

## **Accommodating disability or preventing law suits: an application of the ADA**

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### **ABSTRACT**

This case involves the issue of treating people with disabilities fairly and in accordance with the Americans with Disabilities Act (ADA), while also protecting the public's safety and preventing law suits. This is an particularly significant issue considering the importance of providing satisfactory health care in America's current litigious society. It is a level 3 case study designed for use in management or human resource management courses. As a short case, it is meant to illustrate the tenuous situation health care providers can face as they attempt to provide high quality care to patients while complying with laws and being fair to people covered under the ADA. This case focuses on Morgantown Hospital and Dr. William Wahkovich, an orthopedic surgeon. During a knee-replacement surgery, Dr. Wahkovich suffered a psychiatric episode. After undergoing therapy, Dr. Wahkovich wished to continue performing surgery at Morgantown Hospital, which was not his employer, but rather the place where he worked as an independent physician. The hospital insisted that during the first six months, Dr. Wahkovich be supervised by a certified orthopedic surgeon who could take over a surgery if Dr. Wahkovich experienced another disabling episode. Due to his inability to find a qualified surgeon willing to supervise him, Dr. Wahkovich filed a claim that Morgantown Hospital was not providing "reasonable accommodation" as mandated under the ADA. The purpose of this case is to shed light on the provisions of the ADA and examine how these issues can become matters of life and death. The names used within this case are fictional but, nonetheless represent real individuals in the actual case.

**KEY WORDS:** ADA, Human Resources Management, reasonable accommodation, undue hardship, health care policy

## INTRODUCTION

Dr. Jon Lazinski sat across the table from the hospital's attorney, Brian Dulina. "Do you think he really has a case?" asked Dr. Lazinski, affectionately known as Dr. Laz.

"This case shouldn't go anywhere. If we had allowed Dr. Wakhovich to operate solo on patients and he had another episode in which he couldn't safely complete a surgery, there could have been a death, and we would have been named in any malpractice suits brought against him. The safety of our patients has to be our number one priority," Dulina replied.

"Exactly," concurred Dr. Laz. "Requiring a second surgeon for a six month time period *was* reasonable accommodation." Discussing the matter made Dr. Laz think back on the moment he heard of Dr. Wakhovich's hypomanic episode in the operating room.

## CRISIS IN THE O.R.

Physicians practice medicine *at* Morgantown Hospital, but they are not employees. Instead, doctors request the privilege to work as independent professionals within the hospital. The Credentials Board determines whether a given physician, in this case orthopedic surgeon William Wakhovich, is granted his or her petition. In his application, Dr. Wakhovich gave no indication that he had ever suffered psychiatric issues. As a matter of general policy, he was evaluated by staff psychiatrist Dr. Jacob Barnes, before gaining his hospital privileges.

Dr. Wakhovich was performing his first unsupervised total knee replacement at Morgantown. Suddenly, he began acting erratically. He could not remember the names of surgical instruments and was unable to complete the operation. Operating room staff reported that he was "bouncing off the walls" and at one point appeared to be talking to wall. Fortunately, another orthopedic surgeon was available to scrub in and finish the surgery.

It was later determined that Dr. Wakhovich was experiencing a hypomanic episode, which is a less severe version of a manic episode (Morgan-Besecker, Apr. 2007). Although Dr. Wakhovich admitted to suffering the hypomanic episode, he also contended that he was just rather jovial that day, and was indeed thinking clearly. Regardless, he voluntarily relinquished his hospital privileges temporarily for health reasons (US District Court, 2006, p. 2).

After several meetings with Dr. Barnes, Dr. Wakhovich asked to have his privileges reinstated. Dr. Barnes submitted to the Credentials Board a letter stating that he was not able to determine whether Dr. Wakhovich had experienced a psychiatric problem and therefore could not psychiatrically clear him (US District Court, 2006, p. 3). He noticed that Dr. Wakhovich was very introspective and socially naïve, but not to the extent that it could be considered a disorder or disease. Based on Dr. Barnes' letter that did not unequivocally clear Dr. Wakhovich, the Credentials Board denied the request.

