



CURRENTS IN ADA / FMLA / WORKERS' COMPENSATION

• WEEKLY CASE UPDATE •

CAPEHART SCATCHARD ATTORNEYS AT LAW

OCTOBER 3, 2003

10th Circuit Court Of Appeals Reverses Summary Judgment In Favor Of AOL Against Deaf Job Applicant

by John H. Geaney, Esq.

George Davidson, who is deaf, applied for a job with AOL. Between March 1996 and October 1996, AOL hired seven deaf persons from outside AOL for non-voicephone positions. Basically, these employees handled mail and e-mail communications. AOL changed its policy in 1997. It opened an office in the Philippines as a Call Center handling non-voicephone communications. The company decided to no longer hire outside AOL for job applicants to fill non-voicephone positions. As part of this change, only voicephone positions were available to external job applicants. As a consequence, deaf persons were no longer hired.

When Davidson applied for his job in September 1997 and November 1998, the new policy was in effect. He put on his application that he was seeking a position where speaking was not required. He received no response at first but persisted and was advised that there were no available positions. He applied again in 1998 and was informed that AOL no longer hired deaf people. Davidson filed suit under the ADA alleging discrimination and failure to accommodate.

The District Court found that Davidson was not a qualified individual and that he could not show that he was qualified for the voicephone position available. The Tenth Circuit Court of Appeals focused on the issue of whether AOL successfully proved that there were not any non-voicephone positions available. It noted that while Davidson's application was pending in 1997, AOL transferred about 20 employees from voicephone positions into non-voicephone positions at the Ogden Call Center.

The language of the statute which the Court of Appeals examined was whether Davidson could perform the essential functions of "the employment position that [he]

holds or desires." 42 U.S.C. § 12111(8). The Court of Appeals questioned the approach of the District Court, which focused only on positions which AOL indicated were "available" as opposed to positions which Davidson "desired."

The district court's interpretation of qualified individual reads out the critical phrase 'or desires.' We do not read § 12111(8) so narrowly. The ADA explicitly covers job applicants as well as employees. See 42 U.S.C. § 12112(a) (prohibiting, inter alia, 'discrimination . . . in regard to job application procedures' and 'the hiring . . . of employees'). Davidson applied and asked to be considered for any existing non-voicephone job at AOL. AOL admits that such positions were available, but that they are limited to internal hires. The idea underlying AOL's position is that the company's decisions with respect to filling the non-voicephone positions cannot be characterized as hiring decisions, because the company placed only existing employees in those positions. We recognize that 'hiring' could be thought of as limited to the initial process through which a person joins the employer's workforce. In our view, however, 'hiring' under the ADA encompasses the general process of selecting a person to hold a given job, regardless of whether applicants must already be working for the employer.

The Tenth Circuit essentially attacked the fundamental assumption by AOL that having voice-phone experience is an essential function of all non-voicephone positions. It did not defer to the employer on what is an essential function, unlike other courts which have ruled on this sort of issue. "Viewing the facts in a light most favorable to Davidson, we conclude that he has alleged sufficient facts to establish a genuine issue of material fact of whether

voicephone experience is an essential function of all the non-voicephone positions that he desires the opportunity to fill, notwithstanding the hiring policy AOL has pro- pounded. Notably, although AOL makes the broad asser- tion that non-voicephone positions require AOL voice- phone experience, it admits that voicephone personnel have been transferred to non-voicephone positions with as little as two or three weeks experience. Moreover, AOL has acknowledged that deaf persons can and have filled these positions successfully in the past, until the hir- ing policy was changed in 1997.”

The Court of Appeals did not address the issue of whether a job applicant has the right to request a reas-

signment by way of reasonable accommodation. “We do not decide whether reassignment is available to a job applicant because what Davidson is demanding in this case is not a reassignment, but rather, a restructuring of the non-essential requirements of the non-voicephone positions that Davidson desires.” The Court therefore reversed the dismissal of Davidson’s case. It did com- ment, however, that if a jury were to conclude that voicephone experience is indeed an essential job prerequisite for a non-voicephone position, then Davidson cannot prevail in his trial.

This case can be found at *Davidson v. America Online, Inc.*, 337 F.3d 1179 (10th Cir. 2003). ■

Reasonable Accommodation Issues Under The New Jersey Law Against Discrimination and Americans with Disabilities Act

(Part I of a continuing series)

by Armando V. Riccio, Esq.

A Comparison of the ADA and the NJLAD

The New Jersey Law Against Discrimination (“NJLAD”) prohibits unlawful discrimination or employment practices against a person because that person is or has been at any time handicapped, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment. The resounding battle cry of the NJLAD is evisceration of invidious discrimina- tion. Accordingly, New Jersey Courts recognized that the NJLAD’s definition of handicap is significantly broader than its federal counterpart, the Americans with Disabilities Act (“ADA”). Unlike the ADA, the NJLAD’s definition of handicap does *not* require an individual’s dis- ability to substantially limit a major life activity. Employers must keep in mind that disabilities covered under the ADA are only a floor for determining whether a disability is covered under the NJLAD. For example, under the NJLAD the definition of handicap includes transvestism and morbid obesity.

