schedule an initial appointment with Advanced Plastic Surgery Solutions to discuss cosmetic surgery. Her initial call was answered by a third-party call center the company retained to handle calls from prospective patients. After she revealed she had HIV, the call center employee told the complainant that APSS doctors would not perform the procedure. The woman called back and spoke with an APSS employee, who confirmed that the business would not perform the surgery.

Under the settlement, APSS is required to draft new policies and procedures indicating that it does not discriminate against persons with disabilities, including anyone who has HIV or AIDS. It also has to conduct training for its employees, with a focus on HIV-related discrimination. APSS has agreed to pay $25,000 to compensate the complainant for her emotional distress, and pay a $10,000 civil penalty to the United States.
This matter was handled by Assistant U.S. Attorney Aileen Bell Hughes, who is the Civil Rights Enforcement Coordinator for the U.S. Attorney's Office.

**Aurora Health Care** reached an agreement with the US Attorney for the Eastern District of Wisconsin settling two claims that they discriminated against patients with HIV. Aurora operates 15 hospitals, more than 150 medical clinics, an extensive laboratory system, and 70 pharmacies throughout eastern Wisconsin and northern Illinois.

One patient was refused hip surgery in August of 2015 and another patient’s urologist refused to remove his catheter in January of 2016 because he was concerned there could be blood in the urine.

Under the settlement agreement, Aurora paid $30,000 to Patient No. 1 and $15,000 to the spouse of Patient No. 2. Aurora also paid a civil penalty to the United States in the amount of $15,000. In addition, Aurora reviewed and revised, as appropriate, its existing non-discrimination and infection disease policies and will conduct additional training on the ADA, and report to the Government any alleged violations of the ADA along with a complete copy of Aurora’s response to the complaint.

**Pea Ridge School District in Pea Ridge, Arkansas** which, as a public school, is a title II entity violated the ADA when it removed three students from its schools after reviewing a document referencing the HIV status of the students’ family member. PRSD kept the students out of school and extracurricular activities initially saying they could not return until they had been tested for the HIV virus and those results were known to PRSD. They subsequently relented and readmitted the students prior to receipt of their HIV test results.

In its Letter of Findings under title II a statutory pre-requisite to filing suit under title II of the ADA, the Justice Department found the following specific violations of the statute and the regulation:
The exclusion of these students from PRSD is a clear violation of Title II.

-- PRSD’s actions were rooted in information regarding HIV and a person with whom the students had a known relationship or association. See 28 C.F.R. § 35.130(g).

-- The exclusion of these students denied them the opportunity to participate in or benefit from PRSD’s aids, benefits, services, and programs. See 28 C.F.R. § 35.130(b)(1).

-- In addition, PRSD’s demand that HIV test results be provided to PRSD violates the prohibition on utilizing criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of PRSD’s program with respect to individuals with disabilities. 28 C.F.R. § 35.130(b)(3)(i-ii).

-- The demand for the provision of test results also violates the prohibition on imposing or applying eligibility criteria that screen out or tend to screen out students with disabilities from fully and equally enjoying PRSD’s services, programs, or activities, unless PRSD can show that such criteria are necessary for its provision of those services, programs, or activities. 28 C.F.R. § 35.130(b)(8).

The Settlement Agreement requires the District to adopt and implement a written non-discrimination policy that makes clear that PRSD does not discriminate on the basis of disability and that those individuals who are “regarded as disabled” or are associated with a person with a disability are covered by the ADA’s protections. PRSD has also agreed to revise its “Communicable Diseases and Parasites” policy to state that HIV is not considered to be a condition requiring a student’s exclusion from school under that policy; to provide ADA training to PRSD instructors and administrators; to report on its compliance with the agreement; and to pay $15,000 in compensatory damages.
Valley Hope

4. Among its sixteen locations, Valley Hope has a short-stay (generally less than 30 days) residential addiction treatment facility located at 1816 N 2nd St., Atchison, KS 66002, known as Valley Hope Atchison ("Atchison"). As a result of its investigation, the United States has determined:

   a. From December 24, 2016, to January 10, 2017, the Complainant stayed at Atchison to receive treatment services offered by Valley Hope.

