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# Mixed-Motive Claims Not Viable Under the Pre-2009 ADA

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In *Serwatka v. Rockwell Automation, Inc.,* No. 08-4010, the United States Court of Appeals for the Seventh Circuit determined that the pre-2009 amendments to the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.,* ("ADA"), did not authorize recovery for an individual in a mixed-motive case.

Employee Kathleen A. Serwatka ("Employee") sued her employer, Rockwell Automation, Inc. ("Employer"), alleging wrongful termination under the ADA. At trial, the jury answered "yes" to both of the following questions: "Did defendant terminate plaintiff due to its perception that she was substantially limited in her ability to walk or stand?" and "Would defendant have discharged plaintiff if it did not believe she was substantially limited in her ability to walk or stand, but everything else remained the same?" The trial court construed these answers as a mixed-motive finding, or in other words, a finding by the jury that the Employer's decision to terminate was for both lawful and unlawful motives. The Employee was awarded declaratory and injunctive relief, including attorney's fees and costs. On appeal, the Employer argued – and the Court of Appeals agreed – that under the ADA and the decision of the United States Supreme Court in *Gross v. FBL Financial Services, Inc.,* 129 S. Ct. 2343 (2009), the mixed-motive finding precluded an award for the Employee and entitled the employer to judgment in its favor.

In *Gross,* the United States Supreme Court found that mixed-motive claims were not recognized by the Age Discrimination in Employment Act, 29 U.S.C. §§ 6211, *et seq.,* ("ADEA"). In reaching its decision, the *Gross* Court found it significant that the Civil Rights Act of 1991 added to Title VII a provision that explicitly deemed unlawful any employment practice motivated by an individual's race, color, religion, sex or national origin "even though other factors also motivated the practice." Furthermore, Title VII, as amended, authorized limited relief to employees in mixed-motive cases. The Court noted that the ADEA had not been similarly amended. Therefore, the Court concluded that any anti-discrimination statute that did not contain similar language as under Title VII precluded recovery for a mixed-motive claim.

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## On the inside

The language in the ADEA prohibited an employer from taking adverse employment action "because of", meaning "by reason of: on account of", an individual's age. The *Gross* Court noted that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act." The *Gross* Court reasoned that this language precluded recovery against an employer for a mixed-motive claim.

The pre-2009 ADA contained a similar "because of" provision that prohibited a "covered entity" from discriminating against a "qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (a) (2008). Applying the Court's reasoning in the *Gross* case, the *Serwatka* court concluded that the absence of express language in the pre-2009 ADA authorizing recovery for a mixed-motive claim precluded such recovery.

Applying the Court's reasoning in the *Gross* case, the *Serwatka* court concluded that the absence of express language in the pre-2009 ADA authorizing recovery for a mixed-motive claim precluded such recovery.

However, the *Serwatka* court did not consider whether the 2009 amendments to the ADA, which prohibit an employer from discriminating against an individual "on the basis of disability" differed in meaning from "because of disability" or otherwise affected the viability of a mixed-motive claim. The *Serwatka* court did note that the January 1, 2009 amendments to the ADA would not apply to conduct that occurred before this date "absent a clear indication from Congress that the changes were intended to apply retroactively."

In sum, *Serwatka* dictates that absent a clear indication from Congress that the January 1, 2009 ADA amendments are to apply retroactively, an employee may not recover for mixed-motive claims involving conduct occurring prior to January 1, 2009. ■

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# Physician Disciplinary Records: TMI?!

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## Introduction

The Standard Medical Malpractice Interrogatories under Illinois Supreme Court Rule 213(j) directed against defendant physicians specifically ask whether the physician has appeared before, or attended, "any meeting of a medical committee or official board of any medical society or other entity," whether the physician has ever had his license suspended or had any disciplinary action taken against him, and for the physician's employment history.[1]

As articulated below, in appropriate cases, defense counsel should object to these "standard" written discovery requests, and to the admissibility of such information and related records at trial, inasmuch as they request too much information ("TMI"). More specifically, the requests stand in contrast to various statutory privileges and evidentiary rules, and seemingly require the disclosure of personal and confidential information without first requiring the plaintiff to make a good faith showing that the disclosure of such information is warranted and necessary.

