EMPLOYMENT LAW

The ADA and health insurance

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SINCE the Americans With Disabilities Act of 1990 first became effective, in January 1992, plaintiffs have increasingly attempted to expand its reach. The latest effort involves challenges to health and long-term disability (LTD) insurance policies that provide different levels of benefits for different disabilities, a practice which, as the U.S. Court of Appeals for the 2d Circuit recently noted, is "historic and nearly universal" in the insurance industry. *EEOC v. Staten Island Savings Bank*, 207 F.3d 144, 149 (2d Cir. 2000).

The Equal Employment Opportunity Commission, in its informal 1993 memo *Interpretive Guidance on Application of ADA to Health Insurance*, took the position that, at least with respect to health insurance policies, disability-based distinctions may violate the ADA. Its example was a plan that "singles out a particular disability (e.g., deafness, AIDS, schizophrenia) or a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases)" for lesser benefits.

Naturally, since the release of the EEOC guidance, plaintiffs have argued that such disparate treatment violates either Title I of the ADA (prohibiting disability-based discrimination in employment) or Title III (prohibiting such discrimination in places of public accommodation). Although these cases present interesting legal issues, unfortunately for plaintiffs and the EEOC, their claims have almost unanimously been rejected by the courts.

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ADA 'safe harbor' provision stands up in court

Sec. 501 of the ADA, commonly known as the "safe harbor" provision, excludes from coverage of the ADA a bona fide benefit plan that (i) is consistent with or not regulated by state law, and (ii) does not use § 501 as a "subterfuge" to evade the purposes of the ADA. 42 U.S.C. 12201.

Plaintiffs have argued that the safe harbor provision serves no legitimate purpose if the ADA does not regulate the content of insurance plans. The federal courts, however, have either rejected this argument (*Staten Island Savings Bank*, 207 F.3d at 150-51) or have declined to reach it, finding, as a matter of law, that the decision to treat mental and physical disabilities differently falls within the safe harbor (*Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1115-16 (9th Cir. 2000)).

Moreover, it has also been held, as a matter of law, that a policy cannot constitute a subterfuge if it is consistent with state law and was adopted before the passage of the ADA in 1990. *EEOC v. Aramark Corp*., 208 F.3d 266, 268-73 (D.C. Cir. 2000); *Leonard F. v. Israel Discount Bank*, 199 F.3d 99, 106 (2d Cir. 1999).

Some cases have attacked corporate LTD plans, which provide coverage for physical disabilities typically until age 65. Many plans, however, limit coverage for mental disabilities to two years (especially when the insured is not hospitalized). It is this disparate treatment that plaintiffs claim violates the ADA.

Challenges to long-term disability plans

Recently, the 2d Circuit was faced with two consolidated actions brought by the EEOC on behalf of former employees and other similarly situated people. In *EEOC v. Staten Island Savings Bank*, 207 F.3d 144 (2d Cir. 2000), the EEOC alleged that the LTD plans offered by defendants violated Title I of the ADA by providing less coverage for mental and emotional disabilities than for physical disabilities. On March 23, the 2d Circuit, in a case of first impression, strongly affirmed the dismissal of the action, holding, "[W]e add our voice to a chorus of [six] other United States Courts of Appeals that have ruled that such disparate treatment is not forbidden by the Act."

In an opinion by Judge Robert D. Sack, the court held that "so long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for different disabilities." The court refused to defer to the EEOC guidance, noting that it is an informal publication that has not been subject to notice and comment.

The court also noted that the guidance is in tension with the EEOC's published regulation on fringe benefits, 29 C.F.R. Part 1630, App. § 1630.5, which is "intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees."

Challenges to health plans that restrict coverage

The second category of cases have attacked health insurance plans which either place monetary caps on coverage or exclude coverage altogether for certain disabling conditions or related treatments. Plaintiffs in these cases have not fared much better than plaintiffs challenging LTD plans.

Several cases have alleged that limits on health insurance coverage for AIDS and related conditions violate the ADA. Both the 5th and 7th Circuits recently rejected such claims.

On Feb. 24, the 5th Circuit affirmed the dismissal of a plaintiff's claim that his deceased son's health insurance provider had violated Title III by limiting its AIDS

coverage to $10,000 for the first two years under the policy. *McNeil v. Time Insurance Co.*, 205 F.3d 179 (5th Cir. 2000). The court held that Title III only prohibits defendant from denying the disabled access to its goods or services, and that it does not regulate the content or level of those goods or services.

The 7th Circuit rejected a similar claim in *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), cert. denied, 120 S. Ct. 845 (2000), holding:

"There is, as we have pointed out, a difference between refusing to sell a health insurance policy at all to a person with AIDS, or charging him a higher price for such a policy, or attaching a condition obviously designed to deter people with AIDS from buying the policy (such as refusing to cover such a person for a broken leg), on the one hand, and, on the other, offering insurance policies that contain caps for various diseases some of which may also be disabilities within the meaning of the ADA."

