LEGAL BRIEFS

Gene A. Blumenreich, JD
Nutter, McClennen & Fish
Boston, Massachusetts

Key words: **Disability, judicial interpretation.**

Anesthesia personnel and the Americans with Disabilities Act

If you are not certain how the Americans with Disabilities Act (42 U.S.C. § 12101) applies to the field of anesthesia, you are not alone. It seemed so easy at first. A federal statute was going to protect those qualified individuals who faced double hardship, once by being disabled and then by being forced to suffer discrimination in the job market because they were disabled.

But then, it became a little more complicated. The courts recognized as disabled those suffering conditions not always recognized as disabilities, including a wide variety of mental conditions that might affect an individual's vigilance. Did this mean that employers were going to be forced to permit people to administer anesthesia even when they were not in a condition where they could devote their full and single-minded attention to the patient?

Although it has been more than 10 years since the Americans with Disabilities Act was passed, the courts continue to flesh out the application of the act to real-life situations, adding to a seemingly ever-growing list of complicated issues under the act. Determining the application of the act has been a very slow and deliberate process.

Disability or misconduct?

In a recent case involving an anesthesiologist in Kentucky, brought under the Kentucky Civil Rights Act, the federal court had occasion to consider the effect of the Americans with Disabilities Act on anesthesia. According to the case, the hospital hired an anesthesiologist under a 3-year contract, which provided that he could be terminated without cause on 120 days' notice. Approximately a year and a half later, the hospital's vice president of Professional Affairs suspended the anesthesiologist because the hospital's operating room manager had filed a complaint alleging that the anesthesiologist had physically intimidated her. Four days later, the vice president notified the anesthesiologist that the suspension was being lifted but that his employment was being terminated on 120 days' notice because of reports that he was sleeping while administering anesthetics during surgical procedures.

The anesthesiologist claimed that the reports were incorrect and that he only *appeared* to be snoring due to problems that caused him to clear his sinuses often. Subsequently, he was presented with evidence that 3 doctors and a nurse had filed written complaints to the effect that he had slept during 4 surgical procedures and appeared to be "slack jawed" and "snoring."

At this point the anesthesiologist notified the hospital, for the first time, that he was suffering from chronic sleep deprivation caused by sleep apnea and that he was going to seek medical consultation. The anesthesiologist asked that he be allowed to perform other tasks while he was seeking medical consultation. While the case does not indicate this, the anesthesiologist may have been seeking reasonable accommodations, assured by the Americans with Disabilities Act, for his alleged disability. The hospital rejected his request and suspended him immediately.

The anesthesiologist then underwent a sleep study that revealed that he suffered from severe chronic sleep deprivation secondary to obstructive sleep apnea. A continuous positive airway pressure nasal mask was prescribed, and the specialist treating him reported that "we feel like his…problem with sleepiness has been eliminated" and that the anesthesiologist would not have any problem continuing his employment duties as long as he used the mask.

The anesthesiologist sued the hospital under the Kentucky Civil Rights Act and the Family and Medical Leave Act. The language of the Kentucky Civil Rights Act mirrored the language of the Americans with Disabilities Act, and, therefore, both the federal district court and the appeals court looked to federal law to determine the anesthesiologist's rights.

Both the Kentucky Civil Rights Act and the Americans with Disabilities Act forbid discrimination on the basis of disability. Thus, the issue before both the district court and the appeals court was whether the hospital fired the anesthesiologist because of his disability. The anesthesiologist argued that he was fired for conduct that was "causally related" to his disability. That is, he suffered from sleep apnea, which resulted in sleep deprivation and caused him to fall

asleep in the middle of operations. Being fired for falling asleep was tantamount to being fired for a disability, because falling asleep was "causally related" to his medical condition. Both the district court and the appellate court rejected this argument. The courts held that there was a difference between discharging someone for unacceptable misconduct and discharging someone because of his disability.

The anesthesiologist who suffered from chronic sleep deprivation may well have been so tired that he could not stay awake. But nothing compelled him to administer anesthesia during surgical procedures when he knew he was sleep deprived and could not stay awake. Thus, ruled the courts, the hospital was justified in firing an anesthesiologist who insisted on administering anesthesia when he was so sleep deprived that he could not stay awake. He was fired for endangering patients, not for being sleep deprived. (*Brohm v J.H. Properties, Inc.*, 149 F. 3d 517 (6th Circuit)).

The *Brohm* case has the advantage of being clear, of making a distinction between discharging someone for misconduct and discharging someone because of a disability, and of having a result that seems to comport with common sense. Disability or not, would any patient want to be under the care of an anesthesia provider who could doze off in the middle of an operation? This is not, however, the final word about anesthesia and the Americans with Disabilities Act.

