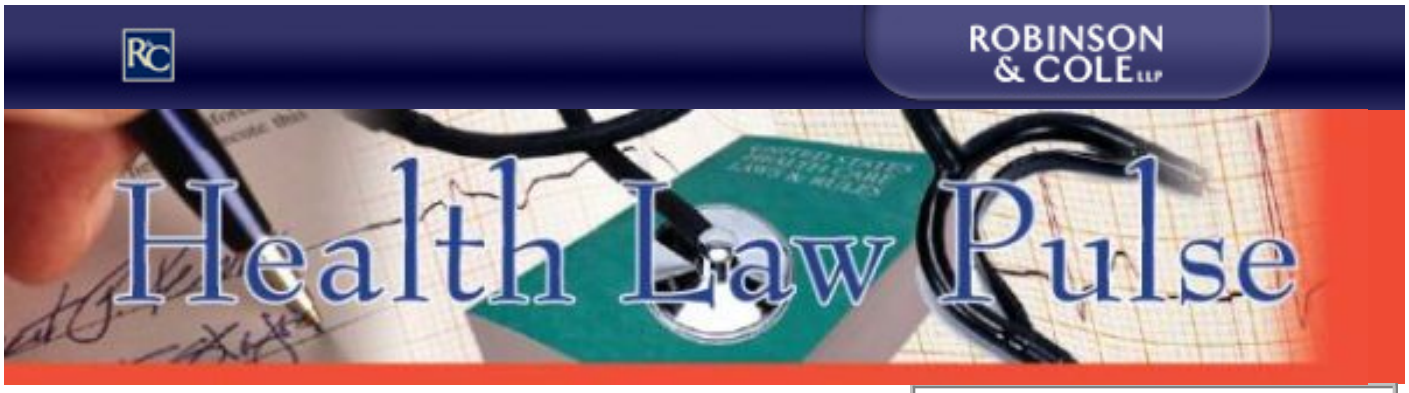

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IN THIS ISSUE

Physicians for Underserved Areas Act and Nursing Relief for Disadvantaged Areas Reauthorization Act Signed Into Law

Recently, the President signed two important bills, which were cleared by both the Senate and the House at the end of 2006. One is the Physicians for Underserved Areas Act (H.R. 4997) and the other is the Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005 (H.R. 1285).

The Physicians for Underserved Areas Act extends for two years a visa waiver program under which foreign doctors in J-1 status who go to work in underserved areas can remain in the country in H-1B status after completing their medical training.

J-1 visa holders who come to the U.S. for graduate or medical education are usually required to leave the country for two years before they can return to the U.S. to work. In 1994, a program was created to waive that requirement for foreign physicians who agree to spend three years working with patients in medically underserved areas, often referred to as "Conrad 30." This program has been extensively used to retain foreign physicians and to allocate medical services to the underserved areas. While the authorization for the "Conrad 30" program expired on June 1, 2006, the signing of the new H.R. 4997 bill by the President reinstated the visa waiver program for an additional period of two years.

The Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005 extends for

three years the Nursing Relief for Disadvantaged Areas Act of 1999, which provides for up to 500 foreign nurses to come to the U.S. annually on H-1C visas to work in medically underserved areas.

Physician Alleges Violation of The Americans With Disabilities Act and The Rehabilitation Act by Hospital That Conditioned Privileges on Supervision

The United States District Court for the Middle District of Pennsylvania, in *Haas v. Wyoming Valley Health Care System*, refused to grant summary judgment in a case alleging violations of the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 by a hospital that placed conditions on an orthopedic surgeon's clinical privileges. The Court found that a genuine question of fact existed as to whether the physician who had experienced a hypomanic episode during surgery posed a "direct threat" to patients.

Background

The plaintiff, Dr. Jonathan Haas, was granted clinical privileges in orthopedic surgery at Wilkes-Barre General Hospital, a hospital operated by the defendant, Wyoming Valley Health Care System. On May 23, 2001, Dr. Haas was performing a total knee replacement when he began to display some unusual behavior. Witnesses claimed that Dr. Haas was unable to remember the names of surgical instruments and could not perform the surgery without assistance. Dr. Haas admitted to experiencing a hypomanic episode during this surgery, but denied engaging in any unusual behavior. Rather, Dr. Haas stated that "he was simply more jovial than usual" on
that day.