Exclusions for certain conditions or treatments

The 7th Circuit's holding in *Doe*, distinguishing between health insurance plans with AIDS caps and those "attaching a condition obviously designed to deter people with AIDS from buying the policy," leaves open the issue of whether plans that exclude coverage altogether for certain disabling conditions or related treatments violate the ADA. Both the 6th and 8th Circuits have rejected lawsuits challenging health plans that exclude coverage for the treatment of certain disabling conditions.

In *Lenox v. Healthwise of Kentucky Ltd.*, 149 F.3d 453 (6th Cir. 1998), the 6th Circuit rejected the plaintiff's claim that the defendants' health plan violated the ADA by excluding coverage for heart transplants. The court held that the ADA does not regulate the content of the goods and services that must be provided by places of public accommodation. In rejecting the plaintiff's theory, the court analogized it to a requirement that a video store stock closed-caption videotapes because ordinary tapes are worth less to a deaf person.

In *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996), the 8th Circuit similarly rejected a claim challenging an exclusion for infertility treatments. The court held that the exclusion was not disability-based because it, for example, bars coverage for infertility caused by age (not a disability under the ADA), as well as for infertility caused by ovarian cancer (which is an ADA-recognized disability).

The court also held that, under the safe-harbor provision, the plan is not being used as a subterfuge to evade the purposes of the ADA. Adopting a narrow definition of "subterfuge," the court held that the exclusion was protected by the safe harbor provision unless it discriminated in a "non-fringe-benefit-related aspect of the employment relation."

In April 1999, Judge Deborah A. Batts, of the Southern District of New York, considered a claim challenging a health plan that excluded coverage for a disabling condition.

In *Morgenthal v. AT&T*, 1999 WL 187055 (S.D.N.Y. April 6, 1999), the plaintiffs—a father, mother and son—sued the father's employer, claiming that the employer's health plan, which excluded coverage for developmental disorders, violated Title I. Although the court dismissed the mother and son from the case, it held that the father had standing to sue his employer for its alleged denial of benefits based on his son's autism under the "association provision" of the ADA, 42 U.S.C. 12112(b)(4).

The court, relying on the not-yet-disfavored 1993 EEOC guidance, denied the employer's motion to dismiss, holding that (i) plaintiff had properly alleged that the plan's exclusion "lacks a sound actuarial basis, and is used as a subterfuge to violate the purpose of the ADA" and that (ii) "defendant has not offered any explanation, actuarial or otherwise, for its challenged policy."

Judge Batts' ruling, however, was issued before the 2d Circuit's decisions in *Staten Island Savings Bank*, which gave no deference to the EEOC guidance, and *Leonard F.*, which rejected the argument that a disability-based distinction is a subterfuge unless it is based on "sound actuarial principles." Thus, it would seem that the *Morgenthal* decision has been rendered a nullity by subsequent 2d Circuit case law. (It should be noted that, subsequent to Judge Batts' decision, the authors represented AT&T in this case, which ultimately was resolved out of court after the 2d Circuit's *Leonard F.* decision).

Effects of the 1996 Mental Health Parity Act

In September 1996, Congress passed the Mental Health Parity Act, which applies only to health insurance plans, and provides that if such plans cover both mental and physical illness, and if such plans contain annual or lifetime dollar limits on coverage, they must set any monetary caps on mental health coverage as they do for other medical/surgical benefits. 42 U.S.C. 330gg-5. The original Senate bill, which did not pass, would have required across-the-board parity in coverage for all mental and physical ailments.

A May 18 *New York Times* article reported that the act does not appear to have increased access to mental health services, and it noted that lawmakers hoping to expand the law have requested a Senate hearing to address their concerns. "Many Employers Found to Violate Law Requiring Parity for Mental Health Coverage," *New York Times*, May 18, 2000, at A26.

Tipper Gore, the wife of Democratic presidential candidate Al Gore, also has advocated "full parity" in insurance coverage and Vice President Gore sometimes promotes the idea in campaign speeches. Regardless of whether the act might be expanded, defendants have argued, and courts have agreed, that the passage of the law demonstrates that, in enacting the ADA in 1990, Congress did not intend the ADA to require parity in insurance coverage. *Weyer*, 198 F.3d at 1117; *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 610 (3d Cir. 1998), cert. denied, 525 U.S. 1093 (1999); *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006, 1017-18 (6th Cir. 1997) (en banc), cert. denied, 522 U.S. 1084 (1998).

Conclusion

Although the cases are fairly recent and the courts have yet to address all the issues, the federal courts of appeals that have considered the question to date have uniformly held that the ADA does not regulate the content of insurance policies. Thus, at least for now, it appears that those seeking full parity in the coverage of mental and physical illnesses must look to federal legislation, and not to the courts, once the 2000 elections are over.