



## Nurse With History Of Drug Abuse Not Entitled To Accommodation

By A. Kevin Troutman (Houston)

When healthcare professionals such as nurses encounter problems with drug abuse or handling controlled substances, licensing agencies often allow them to keep working, subject to strict, individualized supervision during a prescribed period. This significantly limits the professional's ability to perform essential job functions and obviously creates staffing challenges.

Not surprisingly, some hospitals may be reluctant to accommodate professionals who are subject to such restrictions. The U.S. Court of Appeals for the Eighth Circuit recently upheld the termination of a nurse with a history of drug abuse because the hospital could not provide the close supervision required. This is a dicey, fact-specific area, however, so employers must proceed carefully. *Dovenmuehler v. St. Cloud Hospital*

### Nurse Makes Surprise Request for Accommodation

Jeanne Dovenmuehler was a registered nurse at St. Cloud Hospital in Minnesota when, six weeks after starting work, she revealed that she had a history of cocaine addiction and was restricted in her ability to handle controlled substances.

These restrictions were part of a care plan developed for her by the state's Health Professional Services Program. Unfortunately, Dovenmuehler's job required her to administer narcotics to patients, including infants and children in intensive care. Specifically, she was limited to "supervised access" to controlled substances for a year or more.

The Hospital considered limiting Dovenmuehler's duties, watching her closely or reassigning her to duties that did not involve medications, but eventually determined that it was not feasible to have another nurse shadow Dovenmuehler at all times and that none of the options for accommodating her were feasible. Dovenmuehler was terminated by St. Cloud, and subsequently went to work at two other hospitals that were able to deal with her limitations. She then sued St. Cloud, alleging violations of the Americans with Disabilities Act and its state law counterpart. The same legal principles were applicable to Dovenmuehler's federal and state claims.

### Arguments Underlying Disability Claims

Dovenmuehler claimed that her past chemical dependency was a lifelong illness, which at times interfered with some of her "major life activities," including the activity of working. She further alleged that although she was "regarded as disabled" and though not a current drug

abuser, that any relapse would constitute a disability. The district court disagreed and dismissed her lawsuit.

The Eighth Circuit affirmed the dismissal, finding that Dovenmuehler had not established that she was disabled. Thus, she was not entitled to protection under the ADA. Critically, the court determined that Dovenmuehler's licensure restrictions resulted from her actions – diverting Vicodin for her personal use during a previous job. The restrictions were not due to her cocaine addiction and Dovenmuehler was "not protected from the consequences of illicit conduct explainable by her chemical dependence."

The court also found no evidence that her prior drug use interfered with her attaining steady work. Because it determined that Dovenmuehler was not disabled, the court did not even rule on St. Cloud's explanation for termination or whether that explanation was pretext for discrimination.

### Results of Analysis Turn on Specific Facts

The result in this case might well have been different if Dovenmuehler's license had been restricted due to her prior cocaine addiction, rather than due to misdirecting Vicodin. Even though the Hospital was successful in this lawsuit, employers must carefully analyze the relevant facts before refusing other employees' requests for similar accommodations.

The ADA protects not only persons with impairments that substantially limit one or more major life activities; it also protects employees with a "record of such an impairment" and those "regarded as" having such impairment. Current use of illegal drugs is not considered a disability. But an employer may not discriminate against persons who have a "history" of drug addiction, if they are currently not using drugs and are either rehabilitated or undergoing rehabilitation. An alcohol abuser may also be protected under the Act.

In the current environment, employers are likely to continue to receive accommodation requests that involve professionals with restricted licenses. While accommodating these requests can be cumbersome at best, the failure to carefully analyze each request can become even more costly. Contact your Fisher & Phillips attorney for additional information.

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# Home Healthcare Company Agrees To Pay Employees' Travel Time And Expenses

By Wendy Smith and Danielle Urban (Tampa)

A Pennsylvania court recently gave preliminary approval to settlement of a wage and hour collective action lawsuit filed against a Pennsylvania home healthcare company by 3,000 of its current and former home health workers. *Thomas v. Total Home Health Care Corp.*

The suit, which was filed in May 2006, alleged violations of The Pennsylvania Minimum Wage Act and the Pennsylvania Wage Payment and Collection Law. It was one of four lawsuits filed by plaintiffs' attorneys in Pennsylvania seeking pay for travel time and travel expenses. Some of the other lawsuits filed in Pennsylvania against home health companies are also seeking overtime compensation.

## An Expensive Settlement

Under the terms of the agreement, Total Health agreed to pay certain home health employees straight-time pay for time spent traveling between assignments, and to pay overtime for compensable travel time where the compensable time would result in greater than 40 hours worked per week.

Total Health also agreed to reimburse employees for transportation costs, such as public transportation costs, that employees incurred while traveling between assignments.

Also as part of the agreement, Total Health agreed it would classify its home health workers as nonexempt under Pennsylvania wage and hour laws (thus entitling them to minimum wage and overtime pay), maintain all wage policies in written form, and distribute notices to all employees explaining their rights regarding the payment of wages, Total Health's wage policies, and its non-retaliation policies. In a statement to the media regarding the settlement, Total Health noted that while it did not violate wage and hour laws, settlement was more cost-effective than continuing to defend itself in the litigation.

One of the attorneys involved in this lawsuit, Janet Herold of the Service Employees International Union (SEIU), noted that her union is considering filing similar lawsuits in other states to stop alleged patterns of wage and hour violations in this industry.

## Protecting Your Company

Home health providers are well-advised to heed this large settlement and the SEIU's stated intention to file more such lawsuits. Here are some of our suggestions for avoiding this kind of trouble.

- Although many home health companies don't track time or pay employees for travel between jobs, as established an industry practice as this is, it won't necessarily deter plaintiffs' lawyers. It didn't in Total Health's case.
- If you have nonexempt employees who travel from job to job during the workday review how those individuals are compensated, if at all, for travel. While ordinary home-to-work travel and return travel from work to home at the end of the day is usually non-compensable, travel between jobs that cuts across the work day is ordinarily compensable.
- If travel time between jobs is compensable, determine how to accurately capture that time. There are a number of ways to do this. For example, some employers have begun installing GPS units in employees' work vehicles to track time between jobs.
- If you are concerned about what paying employees for travel time will do to your payroll, keep in mind that it is possible to pay employees at two different rates of pay – one rate for travel, and one rate for time spent on the job. But neither rate of pay can be less than the minimum wage (federal or state, whichever is higher). Additionally, if two different rates are used in the same workweek, be sure to accurately calculate overtime, assuming the employee is not overtime-exempt.

If you are contemplating making a change in the way you compensate employees for travel time – or for any other reason – we recommend you contact your Fisher & Phillips attorney for assistance in clarifying what travel time is compensable, the best way to go about accurately capturing that time, and to planning a strategy for introducing these changes to affected employees.

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