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# WHEN IS A PHYSICIAN A HOSPITAL'S EMPLOYEE? – ASK THE JURY

Normally a physician who is not actually "employed" by a hospital is not an employee who would be protected by anti-discrimination laws. But it's not always that simple. In fact, it can be quite complicated and risky for a hospital if the relationship is not clearly established. If the relationship is not clear then a jury may ultimately be deciding whether or not a physician is entitled to proceed with sexual harassment and retaliation claims as an "employee".

These risks were recently highlighted in a case involving a female gastroenterologist and a hospital in Buffalo, New York. In this case the physician was not actually employed by the hospital in the traditional sense. She did, however, have privileges at the hospital and at three others in the area. She claimed to be the victim of sexual harassment and when she complained she lost her privileges at the hospital. She then filed a lawsuit claiming, among many other things, sexual harassment and retaliation. The hospital defended by arguing that she was not an employee covered by Title VII's sexual harassment and anti-retaliation provisions.

## WHAT THE COURTS WILL CONSIDER

The court said not so fast. Based on a listing of thirteen factors identified by the U.S. Supreme Court back in 1989, known as the "Reid Factors" the New York Court said that factual disputes in this case about some of those factors had to be resolved by a jury.

Here are the factors that the courts will look at in determining if a physician is an employee of a hospital:

1. The hospital's right to control the manner and means by which the services are accomplished;
2. The skill required;
3. The source of the instrumentalities and tools;
4. The location of the work;
5. The duration of the relationship;
6. Whether the hospital has the right to assign additional duties to the physician;
7. The extent of the physician's discretion over when and how long to work;
8. The method of payment;
9. The physician's role in hiring and paying assistants;
10. Whether the work is part of the regular business of the hospital;
11. Whether the hospital is in business;
12. The provision of employee benefits; and
13. The tax treatment of the physician.

## THE JURY WILL DECIDE

Even though the court found that several of these factors strongly indicated that the physician was an independent contractor – and not an employee - it did find that there was a dispute over the *amount of control* the hospital exercised over the physician's practice. In particular, the hospital's unique peer review system was found to be distinguishable from other hospital cases where merely being subject to a hospital's peer review program was not sufficient control to create an employee relationship.

### *PEER REVIEW*

In this case, this hospital's peer review program dictated "detailed treatment requirements" for the physician's practice. It not only reviewed the quality of her patient treatment but also mandated performance of certain procedures and the timing of others. Indeed, based on her

performance, the physician was required to undergo re-education, participate in a mentoring program and be re-trained to perform certain services in a particular manner.

For example, the re-education involved controlling specific details of the physician's work at the hospital including: identifying indications and treatments for EGD's; appropriate treatments for A/V malformations and the removal of polyps; use of pH monitoring with esophageal manometry; the length of colonoscopy procedures; and the level of sedation administered during colonoscopy.

***HOSPITAL DIRECTIVES AND REQUIREMENTS***

Besides the peer review oversight and control the hospital also directed which medications she should prescribe and recommended changes to her practice based on the financial impact on the hospital. Additionally, the hospital required her to treat patients admitted by the hospital who were referred to her and required her to use its facilities and staff in that treatment. She was not allowed to refuse to treat any of the patients who were referred to her by the hospital.

Based on these factual disputes the court denied summary judgment to the hospital and ordered the case to proceed to trial where the jury would decide how much control the hospital actually exercised over the physician's practice. If the jury finds sufficient control by the hospital then the physician would likely be deemed an “employee" for purposes of her sexual harassment and retaliation claims and would be entitled to a significant recovery if she can prove that the harassment and retaliation occurred.

***AMOUNT OF CONTROL - WEIGH THE RISKS***

Although this case arose in the state of New York, it is instructive to note that non-employed physicians can, in some circumstances, be seen as protected employees for purposes of antidiscrimination statutes. Hospital administration will need to carefully look at the amount of control expressed in their peer review documents and physician agreements with an eye to the striking the right balance and amount of control necessary to meet its obligations to its patients.

For further information or if you have questions contact Steve Lyman at 317-977-1422 or slyman@hallrender.com or your regular Hall Render attorney.

Reference: *Salamon v. Our Lady of Victory Hospital*, (W.D. N.Y. April 3, 2012).