

Legal Q/A

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Q: *Is a physician in our medical practice who suffers from a disability, and happens to be one of the co-owners of the practice, entitled to the protections of the Americans With Disabilities Act?*

A: In light of recent court cases, it may depend on whether the medical practice is organized as a partnership or as a corporation, and if the practice operates as a corporation whether the physician would be considered an "employee" even though the physician is a shareholder and director of the entity.

The Americans With Disabilities Act of 1990 ("ADA") prohibits employers with 15 or more employees (the New York disability statute under the Human Rights Law covers all employers with at least 4 employees) from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment. An individual with a disability is a person who has a physical or mental impairment that substantially limits one or more major life activities such as walking, breathing, speaking, or working.

The ADA protects individuals who are considered employees, but not true partners in a partnership. If the medical practice is organized as a partnership the ADA will probably not cover the physician partners. And historically, the New York disability statute has been interpreted in the same manner as the ADA.

The issue becomes less clear, however, if the practice is organized as a professional corporation (P.C.). The owners of a P.C. have dual status – they are both shareholders/directors and employees of their own corporation. As a result of a leading court case on this issue in 1986, it was generally conceded that all physicians (even shareholders) who were employees of a P.C. were entitled to the protections of the ADA. Physicians often refer to the other physician-owners in their practice as "partners", despite the fact that they are technically employees who are paid salaries and bonuses and receive a W-2 wage statement at the end of each year.

However, last year the U.S. Supreme Court decided in *Clackamas Gastroenterology Associates, P.C. v. Wells* that shareholder-employees were not automatically covered by the ADA; instead, the Court said that the critical issue is whether the organization can exercise effective control over the physician, such as:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work (note: most professional corporations give the board of directors or supermajority of shareholders the right to terminate physicians);
- The extent to which the organization supervises the physician's work;
- Whether the individual reports to someone higher in the organization;
- Whether the individual shares in the profits, losses and liabilities of the organization; and
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.

Thus, there is no bright line test. The question of whether a physician in a P.C. is an "employee" under the ADA is one that will depend on the particular facts and circumstances of the medical practice. The more that the P.C. vests management and control in the central governing body and the less that independence and autonomy are retained by the individual physicians, the greater the likelihood that the physician will be considered an employee protected under the ADA.

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