

# Bonezzi Switzer Murphy Polito & Hupp Co. L.P.A.

## Are You Hearing the Warning?

By Beth A. Sebaugh, Esq.

How many times have we heard the cliché, “An ounce of prevention is worth a pound of cure”? This is certainly true when it comes to compliance with the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 (RHA). Prevention of unintentional violations of the ADA by your staff and/or professionals will surely place you in a position of saving thousands of dollars in legal fees and potential settlement dollars.

Often times sole medical practitioners (proprietorships), as well as small group medical practices (organizations), may not be attuned to the requirements of ADA and RHA as applicable to their busy practices and are

unintentionally following a recipe for potential disaster. Most hospitals and/or large group practices have addressed the issue and implemented appropriate policies and procedures. However, with the myriad of pressures upon smaller organizations or solo practitioners, many have not devoted time or resources to address these issues.

Pertinent portions of the ADA prohibit discrimination by public accommodations and provide that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns,



leases (or leases to) or operates a place of public accommodation. 42 USCS §12182(a). A place of public accommodation is defined to include the professional office(s) of a health care provider. See 42 USCS §12181(7)(F).

Additionally, 29 USCS §794 prohibits recipients of federal funds from discriminating against individuals on the basis of disability. It is exceedingly rare today to find a physician practice that does not receive at least some federal funds in the form of Medicare reimbursement. Thus, a failure to establish policies and proce-

dures, as well as a failure to adequately train employees in the implementation and compliance with policies and procedures, to ensure a discrimination-free environment when dealing with patients or their family members who suffer from a disability, such as hearing impairment, is resulting in a number of solo and small group practitioners finding themselves on the receiving end of discrimination complaints. That position may result in the incurrance of substantial penalties or settlements, as well as legal fees, when they must respond

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## Workers' Compensation Update: Voluntary Abandonment Applies To All

By Christine C. Covey, Esq.

The malingering injured worker has long been the workers' compensation budget-buster for employers. Prolonged payment of temporary total disability compensation (“TTD”) drives up premiums for State Fund employers and claim costs for self-insured companies. The conventional wisdom for managing workers' compensation claimants receiving TTD has been: a) early efforts for a finding of maximum medical improvement (“MMI”) of the allowed conditions; or b) early return to modified work compliant with the attending physician's work restrictions.

While the former was the preferable strategy, resort to the

latter gained popularity among employers with the operational capacity to accommodate physical restrictions. Decreased productivity was better than no productivity for the employer and early return to work was less financially taxing for the injured worker. Except for the modification of his job tasks, the returning injured worker on modified duty was considered no different than any other employee. Both parties appeared to benefit from modified duty programs.

Ohio courts, in a series of decisions between 1996 and 2007, created a distinction in the application of a key defense to TTD eligibility between injured workers who returned to their former position and those

who returned to modified duty because of work restrictions. Voluntary abandonment, the legal principle that disqualifies an injured worker from TTD, was extended in 1995 to situations where the injured worker had been terminated for cause by the Ohio Supreme Court in the *Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St. 3d 401. If the termination was for violation of a clearly-defined written work rule that the injured worker knew was a dischargeable defense, then the termination constituted voluntary abandonment of his employment and forfeiture of the right to TTD following the termination date. This so-called *Louisiana-Pacific* voluntary abandonment became another defense against TTD eligibility.

But the courts soon began limiting the application of the *Louisiana-Pacific* defense by a series of decisions which relied upon the theory that one cannot abandon a job to which he is medically incapable of returning. Specifically, those who returned to modified duty were not disqualified from TTD even if they violated a known written work rule, which would otherwise constitute a *Louisiana-Pacific* voluntary abandonment. Injured workers returning to modified duty were thus protected from TTD ineligibility even if they committed infractions of written work rules which resulted in discharge. Employers were faced with the Hobson's choice of terminating injured workers for written work

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## Workers' Compensation Update: Voluntary Abandonment Applies To All Cont.

rule violations and resuming TTD payments or affording them preferential treatment by knowingly not applying the prescribed discipline to written work rule infractions just to avoid resumption of TTD payment.

The employer's dilemma was ameliorated somewhat by the recent decision in *Apostolic Christian Home, Inc. v. King*, 10<sup>th</sup> Dist. No. 08AP-1078, 2009-Ohio-5670. The Franklin

County Court of Appeals clarified that an injured worker need not be physically able to perform the job tasks of his former position for a finding of voluntary abandonment. If he has returned to modified duty, his discharge as a consequence of his violation of a known written work rule does not constitute voluntary abandonment which bars future TTD eligibility.

