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# HEALTHCARE INSURANCE, AIDS AND THE ADA

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The HIV infection is a covered disability under the Americans with Disabilities Act ("ADA").<sup>1</sup> In *Doe v. Kohn Nast & Graf, P.C.*,<sup>2</sup> an attorney sued his former employer, a law firm, for termination based on the belief that he had HIV.<sup>3</sup> In *Doe*, the district court was quick to distinguish the assertion by the defendants that HIV was not a disability. Instead, the Court concluded that HIV is a substantial impairment of an important life function and thus, a disability as defined under the ADA, because HIV places a limitation on the ability to reproduce.<sup>4</sup>

In the late 1980s, Jack McGann, who worked for six years with H & H Music Company, had an employee health benefits plan (the "Plan") as part of his employment package.<sup>5</sup> After he was diagnosed with HIV and filed benefit claims, however, he learned that his employer changed the terms of the Plan, which previously had a million dollar lifetime benefits cap for each Plan participant. Subsequent to McGann filing his claims, the the Plan was altered to a \$5,000 cap on benefits only for persons with AIDS.<sup>6</sup> Needless to say, McGann quickly exhausted the new limit. These events occurred prior to the enactment of the ADA. Lawyers for McGann, including the Lambda Legal Defense and Education Fund ("Lambda"), argued that the Employee Retirement Income Secur-

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<sup>1</sup> Americans with Disabilities Act of 1990 (codified at 42 U.S.C., §§ 12101-213 (Supp. V 1993)) [hereinafter ADA].

<sup>2</sup> 866 F. Supp. 190 (E.D. Pa. 1994).

<sup>3</sup> *Id.* at 193.

<sup>4</sup> *Id.* at 196.

<sup>5</sup> See *McGann v. H & H Music Co.*, 742 F. Supp. 392, 393 (S.D. Tex. 1990), *aff'd*, 946 F.2d. 401 (5th Cir. 1991), *cert. denied sub nom.* *Greenberg v. H & H Music Co.*, 113 S. Ct. 482 (1992).

<sup>6</sup> *McGann*, 742 F. Supp. at 393 (recognizing that defendants, in making changes to its health care insurance, including medical coverage, also changed to self-insurance from fully-insured plan previously provided by employer's insurance company).

ity Act ("ERISA")<sup>7</sup> prohibits discrimination resulting from alteration of significant health care benefits after the submission of claims.<sup>8</sup> In particular, Lambda pointed out that section 510 of ERISA appears to expressly prohibit discrimination that is intended to deprive a plan participant of plan benefits granted to such participant from the inception of his employment made as part of the employment bargain.<sup>9</sup>

The federal district court for the Southern District of Texas disagreed with these arguments by the plaintiff and in 1991 the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision.<sup>10</sup> The Court of Appeals held that the insurer and the employer had the right to unilaterally change the terms of the plan at any time and that this was not the kind of discrimination that ERISA was intended to eliminate.<sup>11</sup>

Upon petition of certiorari to the United States Supreme Court, the Solicitor General argued that the Fifth Circuit decision was correct. The government asserted that even though the court's position seems inequitable, a recently enacted law, the American's With Disabilities Act,<sup>12</sup> will remedy this type of employee benefits discrimination. Therefore, according to the federal government, we should not concern ourselves with what the Fifth Circuit and other courts have decided is the scope of ERISA protection against discrimination.<sup>13</sup> In essence, the government was arguing that there were other protections forthcoming, which will protect per-

<sup>7</sup> See 29 U.S.C. § 1140 (1994) (stating that it is unlawful for any person to interfere with protected rights under ERISA).

<sup>8</sup> See *McGann*, 742 F. Supp. at 393-94 (maintaining that ultimate purpose of ERISA is to prevent discriminatory changes from occurring in employer group medical plans).

<sup>9</sup> See 29 U.S.C. § 1140 (1994); *McGann v. H & H Music Company*, 946 F.2d 401, 408 (5th Cir. 1991) (concluding that section 510 of ERISA will deem discrimination illegal "only if it is motivated by a desire to retaliate against an employer or to deprive an employee of an existing right to which he may become entitled").

<sup>10</sup> *McGann*, 946 F.2d at 405-06, 408 (holding that employer election not to cover or continue to cover AIDS is not "discrimination" as defined under ERISA).

<sup>11</sup> *Id.* at 408. The Court stated that under ERISA, "the asserted discrimination is illegal only if it is motivated by a desire to retaliate against an employee or to deprive an employee of an existing right to which he may become entitled." *Id.*

<sup>12</sup> ADA, *supra* note 1.

<sup>13</sup> See, e.g., *Owens v. Storehouse, Inc.*, 984 F.2d 394, 400 (11th Cir. 1993). The *Owens* court adopted an almost identical position as the Fifth Circuit in *McGann*. *But see*, *Wheeler v. Dynamic Engineering*, 850 F. Supp. 459, 467 (E.D. Va. 1994), *aff'd*, 62 F.3d 634 (4th Cir. 1995). The *Wheeler* court distinguished itself from the 5th and 11th circuits and agreed with the 3rd Circuit. See *Confer v. Custom Engineering Co.*, 952 F.2d 41, 42-43 (3rd Cir. 1991) (holding that employer cannot modify its health plan retroactively to exclude coverage for treatment that has already begun); see also *Wheeler v. Dynamic Engineering, Inc.*, 850 F. Supp. 459, 466 (E.D. Va. 1994), *aff'd*, 62 F.3d 634 (4th Cir. 1995).

sons with disabilities from disparate treatment by private employers, regardless of Mr. McGann's current dilemma.<sup>14</sup>

Certainly health care insurance is a significant issue under the employment provisions of the ADA, particularly since employment health benefit plans are the principal source of financing medical treatment for people under the age of 65.