Disability or symptom?

Other courts in other jurisdictions also have struggled with the distinction between discharging someone for unacceptable misconduct and discharging someone because of a disability. In *Teahan v Metro North Commuter Railroad Company,* (951 F. 2d 511, 2d Cir., 1991), an employee was fired by a railroad for what the railroad considered unacceptable misconduct. The employee was fired for excessive absences: 19 in 1984, 47 in 1985, 58 in 1986, and 53 in 1987. As in the *Brohm* case, after the employee was fired, the employee sought treatment. The employee enrolled in a 30-day rehabilitation program, relapsed, and continued to incur unauthorized absences from work. He was notified on December 28, 1987, that his employment would terminate on April 11, 1988 for excessive absenteeism. He voluntarily entered yet another substance abuse program, completed the program, and returned to work late in January 1988. From his return to work in January 1988 until the termination of his employment on April 11, 1988, he had no absences from work.

The trial court concluded that Teahan's employment was terminated for absenteeism, not because of his handicap of alcoholism. However, this raised a very real dilemma. Excessive absenteeism often is caused by substance abuse. How does one distinguish between a symptom and a disability? If the employer terminates the individual's employment for excessive absenteeism, and the absenteeism is caused solely by the disability, isn't the employer really firing the employee on account of the disability? In the *Teahan* case the court held that if the excessive absenteeism was caused solely by the disability, then the Americans with Disabilities Act would apply.

How would the anesthesiologist in the *Brohm* case have fared before the *Teahan* court? It is not clear that the anesthesiologist would have been protected, even under the *Teahan* analysis. The *Teahan* court noted that the employer was entitled, under the Americans with Disabilities Act, to determine whether the consequences of the handicap are such that the employee is not qualified for the position. Moreover, even under the *Teahan* analysis, additional factual considerations were required to see whether all of the absenteeism was caused, in fact, by the disability. If all of the absenteeism was caused by the alcoholism disability, then the act would apply. But if only a portion were related to alcoholism, and the remainder were attributable to factors other than the disability, then the act would not protect the employee.

Finally, in *Teahan* excessive absenteeism was caused by the disability. In *Brohm*, the disability caused excessive sleepiness, but Brohm was not fired for falling asleep. He was fired for administering anesthesia when he should have known he was too tired to do so.

In the *Brohm* case, the *Teahan* case was discussed and distinguished. The *Brohm* court felt that the *Teahan* case was a decision where the conduct was unrelated to job responsibilities. That is, it is one thing for an employee to fail to show up at work at all and another for an employee to come to work when the employee is impaired and can endanger patients.

The *Brohm* court did not consider whether the *Teahan* decision required a conclusion that the Americans with Disabilities Act applied to and protected the sleep-deprived anesthesiologist. It assumed that *Teahan* came to a different conclusion and distinguished the case, indicating that it would not follow *Teahan* in the Sixth Circuit. However, it is not altogether clear that the *Teahan* court might not have come to a

similar conclusion. Apparently, the Sixth Circuit thought it would not. At any rate, the 2 decisions show that the courts are still trying to find their way through very difficult issues involving rights of individual employees and rights of employers and members of the public.

When does the act apply?

Cases about how the Americans with Disabilities Act actually applies to anesthesia have been rare, because unlike *Brohm* and even *Teahan*, many of the decided cases do not get to the substance of the requirements of the act but to preliminary issues regarding whether the act applies at all.

Although the Americans with Disabilities Act has been the law for 11 years, it is still a new law. Human communication is imperfect, and no matter how clearly written a statute is, it is not possible to be certain that you see its implications until it is applied to very specific, factual circumstance. (It is for this reason that US courts are reluctant to give advisory opinions. It is only when statutes are applied to real cases, with real people, that one can understand the policy implications.)

Finally, after 11 years, cases that enhance our understanding of the Americans with Disabilities Act are just now coming before appellate courts. As with any new statute, there are people who think that it applies or that it could conceivably apply to factual situations that many might think extreme. In order to avoid the great time and expense of litigation, defendants try to get lawsuits dismissed as early as possible. Part of the confusion over new statutes is the very peculiar way that they have to come before the court for interpretation.

In order to dismiss a lawsuit at the very outset, the defendant must be able to show, "beyond a doubt that plaintiff can prove no set of facts that would enable [him] to relief." *Homeyer v Stanley Tolchin Assoc., Inc.*, 91 F. 3d 959, 961 (7th Circuit, 1996), quoted in *Mattice v Memorial Hospital,* 249 F. 3d 682 (7th Cir., 2001). That is a very difficult standard for a defendant to meet, and a large number of cases will not be dismissed despite the fact that the long-term prognosis for the case is not very high.

