



Health Care Law Update

March 2015

Hospitals Cannot Fire Physicians Based on Peer Review Conduct

In a recent case of first impression from the New Mexico Supreme Court, a physician who was fired for his actions as a reviewer during a peer review proceeding was permitted to sue the terminating hospital under New Mexico's peer review confidentiality statute. *Yedidag v. Roswell Clinic Corp.*, N.M., No. 34,286 (February 19, 2015). This appears to be the first ruling allowing a peer reviewer to bring a claim for a hospital's actions in response to his conduct during a peer review hearing. It is expected that courts in other jurisdictions will follow suit because peer review statutes are fairly uniform across the United States.

The physician, Dr. Yedidag, who was employed by Roswell Clinic Corp. and Roswell Hospital Corp. (collectively, "hospital"), participated in a peer review proceeding against another physician. A hospital administrator who was present at the hearing reported that Dr. Yedidag "attacked" the physician being reviewed because he did not believe the physician was forthcoming concerning his role in a patient's death (although, according to other physicians at the hearing, Dr. Yedidag's questions were well directed, and the proceeding was neither uniquely contentious nor unprofessional). The hospital subsequently fired Dr. Yedidag for unprofessional conduct, leading to his complaint against the hospital for utilizing confidential peer review information to justify his termination. A jury determined that the hospital violated the confidentiality provisions of the New Mexico Review Organization Immunity Act (ROIA) and awarded Dr. Yedidag compensatory and punitive damages. The New Mexico Appeals Court affirmed the judgment, and the hospital appealed.

The New Mexico Supreme Court affirmed the Court of Appeals, holding that:

- The ROIA creates a private cause of action for breaches of peer review confidentiality when such disclosures do not further any of the listed purposes of the ROIA, such as evaluating and improving the quality of services rendered by health care providers, reducing morbidity or mortality, and credentialing.
- The ROIA includes an implied promise that physician-reviewers will not suffer adverse employment consequences due to their participation in peer reviews.
- The evidence was sufficient to support a jury determination of punitive damages.

The Supreme Court recognized that its holding limits how confidential peer review information may be used, including disclosing what "transpired" during peer review meetings. It found that only those responsible for furthering the ROIA's statutory purposes can be privy to the review information. Because only the medical staff is responsible for conducting and participating in peer reviews, only they may use information concerning peer reviewer conduct. The hospital administrators in charge of employment matters have only clerical connections with medical staffing decisions, and they are not responsible for regulating peer reviewer conduct. Thus, the hospital's administration may not use the information and should not have access to it. Accordingly, the court found that the hospital's use of confidential peer review information concerning Dr. Yedidag's conduct during the peer review for administrative purposes (i.e., employee discipline) was not statutorily permissible and Dr. Yedidag's right to confidentiality was violated as a consequence.

The court supported its conclusions by noting that the other physician-reviewers were shocked by the hospital's actions and recognized concerns regarding the potential for employer retaliation to undermine the peer review candor. It also found that allowing hospitals to use peer review information in this way would be inconsistent with ROIA policies and could have a chilling effect on the peer review process, thereby limiting its effectiveness.

The court also clarified that the medical staff may bring a separate peer review action against a reviewing physician based on his or her conduct, because the medical staff has the authority to enforce its rules regarding physician conduct (which could include termination of the physician's privileges). However, the hospital may not act on any information learned as a result of the peer review proceeding, because it is not responsible for regulating peer reviewer conduct.

Ohio's peer review confidentiality standard is fairly broad, providing that proceedings and records within the scope of the peer review committee of a health care entity must be held in confidence (O.R.C. 2305.252), so it is not unlikely that an Ohio court would reach a similar conclusion given similar facts. In light of this decision, hospitals should not contemplate adverse action against employed physicians based on conduct during peer review proceedings, but they should ensure that their physician employment agreements and codes of conduct require civil conduct at all times (including during peer review proceedings) to retain the most flexibility to take action against a disruptive physician.

FOR MORE INFORMATION

For more information, please contact:

Cori R. Haper

937.443.6856

Cori.Haper@ThompsonHine.com

John L. Green

937.443.6864

John.Green@ThompsonHine.com

Robin D. Powell

614.469.3274

Robin.Powell@ThompsonHine.com

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