

Special Aspects of Employment in the Health Care Industry: Recent Cases

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The National Labor Relations Act (NLRA)

Physician Union Activities

- The Numbers:

A 1997 AMA report estimated that between 14,000 and 20,000 of the nation's 737,800 physicians belong to unions, with nearly half of those being residents.

The growth in physician unionization reflects the recent increase in the number of doctors who work as salaried employees. In 1985, 25% of doctors were salaried employees, as compared to 45% in 1995.

Unionizing physicians cite as their top concerns maintenance of professional authority/doctor autonomy, job security, compensation and benefits, and malpractice insurance.

- Union Activity

In southern New Jersey, doctors are appealing a NLRB decision that denied their attempt to appoint United Food and Commercial Workers Local 56 to represent them in collective bargaining with Amerihealth Insurance Co. of New Jersey.

In northern New Jersey, doctors are attempting to join Local District 15 of the International Association of Machinists and Aerospace workers and are negotiating with attorneys in a number of health care organizations.

In New York, the USPD is supporting an active drive at Lincoln Hospital center where 190 physicians want to join a union.

In Florida, physician members of the Florida Medical Association opted against joining a union -- at least for the present -- and decided instead to create a managed care advocacy center to help doctors and patients resolve issues with managed-care organizations.

Physicians in Washington state voted on June 2, 1998, to join a union to help them negotiate with their employer, Medalia Healthcare, on patient care and other contract issues.

- What is the supervisory status of physicians?

National Union of Hospital and Health Care Employees v. County of Cook, 692 N.E.2d 1157 (Ill. App. Ct. 1998).

The Illinois Court of Appeals upheld a ruling by the state Local Labor Relations Board which concluded that doctors were "supervising employees" within the meaning of the state statute.

The court pointed to the fact that doctors direct the activities of their subordinates, evaluate residents, assign and schedule work to residents, and play an important role in the recruiting and hiring of residents.

Nurse Union Activities

- The Numbers

28% of all NLRB petitions filed for representation elections in 1997 were from nurses seeking to organize as collective bargaining units, more than from any other labor sector.

The NLRB received 163 hospital employee petitions for union elections in 1997, up from 151 petitions the year before.

In the first three months of 1998, there have been 67 hospital employee union election petitions filed with the NLRB.

- Eastern Maine Medical Center v. Maine State Nurses Association, Civ. No. 97-142-B (D. Me. Mar. 12, 1998).

In 1996, the medical center announced that it would no longer employ Certified Registered Nurse Anesthetists (CRNAs), who were included in collective bargaining agreement between the hospital and registered nurses executed two years earlier.

The nurses' union filed a grievance on behalf of the CRNAs, alleging that the hospital violated provisions of the collective bargaining agreement related to subcontracting and outsourcing when it terminated the CRNAs and outsourced the work.

After the arbitrator ruled in favor of the union, the district court affirmed the arbitration award and held that the hospital violated the collective bargaining agreement by firing the CRNAs. The court denied the union's request for attorneys' fees, however.

- What is the supervisory status of nurses under the NLRA?

Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548 (9th Cir. 1997)

The supervisory status of charge nurses at the Providence Medical Center in Anchorage, Alaska, had been at issue since 1994, when the union petitioned for an election among nearly 700 nurses at Providence's six hospital centers.

The employer contended that charge nurses at four of the six hospital centers were supervisors because they used independent judgment in assigning and "responsibly directing" employees.

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The Ninth Circuit rejected this contention and held that the nurses in question were not supervisors under the NLRA and were thus properly included in the hospital's bargaining unit.

In expressing deference to the NLRB's interpretation and application of the NLRA, the Ninth Circuit adopted a very different approach to determining "supervisory status" questions than that adopted by the Sixth Circuit (see below).

Beverly Enterprises, West Virginia, Inc. v. NLRB, 136 F.3d 353 (4th Cir. 1998).

The court accepted the NLRB's position and upheld the Board's conclusion that certain charge nurses were not supervisors.

The court was not persuaded by the fact that the nurses were often the highest ranking personnel on duty and pointed to the "cabined" range of choices actually available to nurses in the organization's multi-level "pecking order."

See also, Beverly Enterprises, Virginia, Inc. v. NLRB, 136 F.3d 361 (4th Cir. 1998); and, Beverly Enterprises, Pennsylvania, Inc. v. NLRB, 129 F.3d 1269 (D.C. Cir. 1997) (holding in both cases that limited assignment, direction, and discipline authority does not transform nurses into supervisors).

Grancare, Inc. v. NLRB, 1998 WL 68888 (6th Cir. 1998).