## Physician Disciplinary Records: The Backdrop

Although the Illinois Personnel Record Review Act[2] permits the disclosure of disciplinary records to third-parties, albeit only if certain procedural requirements are satisfied by the employer,[3] items in a physician's personnel file may be protected by statutory schemes such as the Medical Practice Act[4] and Medical Studies Act,[5] among other provisions that are beyond the scope of this article.[6]

in appropriate cases, defense counsel should object to these "standard" written discovery requests, and to the admissibility of such information and related records at trial, inasmuch as they request too much information ("TMI")

By way of brief background, under Illinois law, members of the public are able to obtain basic information from the Illinois Department of Financial and Professional Regulation ("IDFPR") regarding physicians, such as information regarding discipline, medical malpractice settlements and judgments, and a revocation or restriction on privileges.[7]

However, the information provided to the public does not identify the patient whose care is the subject of the charge and, under the Medical Practice Act ("MPA"), information gathered and considered by the IDFPR in its investigation is deemed strictly confidential as if it were covered by the Medical Studies Act ("MSA").[8]

Despite these provisions, and even in cases where the plaintiff seeks to only hold the medical entity defendant derivatively liable for the defendant physician's conduct, plaintiffs routinely seek to obtain both professional and employ-

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ment disciplinary records in the hope of "scoring" an admission by a party-opponent (i.e., if the entity terminates the physician's employment as a result of the alleged occurrence), or of establishing a violation of the standard of care by mere virtue of a professional disciplinary charge.

Case law regarding the propriety of such tactics is surprisingly scant, but the issue was tangentially considered and approved of by the Fourth District Court of Appeals in *Thomas v. Koe*.[9] There, a patient filed a malpractice complaint against a dentist. After granting the dentist's *motion in limine* barring the plaintiff from referring to an IDFPR investigation of the dentist that arose out of complaints concerning the dentist's treatment of the plaintiff, the trial court found the plaintiff's attorney to be in criminal contempt for violating the order *in limine*. The court later entered judgment on the jury verdict in favor of the dentist.[10]

The plaintiff appealed the trial court's finding that the IDFPR's investigation was privileged based upon a privilege contained in the Medical Studies Act. Specifically, the plaintiff argued that the privilege only covers information belonging to organizations specifically included in Section 8-2101 of the Medical Studies Act—of which the IDFPR is not one—and the purpose of the privilege is to improve hospital conditions and patient care and to ensure effective self-evaluation for members of the medical profession—which are two aims that would not be furthered by the exclusion of the evidence in this case.[11] With little to no analysis, the appellate court agreed with the plaintiff's argument and concluded that the trial court's order *in limine* was reversible error.

### Practice Pointers

From a defense perspective, *Thomas* is not dispositive of the issue at hand inasmuch as it does not appear as though the court considered the confidentiality provision contained in the Medical Practice Act and related regulations, which apply to IDFPR investigations.[12]

Furthermore, defense counsel should argue that a violation of professional regulations is irrelevant in that it is not necessarily reflective of a violation of the applicable standard of care, and the IDFPR does not create a private cause of action. More often than not, the IDFPR's findings of misconduct are phrased broadly (i.e., guilty of "failure to properly treat a patient"), and do not address the specific acts of misconduct asserted in the civil complaint.[13] Also, the IDFPR may consider evidence that would not normally be considered in a court of law.[14]

From a defense perspective, *Thomas* is not dispositive of the issue at hand inasmuch as it does not appear as though the court considered the confidentiality provision contained in the Medical Practice Act and related regulations, which apply to IDFPR investigations.

