

BIAS-BASED COMMENTS HAVE CONSEQUENCES

A recent denial of summary judgment by a U.S. District Court in New York reminds us that bias-based comments can have serious consequences for hospitals and other employers, including that their employment decisions may be undermined. The ruling also suggests that, in certain situations, requiring a waiver of claims may be considered retaliatory.

FACTS AND ALLEGATIONS

In a recent case, an Orthodox Jewish resident was dismissed from a neurosurgical residency program after receiving repeated complaints from attending physicians that his poor surgical skills had endangered patients. During the disciplinary process, the resident, Sandler, asserted for the first time that the program director had made “anti-Jewish comments.” One alleged comment was made recently, while other comments were more distant in time, including many claimed anti-Semitic comments made in years long past at another hospital during the program director’s residency. A number of comments demonstrated a belief that Jewish doctors’ successes were attributable to “conspiratorial clannishness” rather than individual merit.

The residency program made what it viewed as a “compassionate or generous” offer for Sandler to participate in a rehabilitation program but required waiver of discrimination claims as a precondition. When Sandler declined, he was terminated from the program and then filed a lawsuit alleging discrimination and retaliation in violation of various state and federal laws.

COURT DENIED THE DEFENDANTS’ SUMMARY JUDGMENT MOTION

The health system filed a motion for summary judgment seeking dismissal of all claims, asserting that a few stray comments spread out over years are insufficient to support discrimination and hostile environment claims and that there were legitimate quality of care reasons for the disciplinary actions taken.

The court recognized that the “more remote and oblique the remarks are in relation to the employer’s adverse action, the less they prove that the action was motivated by discrimination.” It observed, however, although none of the comments were made during the decision-making process, that the program director was a decision-maker, and at least one of the comments was made during the most recent program year. The court concluded that Sandler’s evidence of comments, though disputed, was sufficient to create a genuine issue of fact about whether the program director harbored anti-Semitic animus before and throughout Sandler’s residency. The discrimination claim will be tried and submitted to a jury.

The court dismissed Sandler’s hostile work environment claims under federal law, concluding that the comments were dispersed over the course of several years and did not rise to the level of severity or pervasiveness required.

The court concluded that Sandler’s termination from the program was not retaliatory because it was already in process before he made any allegations of discrimination. However, the court found that requiring Sandler to waive discrimination claims in order to participate in the rehabilitation program may have been retaliatory since it may not have been required if Sandler had not asserted discrimination allegations. The court refused to dismiss that portion of the retaliation claim.

PRACTICAL TAKEAWAYS

As indicated in a [prior Hall Render article](#), it is important for hospitals to remember that most medical residents are employees and are entitled to the protections of federal and state labor laws and education laws, including Title VII and Title IX.

Every employer should adopt strong equal employment and anti-harassment policies that require any perceived or actual discrimination, including inappropriate comments (past or present) that impact the workplace in any way, to be reported immediately. Failure to report should be grounds for serious discipline. This case demonstrates the importance of learning about and stopping such comments as soon as possible.

Be cautious about requiring an employee to waive claims in order to obtain an employment benefit, especially where a discrimination complaint is pending and the waiver is not a clearly universal requirement in a previously adopted policy.

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