The NLRB regional director granted the union's petition seeking to represent charge nurses at Caremore, a health care facility that offers long-term care. The full Board denied review of that decision.

When Grancare refused to recognize and bargain with the union, the union filed an unfair labor practice charge. The NLRB found that Grancare had unlawfully refused to bargain.

The Sixth Circuit overturned the Board's decision, however, holding that charge nurses were supervisors under the NLRA and thus were not lawfully certified as a collective bargaining unit.

Edgewood Nursing Center, Inc. v. NLRB, 1998 WL 96595 (6th Cir. 1998).

The Sixth Circuit again reversed the Board's order and held that certain charge nurses were supervisors.

Stating that the Board's position "is clearly at odds with this Court's precedent," the court concluded that the Board had impermissibly shifted the burden of proof to the employer regarding the supervisory status of nurses.

See also, Caremore, Inc. v. NLRB, 129 F.3d 365 (6th Cir. 1997) (holding that certain nurses are not supervisors under the NLRA).

Recent Cases

- Beverly Enterprises Inc. v. NLRB, Nos. 96-4171, 96-4211 (2d Cir. Mar. 9, 1998).

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Prior to a union representation vote by the employees of Greenwood Health Center, which is operated by Beverly Enterprises Inc., management unveiled information about existing employee benefits that it had previously concealed.

The NLRB invalidated the election (which the union lost), claiming the stepped-up flow of information from management to employees about the benefits immediately prior to a union election violated NLRA.

The Second Circuit reversed the Board's order, holding that the health center's disclosure of existing benefits on the eve of a representation vote constituted legitimate employer speech.

- Boston Medical Center Corp., 1-RC-20574 (N.L.R.B. Region 1 1997) (initial admin. review).

The NLRB regional director for Region 1 rejected a petition from interns and residents at the Boston Medical Center seeking union representation for 430 interns, residents, and fellows at the hospital. The ruling held that interns and residents are not employees entitled to collective bargaining rights under the NLRA.

The decision relied on the 1976 NLRB opinion in Cedars-Sinai Medical Center which held that house staff physicians in private hospitals are students, not employees, and therefore have no collective bargaining rights. The decision also relied on the 1977 NLRB opinion in St. Clare's Hospital which held that the nature of the relationship between medical residents and teaching hospitals was academic rather than economic.

The union has appealed to the full Board in Washington. In response to the NLRB's request, nearly a dozen parties have submitted amicus briefs in support of both sides to the bargaining dispute.

As of June 9, 1998, the case was still pending before the Board.

Employment Discrimination

Age Discrimination (ADEA)

- Kasper v. Saint Mary of Nazareth Hospital, 135 F.3d 1170 (7th Cir. 1998).

The plaintiff was 42 years old when he was fired from his position as assistant director of security at a Chicago hospital.

He brought suit under the ADEA and state law, alleging discriminatory and retaliatory discharge. The plaintiff argued that the hospital had fired him because of his age, and for making a worker's compensation claim for injuries sustained on the job.

After a trial in the district court, the jury found for the hospital on the ADEA claim but in favor of the plaintiff on the claim of retaliation. The jury awarded \$86,000 for lost past wages; \$400,000 for lost future wages; \$150,000 for emotional distress; and \$75,000 for punitive damages.

The hospital argued that the \$400,000 was irrational, because it was not based on the "present value" of the plaintiff's future earnings.

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The Seventh Circuit (Posner, J.) rejected the defendant's contention, pointing out that the hospital had presented no argument regarding present value to the jury and had put on no expert at trial. Moreover, the court held that the hospital could not raise the question of the irrationality of the jury award on appeal because the jury had awarded less future pay than the plaintiff had demanded (\$600,000) and more than the hospital said was proper (\$0). Because the intermediate figure was within the range of damages sought, it was not irrational according to the court.

- Garrett v. Kenmore Mercy Hospital, 1998 U.S. Dist. LEXIS 2132 (W.D.N.Y. 1998).

Plaintiff was a 51-year-old hospital employee who was fired for insubordination after she refused to coordinate staff during a hospital layoff process.

The plaintiff brought suit for discriminatory discharge under the ADEA, alleging that her supervisor ignored her and often bypassed her in assigning work to the plaintiff's subordinates because of her age.

The court held that the plaintiff had established a prima facie case of age discrimination under the U.S. Supreme Court's standard set out in McDonnell Douglas, and refused the defendant's motion for summary judgment. The court pointed to statements made by hospital personnel involved in the decision-making process which evinced a discriminatory animus.