An argument by analogy can be made with respect to investigations conducted by the Illinois Department of Public Health ("IDPH") in nursing home cases. In *Stogsdill v. Manor Convalescent Home, Inc*.,[15] the plaintiff introduced into evidence at trial various IDPH regulations. The appellate court in held that such regulations, absent expert testimony, cannot be used to establish the standard of care because they are too vague. Specifically, the appellate court stated:

> these requirements are too vague to be sufficient indicators of the standard of due care required of nursing homes by themselves. . . . Thus no duty can be said to have been created by this regulation. . . . It must be remembered that this is a nursing home and not a hospital. It may be that what would

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> be negligence in a hospital because of its greater control over physicians and its more extensive facilities would not be negligence in a nursing home. Since the regulations do not clearly set forth the standard of care required, expert testimony was still required in this case.[16]

The same reasoning applies with respect to findings of misconduct by the IDFPR. Similarly, defense counsel should argue that any probative value in the IDFPR's findings are outweighed by the dangers of undue prejudice and confusion to the jury.

The IDFPR findings and investigatory records do not fit within the public records exception to the hearsay rule because, aside from being confidential, in Illinois, public records which concern cause and effect, involve the exercise of judgment and discretion, and which otherwise express opinions or draw conclusions, are not admissible.

Moreover, defense counsel should argue that, inasmuch as the plaintiff would purportedly be using the IDFPR's findings as an expert opinion of sorts and evidentiary rules, along with Illinois Supreme Court Rule 213(f) and Federal Rule of Civil Procedure 26(a), require experts to disclose the bases for their opinions if asked, these requirements cannot be satisfied in the context of an IDFPR finding because such is confidential under the Medical Practice Act and related regulations.[17]

Additionally, the IDFPR's findings are hearsay. The IDFPR findings and investigatory records do not fit within the public records exception to the hearsay rule because, aside from being confidential, in Illinois, public records which concern cause and effect, involve the exercise of judgment and discretion, and which otherwise express opinions or draw conclusions, are not admissible.[18]

Where the plaintiff seeks to discover or admit into evidence at trial employment disciplinary records, defense counsel should also argue, when appropriate, that the records are privileged from disclosure by the Medical Studies Act.

By way of example, in *Pritchard v. SwedishAmerican Hospital*,[19] the plaintiff submitted interrogatories to the defendant hospital, seeking information to determine whether the defendant doctor's privileges had been suspended or restricted, the dates that the suspension or restrictions were imposed, the specific nature of the restrictions, what methods the hospital utilized to determine whether the doctor was fit for reappointment, and what measures the hospital undertook to supervise the doctor when he was admitting and treating patients.[20] The reviewing court held that the plaintiff could not discover what methods the hospital utilized to determine the doctor's fitness. The court did allow the plaintiff to discover whether the doctor had been suspended or restricted and the nature of any such suspension or restriction.[21] The court explained:

> Under the plain language of the Act, the restrictions imposed by a hospital on a particular physician's privileges to practice as a result of the internal review process are discoverable [citations omitted], but the nature and content of the [peer-review] process itself…is privileged and confidential.[22]

Note, however, that the Second District Court of Appeals in *Green v. Lake Forest Hospital*,[23] found that a suspension form contained in a nurse's personnel records relating to the occurrence was not privileged under the Medical Studies Act and was relevant in a professional negligence case, but a termination form, which stated that the nurse resigned voluntarily fifteen months after the occurrence, was not relevant.

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Additionally, defense counsel may argue that the disciplinary measure constitutes an inadmissible subsequent remedial measure.[24] Specifically, the termination of a physician is not sufficiently probative of prior negligence, because later carefulness may simply be an attempt to exercise the highest standard of care.[25] Also, the after-the-fact disciplinary measure is irrelevant.

In sum, for a physician's privacy to be disregarded so that the plaintiff's attorney can review such matters in great detail on a whim is unfair and prejudicial—it is TMI.

