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Peer Review Confidentiality Requirement Protects Physician Reviewers from Adverse Employment Action, New Mexico Supreme Court Rules

By Joseph J. Lazzarotti on February 27, 2015

When a physician participated in the peer review of another physician and his conduct during the review became the basis for adverse employment action against him, the New Mexico Supreme Court, in Yedidag v. Roswell Clinic Corp., ruled that the reviewing physician had a private cause of action against his employer, and affirmed the jury's verdict for compensatory and punitive damages.

In this case, a hospital administrator who was present during a peer review meeting, but not as a member of the committee, later reported to the hospital's physician practice manager her "visual memories of [the Plaintiff's] behavior, body language, tone of voice and the way things were being said" when the plaintiff, a reviewing physician, verbally attacked his colleague. Other peer review committee members did not agree with the administrator's characterization of the plaintiff's actions during the peer review meeting. According to the Court's decision, the information conveyed by the administrator about the plaintiff's actions during the peer review meeting directly contributed to his termination.

The primary legal basis for the Court's decision was the confidentiality mandates in the Review Organization Immunity Act (ROIA), the law regulating peer reviews in New Mexico, including the provisions at Section 41-9-5(A) which state that "[n]o person… shall disclose what transpired at a meeting of a review organization" except for the purposes listed in the statute. According to the Court, this provision creates an implied promise that the plaintiff would not suffer adverse employment action from participating in the peer review process, and that this promise is incorporated into physician-reviewer employment contracts.

Of course, as noted by the Court, confidentiality in the peer review process is critical. Absent confidentiality, it would be difficult to promote peer review integrity and have candor and objectivity during meetings. Physicians and other medical staff would be reluctant to adhere to those principles for a variety of reasons including fears about loss of referrals, retaliation, damage to personal relationships, lawsuits, and malpractice actions based on records used during the proceedings. On the other hand, decisions like this may leave employers feeling that medical staff participating in the peer review process are immune from actions that transpire during that process. The New Mexico Supreme sought to dispel that notion.

> *Our holding limits the use of peer review information for a statutory purpose, see § 41-9-5(A), and only those individuals responsible for furthering the statutory purposes of ROIA can be privy to such information. See § 41-9-5 (noting that no person can utilize peer review information except to carry out the statutorily enumerated purposes of a review organization). Eastern contends that our holding will completely immunize physician-reviewer conduct in peer reviews, "no matter how egregious." This argument ignores the dual regulatory structure within hospitals. As will be explained, because only medical staff, not hospital administrators, are responsible for peer reviews, medical staff may utilize information concerning peer reviewer conduct to discipline reviewers.*

The Court explained that its holding does not conflict with an employer's contractual provisions enabling termination of employment for cause, it "merely prevents [employers] from using confidential peer review information in making [their] personnel decisions." Healthcare employers, like the defendant in this case, often regulate employee-physicians both through medical staff bylaws and employment contracts. As the Court noted, those bylaws can provide that disruptive conduct may lead to a loss of privileges. An employment contract provision conditioning continued employment on maintaining privileges would, in turn, support the termination of the physician's employment. So, the Court concludes, physicians that are disruptive during peer review are not free from discipline, they just cannot be disciplined by hospital administrators who should not be "privy to what transpires during peer review meetings." Discipline in that case is up to the medical staff.

Hospitals in other states should consider their own processes and the state laws that apply, as many states have laws similar to the ROIA. This includes reviewing medical staff bylaws, employment contracts and long standing practices to ensure they are coordinated, provide appropriate mechanisms to impose discipline and maintain the confidentiality of the peer review process.

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