The court held, however, that the plaintiff cannot rely on a statistical impact study that purported to show a correlation between employees' advanced ages and adverse job actions. The court found the study statistically flawed because of its small sample size.

Race Discrimination (Title VII)

- Frison v. Southeast Missouri Community Treatment Center, 133 F.3d 616 (8th Cir. 1998).

Plaintiff, an African-American substance abuse counselor at the defendant-treatment center, was subject to "stray racist remarks" and was initially assigned to work with only African-American patients.

After hospital supervisors discovered plaintiff had made long distance telephone calls while working, the defendant discharged the plaintiff. The plaintiff brought suit against the defendant under Title VII for discharging her because of her race.

The district court granted summary judgment for the defendant, holding that the plaintiff had failed to present any direct evidence of discrimination.

The Eighth Circuit affirmed in part and reversed in part, holding that indirect evidence of racial discrimination and disputed issues of fact are factors that should be considered in overturning summary judgment for an employer in a Title VII case.

In holding that the defendant likely proffered pretextual reasons for discharging the plaintiff, the court pointed to allegations that the manager allegedly remained silent or even smiled when the "stray racist remarks" were made by center staffers.

- Mullins v. Helena Hospital Association, 1998 U.S. App. LEXIS 1853 (8th Cir. 1998).

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Plaintiff, an African-American X-ray technician, complained to the human resources director of defendant-hospital about her employment conditions, including unequal pay and other treatment that she considered racially discriminatory.

Dissatisfied with the response she received from the hospital, she filed a written grievance to the hospital administrator to which she attached a page from the personnel records of three white employees. Each page included the employee's Social Security number and salary history.

When hospital administrators discovered that the plaintiff had taken the pages from files in a hospital manager's office without permission, they discharged her. The plaintiff subsequently filed suit against the hospital for discriminatory discharge under Title VII.

The Eighth Circuit upheld a lower court jury verdict in favor of the defendant, holding that the jury was not unreasonable in finding that the plaintiff's discharge was not racially motivated.

- Carter v. Three Springs Residential Treatment, 132 F.3d 635 (11th Cir. 1998).

Plaintiff, an African-American guidance counselor at a center for troubled youths, was passed over for promotion by administrators at the defendant-treatment center.

Plaintiff filed suit under Title VII against defendant for race-based employment discrimination. The district court granted summary judgment for the defendant, holding that the plaintiff failed to produce either direct or circumstantial evidence of racial discrimination.

The Eleventh Circuit reversed and remanded, holding that the failure of the treatment center to promulgate hiring and promotion practices, as well as its failure to follow published policies, precluded summary judgment for the employer.

Sex Discrimination (Title VII)

- O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997).

A college student intern who volunteered at a state psychiatric hospital in order to fulfill requirements for graduation was sexually harassed by a doctor. After her complaints were repeatedly ignored, she transferred to another hospital in order to complete her internship.

She brought an employment discrimination suit against the hospital and doctor under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

The Second Circuit upheld the district court's grant of summary judgment for the defendants, holding that the student was not an employee of the hospital under Title VII and thus not entitled to its protection.

The court also rejected the plaintiff's Title IX claim, holding that the state psychiatric hospital was not an educational institution or program under the meaning of the Amendments.

- Ligenza v. Genesis Health Ventures, 1998 U.S. Dist. LEXIS 2074 (D. Mass. 1998).

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Plaintiff was a respiratory therapist hired by defendant, a long-term nursing care facility.

When plaintiff and other staff members were sexually harassed repeatedly by a ventilator-dependent patient, the employer directed all employees responsible for his care to note the behavior on his chart and immediately indicate to him its inappropriateness. When behavior persisted, a more intensive regimen was implemented, including counseling and psychotherapy.

The plaintiff was discharged for slapping the patient after she noticed him looking up her blouse. The plaintiff subsequently brought suit against the center under Title VII for promoting a hostile work environment.

The court granted summary judgment for the nursing home, noting that the patient's inappropriate behavior was addressed by the defendant in a "professional fashion" and that there was no evidence offered that the defendant had knowledge of the alleged effect of the patient's behavior on the plaintiff.

The Americans With Disabilities Act (ADA)

Recent Cases

- Shafer v. Preston Memorial Hospital Corp., 107 F.3d 274 (4th Cir. 1997).

Plaintiff became addicted to Fentanyl, a narcotic analgesic. When she was caught diverting Fentanyl to her own use, the hospital placed her on a medical leave of absence and helped her report to drug rehabilitation.