Dr. Wakhovich turned to Dr. Carol Glass. She met with him three times over the next six months, eventually writing a letter similar to Dr. Barnes' that did not unequivocally clear Dr. Wakhovich, but did not diagnose a disorder. She concluded her statement by suggesting that Dr. Wakhovich would make better progress with a male psychiatrist (US District Court, 2006, p. 3).

Having taken Dr. Glass' advice, Dr. Wahkovich began meeting weekly with Dr. Joseph Manatti, who was recommended by Dr. Glass. After six months, Dr. Glass, in consultation with Dr. Manatti, submitted a letter stating that she believed Dr. Wahkovich was stable and should now be able to work. She concluded her statement with a strong recommendation that Dr. Wahkovich return to work without restrictions.

At the next meeting of the Credentials Board, the board members decided to request additional information from Drs. Glass and Manatti. A month later, they had failed to gain further elaboration. They determined the letter was a "recommendation," but not full psychiatric clearance. Therefore, they granted Dr. Wahkovich operating privileges on the condition that he was accompanied by a board-certified orthopedic surgeon during all surgical procedures and that he received satisfactory monthly evaluations from the supervising surgeon for a period of six months (US District Court, 2006, p. 4). Although one of the general surgeons on the Board volunteered to act as the supervisor, the rest of the board determined that it was necessary for the supervisor to be an orthopedic surgeon, due to the nature of Dr. Wahkovich's practice. The supervising surgeon would be responsible for completing the procedure should Dr. Wahkovich become disabled during the surgery.

Six months later, having failed to find an orthopedic surgeon willing to take on the responsibility of supervising him, Dr. Wahkovich delivered a letter to Morgantown Hospital declaring that those stipulations were not justified and were impossible to comply with. The Credentials Board admitted that they had never before required such supervision when returning from leave of absence, even for drug or alcohol abuse, heart disease or neurological problems (Morgan-Besecker, Feb, 2007). However, no surgeon in recent memory had acted in such a way that directly called into question the surgeon's mental stability or ability to complete a surgery alone.

The following month, Dr. Wahkovich was committed to a psychiatric facility for two weeks. Two months later, Dr. Wahkovich applied for and was granted hospital privileges in another state, providing he was monitored by another orthopedic surgeon during all procedures for six months (US District Court, 2006, p. 5). As far as Dr. Lazinski knew, Dr. Wahkovich was still practicing there.

## **THE CASE ON DR. LAZINSKI'S DESK**

The next year, Dr. Wahkovich filed a complaint against Morgantown Hospital alleging it had violated the American with Disabilities Act for not providing reasonable accommodation for a person with a known disability. In order to successfully make a claim under the ADA-in this case, Title III, Dr. Wahkovich must show that he has a disability, which is defined in that legislation as "a physical or mental impairment that substantially limits one or more of the major life activities of the individual." (US District Court, 2008, p.2) He must also show that Morgantown Hospital operates a place of public accommodation, discriminated against him on the basis of his disability, and thus was thereby denied goods/services. Morgantown Hospital is a place of public accommodation, concedes that it denied "full and equal enjoyment of services" when it suspended Dr. Wahkovich's hospital privileges, and agrees that Dr. Wahkovich suffers from a disability (ADA Title III, 1990). The essence of this case lies in the issue of

whether Morgantown Hospital discriminated against Dr. Wahkovich because of his mental disability.

"He can't win this case," Dulina said with a sigh. "He wasn't discriminated against on the basis of his disability. His condition presented a *direct threat* to our patients."

"And we did provide a method by which he could be reasonably accommodated. He only had to be supervised with positive results for six months, to make sure our patients would be safe during surgery," agreed Dr. Laz. "His contention that we should have provided a supervising surgeon is completely bogus. Morgantown Hospital doesn't hire surgeons in that capacity. He knows that. He was working as a surgeon under that agreement when it all blew up."