The NJLAD is also broader in terms of employer cover- age. Employers with one employee or more are covered by the NJLAD as opposed to the fifteen or more employ- ees required for coverage under the ADA. The NJLAD does not require an employee to file a complaint with a governmental agency prior to filing a law suit. Further, the NJLAD does not impose any monetary limitations upon a punitive damages award. Unlike its federal coun- terpart, individuals can be found personally liable under the NJLAD based upon an aider or abettor theory.

Reasonable Accommodation in General

An employer must reasonably accommodate the known limitations of a handicapped employee, unless the employer can demonstrate that the accommodation would impose an undue hardship. Reasonable accom- modation can become the focal point of a NJLAD lawsuit based upon handicap discrimination in two instances: the employee makes a direct claim against the employer for failure to provide a reasonable accommodation or the employer raises as a defense the employee’s inability to perform the essential job functions. Whether an employ- er has failed to make a reasonable accommodation is decided on a case by case basis.

Under both laws, examples of a reasonable accommo- dation include job restructuring, part time or modified work schedules, acquisition or modification of equipment or devices, job reassignment or other similar actions. This obligation includes providing a reasonable accommo- dation to an employee returning from disability leave and allowing the employee a reasonable time period to recov- er from his injuries. The ADA, which is relied upon as a source for interpreting the protections of the NJLAD, adds the following as examples of a reasonable accommo- dation: readers or interpreters, use of paid or unpaid leave for medical treatment and modification of the method for performing a job function. An employer is also required to consider reassignment of marginal job functions. Although an employer is not required to create a position, eliminate essential job functions or displace another

employee, both laws require employers to consider reassignment to available positions as a potential accommodation. Unlike the requirements for reinstatement under the FMLA, the ADA and NJLAD do not require the employer to provide the same or substantially equivalent pay, benefits or union status in job reassignment cases. Nonetheless, employers should consider reassignment to available positions for which the person is qualified that would allow the employee to maintain the same or somewhat equivalent pay, job benefits or union status.

Under the ADA and NJLAD, an employer's obligation to provide a reasonable accommodation only extends as far as necessary to allow a handicapped employee to perform the essential job functions. The cost of the accommodation must not be disproportionate to the benefits that it would produce. An employer is not required to acquiesce to the employee's demand for a particular accommodation where other accommodations are available which permit the employee to perform the essential job functions. Nor are employers required to eliminate barriers that exist outside of the workplace such as a request for shift reassignment in order to overcome a commuting problem caused by the individual's handicap. An employer is not obligated to accommodate employee mis-

conduct which is an outgrowth of the employee's disability. Although the issue has not been addressed by courts in New Jersey, the majority of other districts have concluded that working at home is rarely a reasonable accommodation under the ADA. Neither law requires an employer to guess at whether an employee needs an accommodation. Instead, it is the employee's initial responsibility to request, or provide information that amounts to a request, for a reasonable accommodation.

Accurate job descriptions created in advance of advertising or interviewing applicants for the position as well as information that identifies the significance of each item identified as a component part of the job responsibilities are key sources for determining whether a particular job function is essential or marginal. The lack of any adverse consequence to the employer by an employee's inability to perform a particular job function is also relevant to determining whether it is an essential job function. A job function is essential if it is the very reason the position exists, there are a limited number of available persons to whom that function can be reassigned for performance and/or it is highly specialized and the job holder was hired for their expertise or ability to perform that function. ■

In response to the increased need to avoid litigation stemming from employment problems, combined with case law which places the onus on employers to establish preventative programs and mandate management training in order to preserve defenses to hostile work environment claims, Armando V. Riccio, Esq., of Capehart Scatchard's Labor and Employment team offers various preventative employment training programs to assist employers, their human resource managers, CEOs, COOs, and administrators to avert costly employment claims and law suits. To discuss cost effective programs, contact Mr. Riccio at (856) 914-2079 or vi e-mail at ariccio@capehart.com. ■

Medicare Secondary Payer Statute Applied To A Class-Action Products Liability Suit

by Robert T. Lewis, Esq.

The United States Court of Appeals for the Eleventh Circuit rendered a decision on September 15, 2003, that applied the Medicare Secondary Payer Statute (MSP) to a class-action products liability suit.

The case at issue is *United States of America v. Baxter International et al.*, 2003 U.S. App. LEXIS 19067. This case arises out of a 1995 class-action products liability suit against manufacturers of silicone breast implants. The settlement in that suit resulted in the creation of a reimbursement mechanism by which several manufacturers agreed to cover health care expenses incurred by or on behalf of qualified members of the class.

The Government sought to recover for medical bills it paid on behalf of Medicare beneficiaries who received treatment related to silicone breast implants. The district court dismissed the Government's complaint for failure to state a claim. The Eleventh Circuit, however, reversed and remanded the case.