In cases where the plaintiff failed to allege any facts in support of his negligent employment theory of liability, and the reviewing health professional's report pursuant to 735 ILCS 5/2-622 is similarly silent on the issue, defense counsel should argue that Section 2-622 is a condition precedent to filing a lawsuit, which means that the plaintiff is not allowed to conduct discovery before filing a sufficient complaint and Section 2-622 report. The purpose of Section 2-622 is to deter the filing of frivolous lawsuits—not to encourage fishing expeditions.[26]

In sum, for a physician's privacy to be disregarded so that the plaintiff's attorney can review such matters in great detail on a whim is unfair and prejudicial—it is TMI. Where these arguments lead remains to be seen. ■

**(Endnotes)**

1 STANDARD MEDICAL MALPRACTICE INTERROGATORIES TO DEFENDANT DOCTOR UNDER ILL. SUP. CT. R. 213(j), Nos. 1, 4, and 6 (Amended May 30, 2008).

2 820 ILCS 40/0.01 et seq.

3 820 ILCS 40/7.

4 225 ILCS 60/23 and 225 ILCS 60/45. See also 68 Ill. Adm. Code 1285.310.

5 735 ILCS 5/8-2102.

6 Other statutes that may be triggered by the disclosure of personnel records include the Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, et seq., HIPAA Privacy Regulations, 45 CFR Parts 160 and 164, and Illinois Alcoholism and Other Drug Abuse and Dependency Act, 20 ILCS 301/30-5 and 42 CFR 2.64 or 2.65. A protective order is advisable in cases where records falling within the purview of these statutes are subject to disclosure.

7 225 ILCS 60/5, 225 ILCS 60/36, and 68 Ill. Adm. Code 1285.310. This information is easily accessible on the IDFPR's website: http://www.idfpr.com/dpr/WHO/med.asp.

8 225 ILCS 60/23 and 225 ILCS 60/45. See also 735 ILCS 5/8-2102; 68 Ill. Adm. Code 1285.310.

9 *Thomas v. Koe*, Nos. 4-08-0705, 4-08-0884, 2009 WL 3052366 (4th Dist. Sept. 21, 2009).

10 *Thomas*, 2009 WL 3052366, at *1-2.

11 *Thomas*, 2009 WL 3052366, at *4.

12 225 ILCS 60/23 and 225 ILCS 60/45. See also 68 Ill. Adm. Code 1285.31.

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[13] 68 Ill. Adm. Code 1285.240.

[14] 68 Ill. Adm. Code 1285.330.

[15] 35 Ill. App. 3d 634, 661-62, 343 N.E.2d 589, 610 (2d Dist. 1976).

[16] Stogsdill , 35 Ill. App.3d at 664, 343 N.E.2d at 611-12.

[17] 225 ILCS 60/23 and 225 ILCS 60/45. See also 68 Ill. Adm. Code 1285.310.

[18] See generally Bloomgren v. Fire Insurance Exchange, 162 Ill. App. 3d 594 517 N.E.2d 290 (3d Dist. 1987) (finding that a fire incident report should have been excluded); Lombard Park District v. Chicago Title & Trust Co., 105 Ill. App. 2d 371, 245 N.E.2d 298 (2d Dist. 1969) (United States geological survey map was improperly admitted).

[19] 191 Ill. App. 3d 388, 547 N.E.2d 1279 (2d Dist. 1989).

[20] Pritchard, 191 Ill. App. 3d at 393-94, 547 N.E.2d 1279.

[21] Pritchard, 191 Ill. App. 3d at 399, 547 N.E.2d 1279.

[22] Pritchard, 191 Ill. App. 3d at 399, 547 N.E.2d 1279.

[23] 335 Ill. App. 3d 134, 781 N.E.2d 658 (2d Dist. 2002).

[24] Fed. R. Evi. 407.

[25] *See generally Schaffner v. Chicago & North Western Transportation Co.*, 129 Ill. 2d 1, 14, 541 N.E.2d 643 (1989).

