Private Physician Plaintiff Not “Employee” Of Hospital For Title VII Purposes

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A federal appeals court recently rejected a physician’s employment discrimination lawsuit against a hospital that revoked her privileges because it found her not to be an “employee” eligible to bring such a claim. The lessons you can learn from this decision might help your organization defend a similar claim in the future.

Complaints Lead To Review, Review Leads To Revocation

Dr. Yelena Levitin, a Jewish surgeon of Russian descent, owned and operated her own private physician practice and performed the majority of her surgeries at Northwest Community Hospital in Arlington Heights, Illinois. After some of the hospital’s doctors submitted complaints about her professional judgment – one going so far as to refuse to work with her – the chair of the hospital’s surgery department referred a series of Dr. Levitin’s previous surgeries to the hospital’s Medical Executive Committee for review.

The committee, which oversees physician credentialing, reviewed 31 of her prior cases and concluded that Dr. Levitin deviated from the standard of care in four of them. Because of this, the committee revoked Dr. Levitin’s hospital privileges.

In 2013, she filed suit against the hospital alleging Title VII discrimination based on sex, religion, and ethnicity. However, because the federal anti-bias statute only enables “employees” to bring suit, the crux of Dr. Levitin’s lawsuit was whether she was an “employee” of the hospital. Title VII defines “employee” as “an individual employed by an employer” and defines “employer” in a similarly unhelpful way. A lower federal court dismissed her claim,
and she appealed to the 7th Circuit Court of Appeals.

**Federal Appeals Court Concludes Control Not Present**

Without much help from the statute itself, the court turned to agency law, its “economic realities” test, and the following factors to help guide its decision:

1. the extent of the employer’s control and supervision over the worker, including directions on scheduling and performance of work; 2. the kind of occupation and nature of skill required, including whether skills are obtained in the workplace; 3. responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations; 4. method and form of payment and benefits; and 5. length of job commitment and/or expectations.

The first factor – the extent of the employer’s control and supervision – carries the most weight. The 7th Circuit succinctly disposed of Dr. Levitin’s argument that she was an employee by analyzing the extent of the hospital’s control over her. It noted that Dr. Levitin “owned her own medical practice, billed her patients directly, and filed taxes as a self-employed physician. Northwest did not provide Levitin with employment benefits or pay her professional licensing dues. Moreover, Levitin’s work agreement with Northwest confirms her independence. She could set her own hours, subject only to operating-room availability; she could obtain practice privileges at other hospitals and redirect her patients to those locations; and she could use her own staff in surgeries. Most importantly, she made the treatment decisions for her patients.”

Dr. Levitin argued, alternatively, that the peer-review inquiries that led to the revocation of her privileges created the level of control necessary to find she was an employee. The court dismissed Dr. Levitin’s novel argument, concluding that “the right to control an employee generally comes from contractual and other workplace terms that govern the parties’ relationship, not an isolated peer-review proceeding.”

**Lessons To Be Learned**

The May 8 decision should serve as a reminder to those hospital employers who regularly employ independent contractors. As the court stated, the level of control the employer exerts is the primary focus in determining whether someone is an “employee.” As in Northwest Community Hospital’s case, the contractor’s claims may turn on this level of control.

Documents like letters of engagement or contracts can set forth exactly the terms of the relationship between contractor and your organization, and would be vital to the defense of just such a claim. While this specific case is only controlling law in Illinois, Indiana, and Wisconsin federal courts, it is worth reviewing the decision with your employment counsel to determine how you can best position yourself to defend these kinds of claims.
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