Firehouse Lawyer

Volume 7, Number 4 *April 17, 2007*

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Inside This Issue

ADA: "Regarded" As Having a Disability

A recent Ninth Circuit case points up the dangers inherent in "regarding" someone with physical limitations as having a disability. Frequently, in the fire service we deal today with employees who may be temporarily unable to meet certain fitness or wellness standards, thus creating a concern about their "fitness for duty". A firefighter who fails a physical examination due to inability to pass the tests regarding the respirator, or fails a treadmill test, suggesting some cardiac issues, is sometimes told by the physician that he/she is not "fit for duty" and must be re-tested. Dealing with this situation carefully, the employer can avoid the pitfalls of "regarding" someone as being disabled, when that is not really the situation at all.

In *Walton v. U.S. Marshals Service,* Case No. 05-17308 (9th Cir., February 9, 2007) the Ninth Circuit Court of Appeals dealt with this issue. Naomi Walton was employed as a court security officer by Akal Security, Inc., which contracted with the Marshals Service (USMS). The USMS established physical requirements that such officers were required to meet. The employees were required to undergo annual medical examinations to determine fitness. In 2001, a hearing test administered to Walton showed she had hearing loss in one ear, rendering her unable to "localize" the source of sounds. Sound localization was one of the adopted physical standards. Given an opportunity to show she was nonetheless qualified, Walton took a second test, but unfortunately that too showed significant hearing impairment in one ear. USMS notified Akal, who terminated Walton's employment.

Walton sued USMS under the federal Rehabilitation Act, which is construed similarly to the Americans with Disabilities Act (ADA). The trial court dismissed her case, finding she was not disabled. Walton appealed, claiming that even if she did not qualify as "disabled" she was still protected because she had been "regarded" as disabled by the USMS.

The Ninth Circuit acknowledged that the ADA does protect those who are only regarded as disabled even if they are in fact not disabled. An employer's mistaken belief that an employee has an impairment that

substantially limits one or more major life activities (such as hearing) can lead to an ADA claim. Walton thus had to prove that USMS believed she had a substantially limiting impairment. The court said that the doctor's findings did not prove her "regarded as" claim; all they showed was that the USMS found she could not meet one of the physical requirements of the job.

Walton also could not really show that the impairment constituted a substantial impairment of one or more major life activities. The evidence showed she should be able to compensate for this problem by use of her vision, to help identify the source of sounds. She also argued that the evidence showed discrimination on the basis of a "record of impairment", but the court found that theory inapplicable.

The lesson to be learned from this case is that some jobs—like firefighting—do have certain physical requirements, such as the ability to wear a respirator, or the ability to perform strenuous physical work with heavy bunker gear on, in hot "atmospheres", without collapsing, which might endanger fellow firefighters. Simply because one is temporarily unable to meet physical requirements, or fails a part of a physical examination or a respirator test, does not mean that one is disabled in a legal sense under the ADA or a parallel state law, such as the Washington Law Against Discrimination. Therefore, employers need to be careful in addressing the situation when a firefighter, for example, fails a part of the annual physical examination. A process should be put in place for dealing with the inability to meet the physical requirement (such as further testing, second opinions, etc.), but without jumping to conclusions about the permanency of the inability, or making statements suggesting that the employer "regards" the person as being disabled, even temporarily. Clearly, the process is something that the employer should bargain with the union, but just as clearly, both management and labor should desire to have such a process in place to ensure both fairness and safety.

SOME HIPAA AND HEALTH CARE INFORMATION ACT ISSUES

Since clients most often comment favorably on the articles concerning "frequently asked questions" in my law practice, I have decided to discuss some recurring questions on patient privacy. Most of my clients are "health care providers" and therefore subject to the federal HIPAA "Privacy Rule". But even those Washington fire departments that are not subject to the federal law often receive requests for medical records, so some discussion of RCW 70.02—the Health Care Information Act—is in order.