In *Mattice,* an anesthesiologist was hospitalized in January 1995 for panic disorder and major depression. He returned to work despite the fact that he was on various medications. When the side effects of these medications presented problems, he took a medical leave of absence from May 1995 to August 1995. After that leave of absence, he received approval to return to work without restriction. The hospital required a second opinion, and when it was provided, it allowed him to return to work but subjected him to more rigorous and critical observation.

In September 1996, a patient died in the operating room while the anesthesiologist was administering the anesthetic. The hospital suspended him, but a peer review panel recommended that he be allowed to return to work. The hospital refused to lift the suspension until the anesthesiologist complained to the board of trustees, who revoked the suspension and allowed him to return to work on the condition that he undergo monitoring and testing relating to his mental health history. The hospital later terminated the anesthesiologist's employment, but the exact reason for the termination was not clear from the record of the case at the time of the decision.

The anesthesiologist filed a charge of disability discrimination, and the hospital asked that the complaint be dismissed. The hospital had obviously terminated the anesthesiologist's employment, but it claimed that he did not have a physical or mental impairment that substantially limited one or more major life activities, the definition of disability in the Americans with Disabilities Act.

This case is a bit frustrating because the hospital was asking that the case be dismissed on the grounds that the complaint did not state a cause of action. The facts are unknown because there has been no discovery and insufficient proceedings for the facts to be developed. The hospital's position, apparently, is that just because the anesthesiologist had a panic disorder, major depression, and reacted poorly to various medications, it did not mean that he was disabled. Their argument was that none of these things amounted to a physical or mental impairment that substantially limited one or more major life activities.

But the anesthesiologist argued that he could still be disabled if he either had a record of such impairment, or if he was regarded as having such an impairment. The anesthesiologist argued that he was fired because the hospital thought he had a substantial impairment "in the major life activity of cognitive thinking…." In addition, he alleged that he "has a history of a significant impairment of major life activities of sleeping, eating, thinking, and caring for himself in addition to other life activities significantly impaired by the existence of and care and treatment for panic disorder, severe depression, and suicidal ideation."

Two questions

Two questions come to mind. The first is, assuming that the anesthesiologist is correct and that the

hospital thinks that he has a problem with cognitive thinking, are they justified in firing the anesthesiologist? Does the act entitle every person fired for lacking the intelligence to perform a job to have a judicial review? This question really overlooks the very limited, and to a large extent, artificial basis on which the case is being presented to the court. The hospital is trying to dismiss the case on the grounds that there is no conceivable theory on which the doctor can recover. The act does not require that every disabled individual is entitled to have whatever job he or she wants. In order to receive the protection of the Act, you have to be a "qualified individual with a disability," and whatever impairments you have or are alleged to have can not be "substantial limitations."

However, the question is not whether the plaintiff will win but whether the act even applies to him. The only question before the court is whether or not the conditions that affect the anesthesiologist constitute a disability under the act. If he is protected by the act, then the courts will consider whether he is otherwise qualified.

The second question is why the hospital would feel that a person who suffered from panic disorder, severe depression, and thoughts of suicide could *not* be considered disabled. Here the hospital had a very legalistic argument. In 1997, the US Supreme Court had ruled that 2 sisters with very poor eyesight were not disabled within the meaning of the Americans with Disabilities Act when United Airlines refused to hire them as global airline pilots. (*Sutton v United Airlines,* 527 U.S. 471 (1997)). Although poor eyesight may be a disability, the Supreme Court held that the disability must affect a major life activity. "Working" is a major life activity, said the court, but "working as a global airline pilot" is not. Working as a global airline pilot is a very limited activity, so unless the disability affected your ability to work in a "broad class of jobs," you are not considered "disabled" under the Americans with Disabilities Act.

In *Mattice,* the hospital argued that the anesthesiologist's susceptibility to panic disorders and other conditions affected Mattice's ability to work only in a small number of jobs, anesthesia being one of them. It was not sufficiently broad to be a "disability" under the act. Mattice argued that if the hospital was correct that panic disorders affected his ability to work as an anesthesiologist, then necessarily they would affect a number of other major life activities and, therefore, were a disability.

Conclusion

These confusing cases show why lawyers make cautionary statements about being uncertain how the courts will decide particular cases. It is not just false modesty. Many disabled individuals are perfectly capable of exercising the kind of vigilance, organization, and care that are the hallmarks of good anesthesia. The courts are moving slowly and deliberately to determine to whom the Americans with Disabilities Act applies. This is an area where society's record of fairness is rather poor, and the courts must protect the individuals. Those who may be entitled to the protection of the act and those who are struggling to understand their obligations under the act should seek counsel and advice from a knowledgeable lawyer who can consider all of their facts and circumstances.