This is a very important case because it provides a lengthy discussion of the MSP including statutory intent, legislative history, and applicable case law. It is also important because it demonstrates the governments intent to pursue claims impacted by the MSP. The following is a brief summary of several issues addressed by the Court.

1. The Medicare Secondary Payer (MSP) Statute

The Court noted that the MSP is a “collection of statutory provisions codified during the 1980s with the intention of reducing federal health care costs.” See *Zinman v. Shalala*, 67 F.3d 841, 845 (9th Cir. 1995); *Provident Life & Accident Ins. Co. v. United States*, 740 F. Supp. 492, 498 (E.D. Tenn. 1990).

The MSP provides that “Medicare will be the secondary rather than primary payer for its insureds. Consequently, Medicare is empowered to recoup from the rightful primary payer (or from the recipient of such payment) if Medicare pays for a service that was, or should have been, covered by the primary insurer.”

The Court noted that since enactment of the MSP, “Congress has expanded its reach several times, making Medicare secondary to a greater array of primary coverage sources, and creating a larger spectrum of beneficiaries who no longer may look to Medicare as their primary source of coverage.”

2. Beneficiaries

The district court dismissed the government’s complaint, in part, for failure to properly identify the beneficiaries for whose care reimbursement was sought. The Eleventh Circuit, however, noted that requiring the Government to plead with such specificity “would run counter to the intent of the MSP statute.” The Court noted that the “statute is built on the recognition that Medicare frequently will not know which of its payments has been subsequently duplicated by an insurer, it would . . . defeat the purpose of the statute to require that the Government identify each patient, procedure, and payment amount at the pleading stage without benefit of discovery.”

This is an important point because Medicare may not learn of a primary payer until long after payments have been made. As the Court noted, “many women will doubtless have received Medicare-compensated treatment for generic symptoms not specifically identified on their providers’ bills as related to breast implants, or perhaps not diagnosed as implant-related until later in the course of treatment.” Thus, rather than placing the burden on the government to identify each and every situation where conditional payments were made, the Court focused on

the intent of the statute - reducing federal health care costs.


3. Conditional Payments

Defendants argued that the Government’s right to recoup its payments never arose, because under the terms of the MSP statute, Medicare’s payments were not “conditional.” The Court did not accept this argument and held that the structure, history and purpose of the MSP statute, plainly indicate that Congress wanted Medicare’s payments to be secondary and subject to recoupment in all situations where one of the statutorily enumerated sources of primary coverage could pay instead. As a result, the Court concluded that “we have no doubt that payments made by Medicare on behalf of breast-implant patients were conditioned upon reimbursement if the patients later recovered from one of the primary sources enumerated in 42 U.S.C. § 1395y(b)(2)(A).”

4. Actual v. Constructive Knowledge

Defendants raised the issue of whether or not they could be forced to repay Medicare, when they did not have actual knowledge of the payments made by Medicare. The Court held that “in light of the well-established common law of subrogation and consistent with the purposes of the MSP statute, that either knowledge or constructive knowledge is sufficient.” Thus, if the Defendants had either “knowledge or constructive knowledge that some of the recipients of the funds they were paying out had received breast implant-related medical treatment for which Medicare already paid, then the Defendants would be liable to reimburse the Government pursuant to § 1395y(b)(2)(B)(iii).” This issue was remanded to the district court to define the scope of constructive knowledge in this particular case. The issue of double damages pursuant to Section 1395y(b)(2)(B)(ii), was also remanded for further consideration.

5. Conclusion

This case is certainly worth reading for anyone involved or interested in claims arising under the MSP. This case proves that the MSP is an area of law that is not going away. If you have any questions about the MSP, please feel free to contact Robert T. Lewis, Esq. (rlewis@capehart.com or 856-914-2064) 


UPCOMING SEMINARS ON WORKERS' COMP/ADA/FMLA

by John H. Geaney, Esq.

October 16, 2003 - Forsgate Country Club, Self Insurers Association

This one-day seminar explores a variety of workers' compensation subjects and includes a discussion of issues facing joint insurance funds, the Medicare Secondary Payer Statute, privacy issues in employment, and pulmonary claims, among others. For information, please email Maura.Bala@cna.com

December 10, 2003 - Cherry Hill, Council on Education in Management

This seminar will focus on FMLA and ADA issues as well as defending against discrimination, harassment and retaliation claims. There will also be discussion of OSHA and Wage & Hour issues. The one-day seminar is part of a Personnel Law Update sponsored by the Council. For information, please contact Brandy Gardner. She can be reached at bgardner@counciloned.com. 

This update is written by John H. Geaney, Esq., a member of Capehart Scatchard's Executive Committee. Should you have any questions or would like more information, please contact Mr. Geaney at 856.914.2063, by fax 856.235.2786, or by email at jgeaney@capehart.com.

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