One often asked question is: "How do we respond when a spouse or other person is seeking patient records on a deceased patient?" The answer is clearly set forth in RCW 70.02.140, which states that the "personal representative" of the decedent is the proper person to request the records. The "PR" completely stands in the shoes of the patient under this state statute, so the PR can sign the authorization form to allow release of the records. Of course, many of you ask, what does "personal representative" mean, and how do we know if, for example, the widow is the "PR". The personal representative means that person designated by the court to deal with the affairs of the decedent. This can either be the executor/executrix, if the decedent had a will, or it can be the administrator/administratrix if the person died without a will. I generally ask to see some court order or other paper designating the requestor as the PR. Generally, it is also good to require some sort of identification, such as a driver's license. If there is a debate on the matter, often I will volunteer to call the attorney for the requestor and explain the law. So when all else fails, the health care provider should call its attorney.

By the way, if there is no PR or if the PR has been discharged by the court, then whoever could have made health care decisions when the patient was living, under existing laws, would still be authorized.

Many health care providers may not have noticed, but RCW 70.02.050 was amended in 2006 to add a new subsection. This new language deals with the situation when law enforcement is investigating certain types of violent crimes, and the health care provider has patient information about the victim. The new subsection provides that, when there has been a gunshot wound, knife wound, or even some blunt trauma situations, the law enforcement agency can request, orally or in writing, certain specified information, and the health care agency is required to provide it. RCW 70.02.050(2)(c) applies to any case in which the patient is being treated, or has been treated, for a bullet wound, gunshot wound, powder burn, or other injury arising from or caused by the discharge of a firearm, or an injury caused by a knife, an ice pick, or any other sharp or pointed instrument, which the provider reasonably believes to have been intentionally inflicted upon the patient, or a blunt force injury that you reasonably believe resulted from a criminal act.

It appears from the statute that the firearm discharge language may apply to accidental discharges. Unfortunately, the statute places the provider in the position of forming "beliefs" as to whether someone has committed a criminal act or an intentional act. This is unrealistic, as the provider is more concerned about treating the injured patient than determining the state of mind, or "criminal intent" of the alleged perpetrator. I would just advise health care providers to respond whenever law enforcement agencies request such information after such injuries are inflicted by such mechanisms of injury, and not delve

into trying to determine the motives of an "assailant", or if such events may be accidental or intentional.

Since the statute only requires release of the following specified information, I still would not release the patient records wholesale, but rather just the specified information. Here are the ten specified items of information: patient's name, address, gender, age, condition, diagnosis or extent and location of injuries, whether the patient was conscious, name of personnel providing above information, whether patient has been transferred to another provider, and the discharge time and date. Because the statute is so specific, I have developed a new form in my "HIPAA" folder, just for answering these inquiries. Anyone who wants the form, client or not, is welcome to it by simply sending me an e-mail. My address is quinnjoseph@qwest.net or joe@firehouselawyer.com.

The other question that is asked frequently relates to RCW 70.02.060, the statute that provides the procedure under which attorneys can request or demand patient records. I will start by saying that, in my recent experience, I have noticed that most attorneys seeking medical records still do not understand how to comply with this statute. The requestors seem to be mostly personal injury attorneys (plaintiff or defendant representatives) and prosecutors with DUI or criminal cases being processed. Sometimes they just call up and ask for the records verbally. Other times they send an attorney's subpoena with no prior notice or request. Often, they could have just had their client sign an authorization to release the records, as their client is the patient!

I advise my client to tell the attorney (or I call the attorney myself) to read RCW 70.02.060, which actually has a rather simple or straightforward procedure that is required. The first step is to provide the health care provider with a notice (a letter will do just fine) stating that 14 days hence, if the provider does not produce the records requested, compulsory process will be forthcoming. Second, the attorney should serve the subpoena. Third, if the time passes and the provider does not produce the records and does not obtain a protective order, then the provider is out of compliance with the statute. In other words, the statute shifts the onus to the provider to do something within the period stated, or else it must provide copies of the patient records. A few of us attorneys who deal with this procedure frequently feel that the subpoena could even accompany the notice, so long as the notice is clear that the subpoena does not go into effect until the 14-day deadline is reached.

Please provide this explanation to the attorneys who seek records. Also note, for whatever reason, that the language of the statute is such that it only applies to attorney requests, not to requests of insurance companies or other such persons.

THAT'S ALL FOR NOW

Well, I have to go pay my taxes, so we will see you next month!

DISCLAIMER