Dr. Haas voluntarily relinquished his clinical privileges soon after this incident for health reasons. In November 2001, Dr. Haas requested reinstatement of his privileges. Although two separate therapists recommended that Dr. Haas be allowed to return to work, neither therapist would provide the "unequivocal" psychiatric clearance that the Credentials Committee of Wilkes-Barre General Hospital (the "Credentials Committee") required prior to reinstating Dr. Haas. In December 2002, after Dr. Haas had undergone several rounds of psychotherapy and evaluations, the Credentials Committee determined that Dr. Haas should be reinstated, with the condition that he be supervised by a board-certified orthopedic surgeon on all surgical procedures for six months. In June 2003, Dr. Haas advised Wilkes-Barre General Hospital that the supervision conditions were "unjustifiable" and in November 2003, Dr. Haas filed a complaint against the hospital, alleging violations of the ADA and the Rehabilitation Act of 1973. Under both causes of action, Dr. Haas requested monetary damages, immediate reinstatement of his clinical privileges, and an injunction preventing the hospital from discriminating against similarly situated physicians in the future. In August 2006, Wilkes-Barre General Hospital moved for summary judgment.

Court's Analysis

The District Court explained that, to prevail on a claim under the ADA or the

Rehabilitation Act of 1973, a plaintiff must show that: (1) he has a disability as defined by the applicable statute, (2) he was discriminated against on the basis of that disability, (3) he was denied goods or services due to this discrimination, and (4) the defendant owns, leases or operates a place of public accommodation. The hospital did not contest the first, third, or fourth prongs of the analysis. In opposition to the second prong of the analysis, Wilkes-Barre General Hospital argued that they did not discriminate against Dr. Haas on the basis of his disability because his condition presented a "direct threat" to Dr. Haas' patients. Under both the ADA and the Rehabilitation Act of 1973, discrimination is allowed if a disability "poses a direct threat to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids or services." In evaluating this assertion, the Court considered regulations of the Equal Employment Opportunity Commission (EEOC) that provide the following four factors for determining whether or not a "direct threat" exists: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm would occur; and (4) the imminence of the
potential harm.

Analyzing Dr Haas' claims under the four "direct threat" factors, the Court found that the duration of the risk could be for Dr. Haas' entire life. As to the nature and severity of the harm, the Court found that the risk was serious bodily harm or death if Dr. Haas could not properly complete a surgical procedure. With respect to the likelihood of harm, the Court concluded that Dr. Haas was more likely to suffer from a hypomanic episode during a surgical procedure than a surgeon that did not possess Dr. Haas' disability. The Court was less conclusive regarding the fourth factor related to the imminence of the potential harm. The Court questioned whether Dr. Haas or the surgical support staff in an operating room would be able to recognize that Dr. Haas was experiencing a hypomanic episode and take action with sufficient time to prevent the harm. Since the Court was unable to definitively quantify the imminency of the harm, there was a question of fact as to whether Dr. Haas was a "direct threat" to patients. Therefore, the Court dismissed the hospital's motion for summary judgment.

Wilkes-Barre General Hospital also moved for summary judgment under the theory that removing the condition on Dr. Haas' clinical privileges would have been an unreasonable accommodation, since it would have fundamentally altered the goods and services provided by the hospital. The Court seemed to be persuaded by this argument, but concluded that the reasonableness of the accommodation was a question of fact, not of law, and therefore denied the hospital's motion for summary judgment. The case will now proceed to trial with the Court.

Conclusion

The Court's denial of summary judgment to the hospital is not dispositive of this case. The case has merely been allowed to continue to trial for the findings of fact, which will affect the legal decision in this case. Specifically, the Court will determine whether Dr. Haas is determined to have posed a direct threat to his patients, or whether the restrictions the hospital placed upon Dr. Haas were unreasonable. The *Haas v. Wyoming Valley Medical*

Center case reflects a trend toward more innovative claims by physicians contesting medical staff action.

Robinson & Cole's Health Law Group includes:

Forward to a Friend

Lisa Boyle (co-chair)	*Theodore J. Tucci (co-chair)*
Bradford S. Babbitt	*Karen P. Conway*
Michael J. Kolosky	*David M. Mack*
Brian D. Nichols	*Tracey E. Scraba*

For more information, please contact Lisa Boyle at lboyle@rc.com
or 800-826-3570.