[26] Maldonado v. Sinai Medical Group, Inc., et al, Case No. 06-C-4149, 2008 WL 161671, *4 (N.D.Ill. Jan. 16, 2008) (granting the defendant hospital and medical clinic's motions to dismiss as to claims alleging negligence by unnamed nurses or technicians, claims alleging institutional negligence, and claims alleging negligence by unnamed residents or interns because the Section 2-622 was not specific as to the identities of these defendants or with respect to the allegations of institutional negligence).

# The Rehabilitation Act — Does It Extend To Independent Contractors?

Kristin Dvorsky Tauras
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The Rehabilitation Act of 1973 was the first major federal statute designed to protect the rights of individuals with disabilities. Disabilities is broadly defined to include any physical or mental impairment that substantially limits at least one major life activity. The Rehabilitation Act prohibits discrimination against individuals with disabilities in federally assisted programs or activities. The Rehabilitation Act is not limited to governmental employers, but extends to all entities that receive federal funding.

Within its scope of protection, the Rehabilitation Act prohibits discrimination relating to employment opportunities. Currently, it is unclear whether the Act is broad enough to extend its protections to independent contractors.

Neither the Seventh Circuit Appellate Court nor the Illinois District Courts have addressed the issue of whether the Rehabilitation Act extends its protections to non-employee independent contractors; however, two federal appellate courts have recently addressed this issue with very different holdings. In *Wojewski v. Rapid City Regional Hospital, Inc.*, 450 F.3d 338 (8th Cir. 2006), the Court held that the Rehabilitation Act does not apply to independent contractors while the Court in *Fleming v. Yuma Regional Medical Center*, 587 F.3d 938 (9th Cir. 2009), held that the Rehabilitation Act does apply to independent contractors. The outcomes differed in these cases due to the courts' different interpretations of the language contained in Section 504(d).

## The Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against individuals with disabilities in federally assisted programs or activities. Section 504(a) of the Rehabilitation Act provides in pertinent part:

> No otherwise qualified individual with handicaps ... shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

29 U.S.C. § 794(a). Section 504 creates a private right of action for individuals subjected to disability discrimination by any program or activity receiving federal financial assistance, which includes discrimination in employment. *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 626, 104 S.Ct. 1248 (1984). The language and history of Section 504 demonstrate Congress' desire to provide the disabled with the guarantee of equal opportunity. *Id.*

The Rehabilitation Act incorporates various standards and remedies from other civil rights laws, including the Americans with Disabilities Act (ADA), to determine whether employment discrimination has occurred. Section 504(d) states that,

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act ... as such sections relate to employment.

The difficulty in applying Title I of the ADA is that it only addresses discrimination within the employer-employee context. 42 U.S.C. §§ 12111-12112. Indeed, several courts have held that independent contractors are not covered by

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Title I of the ADA. See *Aberman v. J. Abouchar & Sons, Inc.*, 160 F.3d 1148, 1150 (7th Cir.1998); *Johnson v. City of Saline*, 151 F.3d 564, 567-69 (6th Cir.1998); *Birchem v. Knights of Columbus*, 116 F.3d 310, 312-13 (8th Cir.1997). These cases, however, do not necessarily answer the question of whether the Rehabilitation Act extends its protections to independent contractors.

The question still remains regarding whether Section 504 of the Rehabilitation Act, by incorporating the "standards" of Title I of the ADA, applies only to the employer-employee situation as set forth in the ADA, or whether the Rehabilitation Act incorporates only those portions of Title I of the ADA that specifically address the standards to be applied in determining whether a violation has occurred. The courts have been struggling to resolve this issue and have reached differing opinions as discussed below.

The question still remains regarding whether Section 504 of the Rehabilitation Act, by incorporating the "standards" of Title I of the ADA, applies only to the employer-employee situation as set forth in the ADA, or whether the Rehabilitation Act incorporates only those portions of Title I of the ADA that specifically address the standards to be applied in determining whether a violation has occurred.