The ADA prohibits discrimination against disabled persons also in regard to employee compensation and other terms, conditions, and privileges of employment.<sup>15</sup> The ADA makes it unlawful for an employer to limit, segregate, or classify an employee in a manner that adversely affects their employment opportunities or status on the basis of disability.<sup>16</sup> The legislative history of section 12112(b)(1) of the ADA indicates that it was intended to apply to employer-provided health care insurance.<sup>17</sup> Finally, the ADA defines the term "discriminate" as participation in a discriminatory contractual or other type of arrangement by an employment agency, a labor union or an organization providing fringe benefits.<sup>18</sup>

The Equal Employment Opportunity Commission (the "EEOC") has promulgated regulations for guidance of its staff in an attempt to set out the interplay between the ADA non-discrimination mandates of Title I and the ADA Title V insurance provisions. To reconcile the two, the EEOC has relied on Congressional Committee reports reflecting the ADA's purposes.<sup>19</sup> Clearly, if the plans are insured, as opposed to self-funded plans, they must also comply with the anti-discrimination provisions of any relevant state insurance laws.<sup>20</sup>

<sup>14</sup> See *Owens*, 984 F.2d at 400. (stating that absent evidence of retaliation or interference with attainment of entitled rights under plan, ERISA provides no right to perpetual health benefits with immutable terms).

<sup>15</sup> See 42 U.S.C. § 12112 (Supp. V 1993).

<sup>16</sup> *Id.* § 12112(b)(1).

<sup>17</sup> See H.R. REP. No. 48511, 101st Cong., 2d Sess. 54 (1990), *reprinted in* 1990 U.S.C.A.N. 267, 336-37 [hereinafter ADA Legislative History] (noting that legislation prohibits discrimination against any qualified individual with disability, including limitations on fringe benefits available by virtue of employment, whether or not administered by covered entity).

<sup>18</sup> See 42 U.S.C. § 12112(b)(2) (Supp. V 1993).

<sup>19</sup> See *generally* Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. app. § 1630 (1994) [hereinafter EEOC Regulations].

<sup>20</sup> ADA Legislative History, *supra* note 17, at 416 (describing purpose of § 12112(b)(2) is to permit development and administration of benefit plans in accordance with accepted principles of risk assessment).

Based on EEOC regulations, the ADA permits a plan to classify or administer risks as well as limit the types of coverage based on actuarial risk, provided a given risk classification is not used as a subterfuge for discrimination.<sup>21</sup> The EEOC traditionally has defined subterfuge as, a disability based on a distinction which cannot be cost justified.<sup>22</sup>

In other words, the ADA legislation and the EEOC regulations require that an individual with a disability have equal access to all health care coverage under a given plan provided to those without disabilities. To determine compliance, the disparate treatment test, rather than the disparate impact test, is employed. Therefore, it would appear that under the ADA, even though an exclusion of certain types of treatments, such as x-rays, may have a greater impact on some persons with disabilities than others, it is not prohibited under the ADA's prohibition on discrimination regarding the terms of the benefit plan provided.<sup>23</sup>

On the other hand, if an employer-provided benefit plan excluded AZT treatment, which almost exclusively is associated with the treatment of HIV, then the EEOC would consider this the kind of disability based discrimination that the ADA prohibits.<sup>24</sup> Taken together, this permits the employer [or insurance company?] to deny coverage to an individual for certain types of treatment provided it is not clearly an attempt to deny coverage on the basis of a disability diagnosis. However, singling out a particular disease rather than a particular type of treatment will not be tolerated under the ADA.

More recently, cases that Lambda is involved with, on the amicus level, examine: (1) the extent to which the ADA is being applied to self-funded plans that have evaded protection and regulation under ERISA, and; (2) the definition of an employer under the ADA.

<sup>21</sup> See EEOC Regulations, *supra* note 19 (noting that practices permitted by § 12112(b) should not violate any EEOC regulations even if they result in limitations on individuals with disabilities provided that these activities are not used as subterfuge to evade purposes of ADA).

<sup>22</sup> *Id.* (stating that whether or not activities are being used as subterfuge is to be determined without regard to date insurance plan or employee benefit plan was adopted).

<sup>23</sup> See 42 U.S.C. § 12112(d)(4)(B) (Supp. V 1993) (stating that acceptable voluntary medical examinations as part of employee health program and acceptable inquiries by covered entity are related to job-related functions).

<sup>24</sup> See *T.E.P. v. Leavitt*, 840 F. Supp. 110, 112 (D. Utah 1993) (holding that state statute prohibiting and voiding marriage by persons with AIDS is violative of ADA and Rehabilitation Act of 1973); see also 42 U.S.C. § 12132 (Supp. V 1993).

In conclusion, the ADA is not going to bankrupt the private insurance system. Instead, it requires the employer to treat all its employees equitably. Those attorneys who have represented people with HIV for years welcome the kind of protection that the ADA will provide to people living with HIV and AIDS. The protections of the ADA against discrimination applies to persons with AIDS and also to those perceived to have HIV. Both categories predominantly have been gay men. In the past, such discrimination has resulted in limited or no access to benefits in the work place which traditionally have been afforded to other workers. Hopefully, the ADA will place such employees on an equal footing.