The *Louisiana-Pacific* voluntary abandonment doctrine, accord-

ing to *Apostolic Christian*, applies to all injured workers, including those who return to less-than-full duty work. For now, at least, *Apostolic Christian* supports an employer's enforcement of its termination policy against injured workers returning to modified duty who violate known written work rules.

Accommodating work restrictions for injured workers is not an impediment to disciplinary

charges.



Christine C. Covey, Esq.

## Robinson Prevails -- Write-Offs Are Admissible

By Michelle H. Bagi, Esq.

The Supreme Court of Ohio has recently resolved a longstanding dispute as to whether a plaintiff may recover damages for expenses that were never actually paid. For example, before the Court's intervention, a plaintiff could introduce a jury to a \$100,000 medical bill despite the hospital's acceptance of \$25,000 as payment in full from the insurance company. Conversely, a defendant was not permitted to show the jury how much of the medical bill was written off (or not paid by anyone). Today, the original medical bill rendered and the amount accepted as full payment are both admissible to prove the reasonableness and necessity of charges for medical care.

The conflict between *Robinson v. Bates* and the collateral-source rule, R.C. 2315.20, no longer exists. On May 4, 2010, the Ohio Supreme Court clearly stated that R.C. 2315.20 does not apply to write-offs and that evidence of write-offs is admissible to show the *reasonable value* of medical expenses.

In *Jaques v. Manton*, Slip Opinion No. 2010-Ohio-1838, the plaintiff-appellee, Richard Jaques, brought a personal-injury action against defendant-appellant, Patricia Manton, to recover for injuries he sus-

tained in an automobile accident. Manton admitted liability. Jaques received medical care and treatment from various medical providers and the total amount billed for those services was \$21,874.80. Jaques was insured by Medical Mutual of Ohio. Medical Mutual paid the various medical providers a reduced payment of \$7,483.91 as payment in full for those services.

Prior to trial, Jaques's motion to preclude Manton from offering evidence of the \$14,390.89 write-off by the various medical providers was granted; therefore, at trial the jury was only able to consider the full amount billed by the various medical providers, rather than the reduced amount accepted as payment in full. As a result, the jury awarded Jaques \$25,000 in damages and this award included \$15,500 for medical bills. The trial court denied Manton's motion for a new trial. In addition, the Court of Appeals affirmed the trial court's evidentiary ruling, holding that evidence of the write-offs was precluded by R.C. 2315.20.

In 2006, the Ohio Supreme Court heard a similar case, *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, and held that under the common-law collateral source rule in force prior to the enactment of R.C. 2315.20, a defendant was

permitted to introduce evidence of write-offs that reduced the amounts of the plaintiff's medical bills. Justice O'Donnell, writing for the majority in *Jaques*, reasoned that the common-law analysis from *Robinson* applies equally in the context of R.C. 2315.20:

"Both versions of the collateral-source rule are concerned with actual payments made by third parties to the benefit of the plaintiff, but the focus of the statute is to prevent a double-payment windfall for the plaintiff while the focus of the common-law rule was to prevent the defendant from escaping the full burden of his tortious conduct. Write-offs are amounts not paid by third parties, or anyone else, so permitting introduction of evidence of them allows the fact-finder to determine the actual amount of medical expenses incurred as a result of the defendant's conduct. This result supports the traditional goal of compensatory damages -- making the plaintiff whole." *Id.*, at ¶12.

The Supreme Court in *Jaques*, held that the trial court and Court of Appeals both erred in refusing to admit evidence of write-offs by the medical providers. The Court held that evidence of write-offs is admissible to show the reasonable value of medical expenses as originally held in *Robinson*.

Today, a plaintiff is entitled to recover the reasonable value of medical expenses incurred due to the defendant's conduct - the reasonable value of medical services is a matter for the jury to determine from all relevant evidence. This means that both the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical care.



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## Are You Hearing the Warning? Cont.

to a complaint of discrimination regarding the manner in which they or their office staff has dealt with a hearing impaired or other disabled individual.

