

PUBLICATION

Second Circuit Holds Physician with Staff Privileges May Sue Hospital Under Title VII

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The U. S. Second Circuit Court of Appeals recently held that a physician with staff privileges could be considered an "employee" of a hospital under federal employment discrimination laws even though the physician set her own hours, determined if and when to admit patients to the hospital, and did not receive any salary from the hospital. Although the Court acknowledged that at least three other federal circuit courts have declined to find that hospitals exercise sufficient control over a physician's medical practice to consider them "employees," the Court noted that the inquiry in each case is fact specific and that "staff privileges standing alone, do not decide employment status."

In the case of *Salamon v. Our Lady of Victory Hospital*, decided on January 29, 2008, a female gastroenterologist with staff privileges at the defendant hospital filed suit under Title VII of the Civil Rights Act of 1964 (Title VII) claiming she was subjected to unwanted sexual advances by the chief of her division. She further alleged that administrative scrutiny of her practice increased after she complained of the harassment. In determining whether the physician was a hospital employee or an independent contractor (Title VII applies only to employees), the Court applied a fact-specific analysis of 13 factors but placed special emphasis on one of the factors, i.e., the extent to which the hiring party controls the "manner and means" by which the physician completes her assigned tasks.

The Court began by acknowledging that, in certain ways, the physician was not under the hospital's control:

Salamon was generally free to set her own hours and maintain her own patient load, subject to the availability of the endoscopy equipment, which the hospital controlled, and to an on-call requirement discussed below. She determined which patients to see and treat, and whether or not to admit them to OLV (or another hospital). Salamon was allowed to maintain staff privileges at other hospitals, and she did so, although the 'vast majority' of her practice was at OLV. OLV did not pay her a salary, wages, benefits or any other monetary compensation. She billed patients (or their insurers) directly for her services, while OLV billed them separately for the corresponding use of its facilities.

(Internal citations omitted).

However, on balance, the Court determined that the hospital, through its quality assurance and peer review program, exercised substantial control not only over the treatment outcomes of the physician's practice but over the details and methods of her work. As alleged by the physician, the hospital's quality assurance program mandated performance of certain procedures and the timing of others, and impacted her choices about which medications to prescribe, not in the interest of medical judgment, but allegedly to maximize hospital profits. The Court also noted that following her complaint of harassment, the hospital implemented a re-education program (as a result of peer review activities), which the Court found was "designed to change the methods by which the physician arrived at her diagnoses and treatment." On this record, the Court found that the hospital's detailed treatment requirements raised a genuine issue of material fact about the plaintiff's employment status. In so holding, the Court reversed the lower court's summary dismissal in favor of the hospital, and remanded the case to the trial court for further proceedings. We note that the defendant hospital has filed an application for rehearing with the Second Circuit.

While this decision, if affirmed, is only controlling authority within the states of New York, Connecticut and Vermont – the jurisdictional territory for the Second Circuit Court of Appeals – all hospitals would be well served to review their relationships with their staff physicians in light of this decision, paying particular attention to the extent to which the hospital exercises control over the physician's diagnoses and treatment outcomes by virtue of its quality assurance and peer review processes.