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WHEN INTERPRETIVE SERVICES ARE ADEQUATE UNDER THE ADA

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Title III of the Americans with Disabilities Act ("ADA") prohibits discrimination against those with disabilities in places of public accommodations, including hospitals, ambulatory surgery centers, physician offices, and many other healthcare entities. 42 U.S.C. §§ 12181 – 1289. Under the ADA, places of public accommodation must provide individuals with disabilities with access to auxiliary aids and services, such as a "qualified interpreter," when necessary to ensure effective communication between the service providers at the public accommodation and a person with a disability.

The Department of Justice ("DOJ") has provided guidance, which notes that writing may be an effective form of communication for some situations and outlining other situations where an interpreter may be necessary for effective communication, such as:

- discussing a patient's symptoms and medical condition, medications, and medical history;
- explaining and describing medical conditions, tests, treatment options, medications, surgery and other procedures;
- providing a diagnosis, prognosis, and recommendation for treatment;
- obtaining informed consent for treatment;
- communicating with a patient during treatment, testing procedures, and during physician's rounds;
- providing instructions for medications, post-treatment activities, and follow-up treatments;
- providing mental health services, including group or individual therapy, or counseling for patients and family members;
- providing information about blood or organ donations;
- explaining living wills and powers of attorney;
- discussing complex billing or insurance matters; and
- making educational presentations, such as birthing and new parent classes, nutrition and weight management counseling, and CPR and first aid training.

When necessary to facilitate effective communication under these guidelines, the place of public accommodation must provide an interpreter or interpretation service at its expense. An interpreter provided to a patient (or a family member) should be "a qualified interpreter." A "qualified interpreter" "means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary." 28 C.F.R.

Part 36, Appx. C. The interpreter should be able to facilitate *effective communication* between a hospital and a person with a disability whether such services are provided via on-site appearance or via video remote interpreting ("VRI"). 28 C.F.R. §§ 36.104, 36.303. A district court within the Eastern District of Wisconsin has found that "if a place of public accommodation provides a VRI that consistently results in 'lags, choppy, blurry, or grainy images, or irregular pauses in communication,' 28 C.F.R. § 36.303(f)(2), at some point it is no longer an isolated technical glitch but instead amounts to discrimination if it results in ineffective communication." *Juech v. Children's Hosp. & Health Sys.*, 353 F. Supp. 3d 772 (E.D. Wis. 2018).

The Eleventh Circuit has repeatedly stated that an effective-communication claim does not require a patient to show actual deficient treatment or recount exactly what they did not understand. "Rather, the relevant inquiry is whether the hospitals' failure to offer an appropriate auxiliary aid impaired the patient's ability to exchange medically relevant information with hospital staff." *Silva v. Baptist Health S. Fla., Inc.*, 856 F.3d 824 (11th Cir. 2017). Thus, in a subsequent 2018 case, *Crane v. Lifemark Hosps., Inc.*, 898 F.3d 1130 (11th Cir. 2018), the Eleventh Circuit reversed the district court's grant of summary judgment to a hospital, noting that there were genuine issues of material fact as to whether the patient was able to effectively communicate medically relevant information. While the district court found that the patient's medical notes sufficiently showed that the hospital provided an evaluation, the Eleventh Circuit again emphasized that the relevant question is whether the *patient* had an "equal opportunity to communicate medically relevant information to hospital staff."

MCKAGUE V. HSCGP, LLC

Recently, in *McKague v. HSCGP, LLC*, No. 4:22cv00018, 2022 U.S. Dist. LEXIS 135165 (W.D. Va. July 29, 2022), the United States District Court for the Western District of Virginia evaluated whether to grant a preliminary injunction to a deaf individual who alleged that while at the hospital to receive medical care for herself and her husband, "she was denied—or provided with ineffective—accommodations for her deafness, which prohibited her from participating fully in her and her husband's medical-care decisions."

Specifically, the plaintiff, Ms. McKague, alleged that on at least twenty-five (25) occasions, the hospital did not provide her with interpretive services during her visit or provided her with VRI that "did not work, had poor video quality, frequently froze and disconnected, and was not an effective means of communication." Ms. McKague sought a preliminary injunction requiring the hospital "to immediately provide [her] with either on-site certified American Sign Language ('ASL') interpreters or ASL interpreters through Video Remote Interpreting ('VRI') services and technology when [she] seeks healthcare treatment at [the Hospital] and when [she] is a companion to her husband seeking healthcare treatment at [the Hospital]."

To seek an injunction under the ADA, a plaintiff must show that they are likely to suffer future discrimination from the defendant. Here, the Court held that Ms. McKague had standing to bring her claim for a preliminary injunction based on her and her husband's long history of receiving medical care at the hospital, the hospital's access to and knowledge of Ms. McKague's husband's medical records and issues, the geographic proximity to Ms. McKague's residence, and the lack of other providers in the area.

However, the Court found that Ms. McKague failed to show that she faced a likelihood of irreparable harm in the absence of injunctive relief. The Court outlined two reasons for denying Ms. McKague's request for injunctive relief: (1) the hospital had uncontested affidavits that Ms. McKague declined functioning VRI technology at each of her last two visits; and (2) Ms. McKague admitted to using an app on her phone that gave her immediate, real-time access to a live interpreter during past visits when the VRI was not working or she feared the VRI would not work. The use of the app cost $1.00 per minute and the hospital offered to reimburse Ms. McKague for such expenses.

The Court concluded that based on the evidence, "it is clear that, if [Ms.] McKague returns to the Hospital and appropriate interpretative accommodations are either not available or not provided, she can use the app on her phone and be reimbursed for any expenses incurred for its use. Accordingly, she has not shown a likelihood of irreparable harm in the absence of injunctive relief."

Lastly, the Court declined to grant the hospital's motion to strike Ms. McKague's claim for emotional distress damages under Rule 12(f), noting that Rule 12(f) was "an improper vehicle for the claim sought."

CONCLUSION

Hospitals and similar places of public accommodation should be diligent in continuing to provide interpretive services to patients and their families in accordance with the ADA. While the Court declined to grant injunctive relief in *McKague v. HSCGP, LLC*, No. 4:22cv00018, 2022 U.S. Dist. LEXIS 135165 (W.D. Va. July 29, 2022), this case establishes that patients may have standing to bring such claims depending on the facts of the case. *Compare* *Juech v. Children's Hosp. & Health Sys.*, 353 F. Supp. 3d 772 (E.D. Wis. 2018) (holding that a mother who was deaf did not have standing to seek injunctive relief as the hospital was not the nearest to her home and she had taken her children to other hospitals, noting that there was an insufficient "real and imminent threat" to bestow standing). Additionally, while the Court in this case declined to grant injunctive relief, it did not rule on Ms. McKague's damages claims.

If you have any questions or need further guidance regarding providing interpretive services under the ADA, please contact a member of Hancock Daniel's Labor & Employment or Compliance teams.

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