While it is true that a private party who alleges a violation of Title III of the ADA may receive only injunctive relief and not damages, every individual who believes he or she has been the recipient of discriminatory practices or procedures may file a complaint with the United States Department of Justice (DOJ). Once the DOJ becomes involved, compensatory damages may become an issue and the allegedly offending professional faces the sobering reality of incurring legal fees, as well as a significant time commitment, with respect to the defense of the DOJ investigation. Payment of significant settlement dollars and implementation of a government monitored remediation plan have become common-place, even if the matter is resolved prior to an actual lawsuit being filed. While a private party who alleges a violation of Title III of the ADA may receive only injunctive relief, not monetary damages, there is Federal case law which has held that “[t]he ADA gives the court discretion to award attorneys fees to prevailing parties.”

Moreover, 29 USCS §794(b)(3) expressly extends the coverage of the Rehabilitation Act of 1973, 29 USCS §701 et seq. to any entity receiving federal funds, if that entity is engaged principally in the business of providing health care or social services. While the regulations implementing the RHA require 15 or more employees, such regulations, specifically 45 CFR §84.52(d)(2), may be held applicable to providers who employ less than 15 individuals where the application “would not significantly impair the ability to provide services.”

The obligations imposed by

application of one or both of the aforementioned statutes require that a disabled individual be provided with auxiliary aids, which more often than not, include the availability of an interpreter, **at the expense of the medical provider.** Violation of 29 USCS §794 affords a private cause of action for compensatory damages to the perceived victim of the discrimination. Moreover, it is well established that the perceived victim of the discrimination need not be a patient who is subject to Medicare or Medicaid funding. The law recognizes that an entire entity or sole proprietorship faces potential liability under the RHA if any part of its operations receives federal funding. It is not necessary that the disabled patient or victim be a recipient of federal funds. *Sharrow v. Bailey*, 910 F.Supp. 187, 193 (N.D. Pa. 1995).

Lastly, it is well settled in Federal law that “intentional discrimination” can be inferred from a provider’s deliberate indifference to the strong likelihood that pursuit of its questionable policies, procedures or practices will likely result in a violation of federally protected rights. Such a finding by the fact finder (jury) will justify an award of money damages to the complaining party under the RHA.

**In practical terms**, the foregoing requires that physicians and their staff when dealing with a hearing impaired individual who has requested the availability of a sign language interpreter, provide an interpreter to that individual at the expense of the sole proprietorship/medical group. Moreover, it is certainly prudent that the interpreter provided be one that is certified. Anything less subjects the provider to claims of discrimination under the RHA and/or the ADA (regardless of a physical injury to the patient), as well as potential claims of negligence

against the medical provider if there is an unclear communication between the patient and the provider or the provider’s staff which results in injury to the patient. The law requires not only that providers refrain from discriminating against handicapped individuals, but that providers take an active role in assuring that persons with impairments are afforded “appropriate auxiliary aids.”

When a proprietorship or organization claims that provision of the requested aid(s) would constitute an “undue burden,” i.e., a significant difficulty or expense, the relevant consideration is the gross income of the proprietorship/organization, not the fees/receipts derived from providing medical services to the disabled individual. In other words, the entire financial picture of the proprietorship/organization is to be considered.

**In terms of implementation**, the practical standard is to make certain that the proprietorship/organization is providing access for disabled individuals to the same services that the proprietorship/organization is providing to its patients/clientele who are not disabled. Such access may include the following:

- **Provision**, free of cost to requesting patients, of auxiliary aids and services, including qualified interpreters, where necessary to insure effective communication with individuals with disabilities;
- When a sign language interpreter is requested, the proprietorship/organization will **make arrangements** for provision of a **qualified** sign language interpreter for any qualified (hearing impaired) person seeking medical care;
- A companion is anyone who the proprietorship/organization would typically

communicate or would reasonably be expected to communicate regarding the patient’s medical care (that is a parent of a minor or a primary caregiver/guardian for an individual who is unable to manage his/her own affairs).

Please note that a proprietorship/organization may not require a family member or other associate of the patient to provide interpreter services, rather than the proprietorship/organization providing a qualified sign language interpreter.

It is important for proprietorships/organizations to have written policies/procedures in place to address the request of a patient for auxiliary aids prior to the organization first being confronted with such a request. Such policies and procedures should include the training of “front-line” individuals on how to respond to such a request, a listing of the individual(s) within the organization to whom such a request should be directed for **prompt** attention and an up-to-date listing of identification and contact information for available aids (certified sign language interpreters) within the community. For example, a patient in need of a sign language interpreter may not be given an appointment for 30 days out when non-disabled patients are routinely given appointments within one to two weeks of requesting the same.



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## Insufficiency of Service of Process and Lack of Personal Jurisdiction are Never Waived if Asserted Prior to Actively Participating in the Case

By Jennifer R. Becker, Esq.