**Rehabilitation Act and Independent Contractor Cases**

Two Federal Appellate Courts have recently addressed the issue of whether an independent contractor is protected under the Rehabilitation Act. Both cases involved an independent contractor physician suing a hospital for failing to accommodate his disability. While the relevant factual scenarios are virtually identical, the Courts' analysis differ and their holdings conflict.

**Wojewski v. Rapid City Regional Hospital**

In *Wojewski v. Rapid City Regional Hospital,* 450 F.3d 338 (8th Cir. 2006), the Eighth Circuit Appellate Court held that independent contractors are not entitled to protection under the Rehabilitation Act. The Court determined that Title I of the ADA is incorporated in its entirety into the Rehabilitation Act and, therefore, as with Title I of the ADA, reasoned that the Rehabilitation Act applies only to employees.

Dr. Wojewski was a physician with staff privileges at a hospital who was diagnosed with a bipolar disorder and took a leave of absence for treatment. Later, he was conditionally reinstated on a limited basis. After being reinstated, he entered a manic phase of his disorder. His staff privileges were terminated and he sued under both the ADA and the Rehabilitation Act. The district court first determined that Dr. Wojewski was an independent contractor and then ruled that as an independent contractor, he was not entitled to protections under either the ADA or the Rehabilitation Act, which was appealed.

After recognizing that no court had yet addressed this specific issue, the Eighth Circuit held that an independent contractor is not protected under the Rehabilitation Act and affirmed the lower court.

The Court's decision was based on the similarities between the language used in Title I of the ADA and the Rehabilitation Act. The Court reasoned that the Rehabilitation Act and Title I of the ADA are interchangeable in many respects. The ADA requires an employee-employer relationship, and the Rehabilitation Act contemplates the same. Thus, given the similarity between Title I of the ADA and the Rehabilitation Act, and the absence authority to the contrary,

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the Court held that both the ADA and the Rehabilitation Act require an employee-employer relationship and declined to extend coverage of the Rehabilitation Act to independent contractors.

At least one lower court has followed *Wojewski*. In *Cortes-Rivera v. Department of Correction and Rehabilitation of Puerto Rico*, 617 F.Supp.2d 7 (D.Puerto Rico, 2009), the district court held that a plaintiff who is precluded from bringing claim under Title I of the ADA because he is an independent contractor is also precluded from bringing claim pursuant to the Rehabilitation Act.

### *Fleming v. Yuma Regional Medical Center*

In *Fleming v. Yuma*, 587 F.3d 938 (9th Cir. 2009), the Ninth Circuit Appellate Court determined that Section 504(d) incorporates only portions of Title I of the ADA and it does not incorporate the ADA's limitations regarding the employer-employee relationship. The *Fleming* court reasoned that based on the wording of the statute, the Rehabilitation Act should be broadly construed and held that independent contractors are covered by the Rehabilitation Act.

Dr. Fleming was an anesthesiologist who suffered from sickle cell anemia. He applied for a position as an anesthesiologist at the Yuma Regional Medical Center ("Yuma"). Upon learning of Dr. Fleming's sickle cell anemia, Yuma told him that it would not accommodate his operating room and call schedules. Dr. Fleming brought suit against Yuma for employment discrimination in violation of Section 504 of the Rehabilitation Act. The district court held that an independent contractor is not covered by the Rehabilitation Act.

On appeal, the Ninth Circuit reversed the district court and held that an independent contractor can bring a cause of action under the Rehabilitation Act and based its holding on the below enumerated reasons.

First, the Court determined that the scope of the Rehabilitation Act is broader than the ADA. The Rehabilitation Act covers any "otherwise qualified individual" who has been "excluded from the participation in, or denied the benefits of, or ... subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794(a). The Rehabilitation Act broadly defines "program or activity" as "all of the operations of" state instrumentalities, colleges and universities, local education agencies, and "an entire corporation, partnership, or other private organization, or an entire sole proprietorship." 29 U.S.C. § 794(b). Thus, the Rehabilitation Act covers "all of the operations" of covered entities, not only those operations related to employment. *Id.* at 942. By contrast, Title I of the ADA covers only certain aspects of the employer-employee relationship. 42 U.S.C. § 12112.