   b. As part of the intake process at Atchison, individuals are asked about their HIV status or if they would like to be tested.

   c. Complainant self-identified as having HIV.

   d. During a typical stay at Atchison, an individual would have a roommate, but Complainant was told that because he has HIV he had to either room by himself or reveal his status to a potential roommate. Complainant would have preferred to have a roommate, but he opted to room alone.

   e. Valley Hope's employees confirmed that Valley Hope's practice or policy is that individuals with HIV are required to have a separate room unless the individual is willing to reveal his or her status to the potential roommate.

   f. During a typical stay at Atchison, an individual would have the option to engage in work activity around the facility including helping in the kitchen, but when Complainant offered to wash dishes after lunch, he was informed in front of other patients that he could not work in the kitchen because he has HIV.

   g. Valley Hope's employees confirmed that the practice or policy is to exclude individuals with HIV from working in the kitchen and that Complainant was excluded pursuant to this policy or practice.

5. Because of the practice or policies related to individuals with HIV, Complainant wanted to and did leave Atchison prior to completion of the program, and he made arrangements for future treatment through an
outpatient service in Texas, including outpatient visits to Valley Hope in Grapevine, Texas

6. Within 30 days of the effective date of this Agreement Valley Hope will pay $20,000.00 to the Complainant to compensate him for the alleged harm he has endured (including, but not limited to, emotional distress, pain, and suffering). Valley Hope shall provide written notification to counsel for the United States, including a copy of the check, when it has completed the actions described in this paragraph.

Lambda Legal Presentation

LAMBDA will report out on its most recent litigation and settlements

Dorn v. Michigan Dept. of Corrections: Opinion on Motion to Dismiss; Michigan PD 03.04.120 (Departmental policy at issue in the case)

Janssen v. Granite Mesa: EEOC Determination of Probable Cause; Settlement Agreement

Moore v. Air Evac Lifeteam: Expert Report of Joel Gallant; EEOC Notice of the Right to Sue; Complaint

Pierce v. Ackal: ADA § 12112 (statute prohibiting pre-employment medical exams without an offer of employment)

AIDS Law Project of Pennsylvania

Report out on the nationwide class action lawsuit against and subsequent settlement with Aetna Insurance Company. The class action suit was filed on behalf of Aetna policy holders whose medical privacy was breached when Aetna send letters to the policy holders that publically revealed their HIV status. The suit settled for 17 million dollars for as many as 12,000 claimants.
Diallo’s of Houston, a Houston-area nightclub and party venue violated the ADA when it forced a waitress to provide medical documentation that she was NOT HIV POSITIVE. A manager approached the waitress in response to a “rumor” that the waitress was HIV positive. The manager then demanded the waitress prove she was negative. The demand was based on the manager’s assumption that if the waitress was positive she would pose a hazard to the company’s business.

Interestingly, when the attorney failed to show for an attorney conference, EEOC moved for and was granted a default judgment (which Diallos appealed to the 5th Cir. And was denied). They were ordered to pay a total almost 200k in damages. It is a violation of title I to make a disability-related inquiry of an incumbent employee unrelated to the employees job requirements or any legitimate business necessity.

EEOC TA Documents

EEOC Issued Two Important Technical Assistance Documents on the Rights of Job Applicants and Employees who have HIV at the close of the last administration.

Living With HIV Infection: Your Legal Rights in the Workplace Under the ADA explains that applicants and employees are protected from employment discrimination and harassment based on HIV infection, and that individuals with HIV infection have a right to reasonable accommodations at work. It also answers questions about the process for obtaining an accommodation; possible accommodations; the privacy rights of people who have HIV infection; the employer's obligation to
keep medical information confidential; and the role of EEOC in enforcing the rights of people with disabilities.

Helping Patients with HIV Infection Who Need Accommodations at Work explains to doctors that patients with HIV infection may be able to get reasonable accommodations that help them to stay productive and employed, and provides them with instructions on how to support requests for accommodation with medical documentation. It also answers questions about the types of accommodations that may be available; the ADA's protections against employment discrimination based on having the condition or on the need for accommodation; the importance of disclosing the need for an accommodation before a problem occurs; and what to do when an employer raises safety concerns.