What can you do to protect your client when there has been improper service and your client will be participating in the case? The quandary is whether counsel should file an Answer or other responsive pleading on behalf of the client. The answer is yes, but most importantly, the affirmative defenses of insufficiency of service of process and lack of personal jurisdiction must be properly raised and preserved. Once raised, these defenses are never waived. See., *Glozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St. 3d 141, 2007-Ohio-3762.

Having notice of a lawsuit and not being prejudiced by the failure of service, does not constitute a waiver of insufficient service and lack of jurisdiction. If this were the case, these defenses would never be asserted in an Answer or responsive pleading pursuant to Civ.R. 12(B), because the mere assertion of these defenses would prove that the defendant knew about the pendency of the action; and thus, all rules relating to service of process would be nullities. See., *Halley v. Hanna* (1915), 93 Ohio St. 49; *Bell v. MidWestern Educ. Serv.* (1993), 89 Ohio App. 3d 193.

In *Glozzo*, plaintiff-patient's attempted service by certified mail failed on defendants-physician and his medical practice and plaintiff did not attempt further service on defendants within the one-year period under Civ. R. 3(A). *Id.*, ¶1-2. Defendants filed their answer denying the medical malprac-

tice allegations and raised various affirmative defenses, including insufficiency of service of process. *Id.*, ¶3. The trial court granted defendants' oral motion to dismiss, on the day of trial, based on lack of proper service. *Id.*, ¶4. In a two-to-one decision, the Eighth District Court of Appeals reversed the trial court, finding that the defendants had actively participated in the case and that they submitted to the trial court's jurisdiction, such that the insufficient service defense was waived. *Id.*, ¶5. The Ohio Supreme Court reversed the judgment of the Court of Appeals holding that since the defendants asserted the insufficiency of service of process defense in their first responsive pleading, it was not thereafter waived by their participation in the litigation. *Id.*, ¶18.

The Ohio Supreme Court, explained, "[i]n some instances, a party who voluntarily submits to the court's jurisdiction may waive available defenses, such as insufficiency of service of process or lack of personal jurisdiction. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-157, 11 OBR 471, 464 N.E.2d 538. The only way in which a party can voluntarily submit to a court's jurisdiction, however, is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions before any pleading. *Id.* at 157-158, 11 OBR 471, 464 N.E.2d 538. Only when a party submits to jurisdiction in one of these manners will the submission constitute a waiver

of the defense." *Glozzo*, at ¶13. The Court held, "[w]hen the affirmative defense of insufficiency of service of process is properly raised and properly preserved, a party's active participation in the litigation of a case does not constitute waiver of that defense." *Id.*, at ¶18.

A case that factually distinguishes *Glozzo* was recently decided on February 8, 2010, *Kennedy v. Kennedy*, 9<sup>th</sup> Dist. No. 09CA009645, 2010-Ohio-404. In this domestic relations case, there was a failure of service on the defendant-husband, but he appeared and participated in a court hearing. *Id.*, at ¶3-4. The defendant failed to appear at subsequent hearings and asserted that the court lacked personal jurisdiction because he had never been properly served. *Id.* The trial court determined that the defendant submitted himself to the personal jurisdiction of the court by voluntarily participating in the hearing and by failing to file a pleading (or orally asserting) that there was a failure of service, prior to his participation. *Id.* The Ninth District Court of Appeals affirmed this decision. *Id.*, at ¶16.

The Court explained that "[i]n order to render a valid personal judgment, a court must have personal jurisdiction over the defendant." *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156, 11 Ohio B. 471, 464 N.E.2d 538. 'This may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his

legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court.' *Asset Acceptance, L.L.C. v. Allen*, 9<sup>th</sup> Dist. No. 24676, 2009-Ohio-5150, at [¶]3, quoting *Maryhew*, 11 Ohio St.3d at 156. 'The latter may more accurately be referred to as a waiver of certain affirmative defenses, including jurisdiction over the person under the Rules of Civil Procedure.' *Maryhew*, 11 Ohio St.3d at 156." *Kennedy*, at ¶7.

Accordingly, in light of these cases, if you and your client are going to participate in a lawsuit – whether it be at a deposition, hearing or filing pleadings, and there has been improper service, it is important to file an Answer or responsive pleading that properly raises and preserves the affirmative defenses of insufficiency of service of process and lack of jurisdiction because then you will be shielded from waiving these defenses.



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