Second, Congress did not use language of complete incorporation when it referred to the ADA in Section 504(d). Rather, Congress referred to the "standards used to determine whether [§ 504] has been violated in a complaint alleging employment discrimination." 29 U.S.C. § 794(d). Therefore, it was not the intent of Congress to incorporate all paragraphs of Title I of the ADA.

The *Fleming* court reasoned that based on the wording of the statute, the Rehabilitation Act should be broadly construed and held that independent contractors are covered by the Rehabilitation Act.

Third, "jot-for-jot incorporation" would substantially narrow the scope of the Rehabilitation Act in other unintended ways. For example, the ADA defines employer as "a person engaged in an industry affecting commerce who has 15 or more employees," 42 U.S.C. § 12111(5). Incorporating this standard would significantly limit the availability of employment discrimination claims under the Rehabilitation Act only to employers with more than 15 employees, which would be at odds with Congress' broad definition of programs and activities covered by the Rehabilitation Act. 29 U.S.C. § 794(b). Without additional direction from Congress, the Court was "hesitant to reduce the express scope of the Rehabilitation Act by wholesale adoption of definitions from another act." *Id.* At 943.

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Fourth, if the Court found that the Rehabilitation Act did not apply to independent contractors, there would be substantial duplication between the Rehabilitation Act and the ADA, including inconsistent duplication in the definitions of key terms. *Id.* at 944.

Similar to the *Fleming* Court, other courts have selectively incorporated portions of Title I into the Rehabilitation Act, although in a different context. For example, the Tenth Circuit, in *Schrader v. Ray,* 296 F.3d 968 (10th Cir. 2002), determined that the Rehabilitation Act did not incorporate ADA definition of "employer" and thus even employers with fewer than fifteen employees were subject to Rehabilitation Act requirements so long as they were recipients of federal assistance. See also *Johnson v. N.Y. Hosp.*, 897 F.Supp. 83, 86 (S.D.N.Y.1995) (holding that 1992 amendment to Rehabilitation Act did not incorporate the ADA definition of "employer.")

Two different Federal Appellate Courts have analyzed the scope of the Rehabilitation Act and have reached very different conclusions.

In *Fleming,* the Ninth Circuit recognized that its decision was in direct conflict with the decision issued by the Eighth Circuit in *Wojewski* but stated that the *Wojewski* Court was wrong to base its decision on the perceived similarities between Section 504 of the Rehabilitation Act and Title I of the ADA where Section 504 does not even mention employment whereas Title I deals exclusively with employment. The Ninth Circuit also recognized that the issue is not easily resolved and conceded that its resolution of "the matter is not entirely free from doubts." *Id.* at 941.

### Looking Ahead

Two different Federal Appellate Courts have analyzed the scope of the Rehabilitation Act and have reached very different conclusions. The employers in the *Fleming v. Yuma Regional Medical Center* Case intend to file a Petition for Leave to Appeal to the U.S. Supreme Court and have already filed a motion to extend the time to do so. Given this split in the federal appellate courts and the attention given to recent amendments to the ADA, this case should draw the attention of the U.S. Supreme Court.

In the meantime, with no decision binding on the District Courts in Illinois, employers who participate in programs or activities receiving federal financial assistance should assume there is at least the potential of future liability for independent contractors who bring a claim of discrimination under the Rehabilitation Act. ■

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# 2010 CALENDAR *of Events*

- **April 27, 2010** — **Board of Directors Meeting / Springfield Reception**
  Executive Mansion • Springfield
- **May 14, 2010** — **Social Networking Seminar**
  Offices of the Chicago Bar Association • Chicago
- **May 21, 2010** — **Executive Committee and Board of Directors Meetings** • Chicago
- **June 18, 2010** — **Annual Meeting and Broadway in Chicago Event**
  Chicago

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