"Exactly. This case will be dismissed, and we can close the file on this," Dulina concluded.

## **REASONABLE ACCOMMODATION**

Dr. Wahkovich's condition is considered a disability because it severely limits his ability to work as a surgeon, even though he could work in other jobs. If medicine were available to ensure that Dr. Wahkovich would not experience another hypomanic episode, he would not have a disability under the ADA. Likewise, other people with mental disabilities who are otherwise qualified for a job cannot be discriminated against if medicine or another reasonable accommodation, such as job restructuring, modification of the work schedule, would allow the person to work (U.S. Equal Employment Opportunity Commission-EEOC, 2008). It is not necessary for the employer to lower quality standards or production volume.

However, if an employer would suffer "undue burden" from making an accommodation, it may be excused from a specific modification (US District Court, 2008, p.13). The exact definition of undue hardship is not consistent from company to company because an employer's size, financial resources, and operations are taken into account. Modifications are not required if they would "fundamentally alter" the nature of the goods or services provided by the employer (US District Court, 2008, p.12). In this case, Morgantown Hospital did not hire physicians to treat patients within the hospital, but rather, allowed to them to practice their personal profession at the hospital. By hiring a surgeon to supervise Dr. Wahkovich, Morgantown Hospital would have substantially changed the nature of the services it provides, as well as possibly suffering undue hardship.

## **DIRECT THREAT**

Another situation in which modifications are not required is when doing so would pose "a direct threat to the health and safety of others." A direct threat is considered to exist when it presents a *significant* risk to the health or safety of others, providing it cannot be reduced or eliminated by reasonable accommodation. The Supreme Court has ruled that most activities in life present some level of risk, and therefore the ADA is applicable when a risk is significant, rather than simply exists in any amount. The Equal Employment Opportunity Commission relates direct threat to potential harm by identifying four factors be considered: the likelihood that potential harm will occur, the

imminence of the potential harm, the nature and severity of the potential harm, and the duration of the risk (U.S. Equal Employment Opportunity Commission-EEOC, 2007). The extent of the risk is based on the situation presenting itself if the person refuses treatment or a reasonable accommodation.

If Dr. Wahkovich suffered another hypomanic attack during surgery such that he could not complete the procedure, the potential harm to the patient could be very serious, even deadly. Although Dr. Wahkovich had not revealed the information previously, he had suffered attacks in the past, and could suffer them again in the future, especially under stress, such as is common in orthopedic surgeries in which surgeons must quickly perform many tasks. It is debatable whether he would realize he was suffering an attack (he had not been able to do that in the past) or if surgical support staff would be able to identify the situation and bring in another surgeon to complete the surgery.

From the point of view of Dr. Wahkovich and the two psychiatrists who recommended he return to work, his disability did not pose a direct threat to his potential surgical patients. In addition, Dr. Wahkovich felt the requirement of being supervised by a board-certified orthopedic surgeon for six months was not reasonable (US District Court, 2006, p.16). Nevertheless, he agreed to the latter when he accepted employment in another state .

Morgantown Hospital contends that because surgeons are not employees of the hospital, it could not assign an independent surgeon to the job of supervising Dr. Wahkovich. If the hospital were to pay a surgeon to supervise Dr. Wahkovich's surgeries, the nature of its services would have been "fundamentally altered" because providing that level of medical care was not within its mission (US District Court, 2006, p.16).

### **COURT DECISION(s)**

At the 2006 hearing, the court decided in Dr. Wahkovich's favor, declaring that Morgantown Hospital violated the ADA by not providing reasonable accommodation. The jury awarded him \$250,000 in compensatory damages for lost wages (Morgan-Besecker, April 2007). Disability advocates declared the victory a win for all mentally disabled people (Morgan-Besecker, February 2007).

An important and interesting element of the case is that the judge prohibited the defense from informing the jury that Dr. Wahkovich worked in another state under the same restrictions as those imposed by Morgantown Hospital. The hospital appealed the case based on the fact the jury was falsely led to believe that Dr. Wahkovich was not able to find work after he was denied reinstatement (Morgan-Besecker, April 2007).

