

Is hospital liable when the doctor 'misbehaves'?



Curbside Consult

ALEXANDER DEL RUSSO

A: A doctor with staff privileges at my hospital was accused of sexual harassment in the workplace. Are we liable?

Q: A hospital may or may not be held liable to an employee for the misconduct. The answer in large part will depend on whether the doctor is considered an "employee" of the hospital, the "supervisor" of the employee, or neither.

Doctors with staff privileges are not "employees" of hospitals. Staff privileges are nothing more than recognition by a hospital that a doctor is competent and qualified to practice at that facility. Staff privileges do not establish an employment contract with the hospital, or guarantee a particular economic value to the doctor. Rather, the use a doctor makes of staff privileges depends upon how the doctor chooses to operate his or her private practice.

Nor should staff privileges make a doctor the "supervisor" of hospital employees for purposes of analyzing employer liability under the employment laws. The U.S. Supreme Court has recognized that, reduced to its essence, the power to supervise is the power to hire and fire, and to set work schedules and pay rates. The question

becomes: Is the authority granted to a doctor of "substantial magnitude" to render the doctor a supervisor?

On that question, the Equal Employment Opportunity Commission considers someone an employee's "supervisor" if the individual has authority to (1) undertake or recommend tangible employment decisions affecting the employee, or (2) direct the employee's daily work activities. As for the first part, the recommending of employment decisions creates supervisory status only if the recommendation is given substantial weight by the decision-maker/supervisor. As for the second part, someone who directs only a portion of the daily work activities of an employee or a limited number of tasks or assignments does not qualify as that person's supervisor.

Against this backdrop, doctors with staff privileges are generally not supervisors. They do not make tangible employment decisions. They do not hire, evaluate, discipline, promote, schedule or transfer employees. Although they might recommend employment decisions affecting a hospital employee, these are not typically given substantial weight by hospital administration. Nor do doctors with staff privileges direct the daily work activities of hospital employees. To be sure, hospital employees would be expected to comply with reasonable requests by a physician relating to the care of a patient. But directions on patient care do not reflect a sufficient magnitude of control over hospital employees, especially since doctors are otherwise not involved

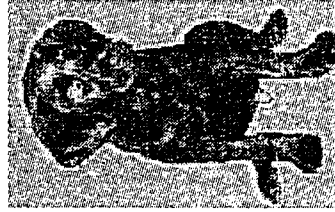
in employee assignments.

Recognizing that doctors, generally, are not the "supervisors" of hospital employees, however, does not mean hospitals can escape liability for doctors' workplace misbehavior. Instead, this means the employee must show the employer "knew or should have known" of the misconduct, and then failed to take prompt corrective action. These requirements may insulate a health-care facility from liability (1) if it is unaware of any physician misconduct, or (2) if it becomes aware of such conduct — it takes prompt action.

To avoid liability, hospitals should work with their medical staff to expressly recognize that physicians do not have authority to make personnel decisions or direct the daily activities of

employees beyond instructions on patient care. In the unlucky event an employee sues a hospital based on the workplace misconduct of a doctor with staff privileges, the hospital should assert not only a defense that the doctor is not a hospital employee, but also that the doctor was not the employee's supervisor. These defenses may allow the hospital to exit the lawsuit based on a motion and avoid a lengthy trial that could result in substantial liability. ♦

CURBSIDE CONSULT features a unique industry expert each issue. Alexander del Russo is a shareholder and board-certified trial lawyer based in the West Palm Beach office of Carlton Fields, 561-650-0332; adelrusso@carltonfields.com. Co-author James Wiley is a shareholder and board-certified in labor and employment law in the Tampa office, 813-229-4325; jwiley@carltonfields.com.



Healthcare Compliance Resources Education and Services Voted #1 By An Independent Lab

It is Not Too Late to Register

May 15-19, 2006...Newark, NJ

Sept. 18-22, 2006...Savannah, GA

4 days of instruction will prepare you for both