### **TEACHING SUGGESTIONS**

This case is useful for creating discussion regarding the ADA and its implications in the workplace, especially a workplace that 1) has great responsibility for the health and safety of its clients and 2) is constantly in danger of being named in a malpractice suit if patients suffer from faulty decisions.

Although the names have been changed, this case is based on a true story. It is suggested that students play the role of judge and determine whether they would decide for Morgantown Hospital or Dr. Wahkovich and explain the reasoning for their decisions.

Alternatively, students could represent Dr. Wahkovich and Morgantown Hospital in a mock trial, presenting each side's arguments.

Some interesting in-class discussion points include the nature and intent of federal employment law. The student could identify the circumstances under which protected characteristics such as disability can affect the basis for employment decisions as well as the circumstances under which a company may be found guilty of illegal discrimination. Posing the question "How is the ADA relevant to the case?" may effect robust discussion. Such interaction would cover human resource management being subject to the following major federal employment laws: Equal Pay Act, Civil Rights Acts of 1964 and 1991, Age Discrimination in Employment Act, Pregnancy Discrimination Act, Americans with Disabilities Act, and Family and Medical Leave Act. It is important to understand that these laws govern the entire human resource management process, including selection decisions (i.e., hiring and promotion), as well as all training and development activities, performance appraisals, terminations, and compensation decisions.

The general result of this body of law, which is still evolving through court decisions, is that employers may not discriminate in employment decisions on the basis of gender, age, religion, color, national origin, race, or disability. The intent is to make these factors irrelevant in employment decisions. Stated another way, employment decisions should be based on factors that are "job related," "reasonably necessary," or a "business necessity" for successful job performance. It can be reinforced that the ADA is administered by the EEOC. Employers who use disability to make employment-related decisions when those factors are unrelated to an applicant's or employee's ability to perform a job may face charges of discrimination from the EEOC. The EEOC has investigatory, enforcement, and informational responsibilities. Therefore, it investigates charges of discrimination, enforces the provisions of these laws in federal court, and publishes guidelines that organizations can use to ensure they are in compliance with the law.

Other questions could include A)When do employers NOT have to provide reasonable accommodation? B)Was reasonable accommodation provided by the employer here? The primary issue in this case relates to whether Morgantown Hospital provided reasonable accommodation. One major element of this issue is whether Dr. Wahkovich's disability presented a direct threat to others. Another element involves the requirement of an interim surgical supervisor (which Morgantown Hospital would not provide) thereby speaking to the nature of services provided by Morgantown Hospital.

## **DISCUSSION OF QUESTIONS from TEACHING SUGGESTIONS**

1-How is the ADA relevant to the case?

Answer: This could treat cover human resource management as the subject of the following major federal employment laws: Equal Pay Act, Civil Rights Acts of 1964 and 1991, Age Discrimination in Employment Act, Pregnancy Discrimination Act, Americans with Disabilities Act, and Family and Medical Leave Act. It is important to understand that these laws govern the entire human resource management process, including selection decisions (i.e., hiring and promotion), as well as all training and development activities, performance appraisals, terminations, and compensation

decisions. The process of the case (and appeal) could also be studied to see the legislated act in action.

2-When do employers NOT have to provide reasonable accommodation?

The topic here deals with the ADA concept of “undue burden”. The following are circumstances under which employers do not have to provide reasonable accommodation.

- An employer does not have to provide a reasonable accommodation if it imposes an “undue hardship.”
- Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer’s size, financial resources, and the nature and structure of its operation.
- An employer is not required to lower quality or production standards to make an accommodation
- An employer is NOT obligated to provide personal use items such as glasses or hearing aids.

3-Was reasonable accommodation provided by the employer here?

The reasonable accommodation section of the ADA legislation includes the following:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

Upon reviewing these conditions, the instructor can then lead debate or discussion on which of the above items are addressed in this case. As this was a case in which a judge overturned a jury verdict, this should provide for good debate of the key points.

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