After she completed rehabilitation, the hospital terminated her employment for gross misconduct. Plaintiff sued, claiming she was discriminated against on the basis of her addiction.

Defendant contended that plaintiff was not "otherwise qualified" because she was "currently engaged in the illegal use of drugs."

The Fourth Circuit agreed with the defendant and forcefully rejected the narrow definition of "currently" advanced by the plaintiff, writing, "ordinary or natural meaning of the phrase 'currently using drugs' does not require that a drug user have a heroin syringe in his arm or a marijuana bong to his mouth at the exact moment contemplated."

According to the court, an employee using drugs in a periodic fashion in the weeks and months prior to discharge is "currently engaging in the illegal use of drugs," and, therefore, not protected by the ADA.

- Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997).

Plaintiff, who was diagnosed with diabetes, was terminated from his job as an emergency medical technician for conduct unbecoming a paramedic and for a history of rudeness to patients.

Among the symptoms of his disease were frustration and irritability if tension caused his blood sugars to fluctuate. Gilday argued that he needed to be accommodated in a less stressful job.

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The Sixth Circuit held that Gilday had presented a question of fact as to whether his condition was a disability.

Compare Uhl v. Zalk Joseph Fabricators, Inc., 121 F.3d 1133 (7th Cir. 1997), in which the court dismissed plaintiff's claim that his demotion was a result of disability discrimination because of his diabetic condition and held that plaintiff had not made the requisite causal connection between his diabetic condition and his demotion.

- Mauro v. Borgess Medical Center, 137 F.3d 398 (6th Cir. 1998).

Plaintiff worked as a surgical technician at Borgess Medical Center from May 1990 until August 1992.

When the defendant-hospital learned that Mauro was HIV-positive, it created a special position for him as cart/instrument coordinator where there was no risk of transmitting HIV. The plaintiff refused the newly-created position, was laid-off, and subsequently filed suit.

The district court concluded that the plaintiff's presence in the operating room as a surgical technician posed a direct and significant threat to the health and safety of others and granted summary judgment in favor of the defendant.

The Sixth Circuit framed Mauro's appeal as an inquiry into whether there was any reason to overturn the lower court's finding that Mauro posed a direct threat to the safety and health of others, found there was no reason to overturn the decision, and affirmed the district court's decision.

- Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997); cert. granted, 118 S. Ct. 554 (1997).

During a routine dental examination, the defendant discovered that plaintiff, who is infected with HIV, had a cavity near her gumline. The defendant feared exposure to HIV and informed plaintiff that he would not fill her cavity in his office, but would do so in a hospital.

Plaintiff sued under the ADA, the district court granted summary judgment for the plaintiff, and the First Circuit affirmed. The First Circuit found that the plaintiff was disabled under the ADA because of the impact of HIV on reproduction.

The Supreme Court has granted certiorari as to the following questions: (1) is reproduction a major life activity within the meaning of the ADA?; and, (2) are asymptomatic individuals infected with HIV per se disabled within the meaning of the ADA?

- Wilking v. County of Ramsey, 983 F. Supp. 848 (D. Minn. 1997).

A clinical nurse specialist hired on a probationary basis was not offered regular employment by the hospital because of attendance and performance problems.

Plaintiff blamed her problems, which included difficulties handling stress, on "depression." She claimed that the depression was a disability under the ADA because it was a "substantial limitation on her major life activities."

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Plaintiff admitted, however, that her problems were a function of her refusing to take her medication, which resulted in her having difficulty sleeping, concentrating, and taking care of herself.

The court held that the EEOC guideline requiring that "determination of whether an individual is substantially limited in a major life activity ... be made on a case by case basis, without regard to mitigating measures such as medicines," was contrary to the ADA. The court held, therefore, that it could consider the beneficial effects of the plaintiff's medication in determining her disabled status.

The court concluded that the plaintiff had no disability because her condition, when properly treated, does not impair any major life activity.

- Cody v. Cigna Healthcare of St. Louis, Inc., 139 F.3d 595 (8th Cir. 1998).

A nurse assigned to quality of care reviews at physicians' offices requested a change in assigned areas, stating that the depression and anxiety she suffered caused her to be afraid to go into certain areas of the city.

Her employer offered her paid medical leave and required her to see a psychologist before returning to work.

She brought suit under the ADA, claiming she was disabled from depression or that the employer regarded her as disabled.

In affirming summary judgment for the defendant, the court held that a request for mental evaluation under these circumstances is "not inappropriate" and does not show the employer regarded her as substantially limited in her major life activities.

- Menkowitz v. Pottstown Memorial Medical Center, 1997 U.S. Dist. LEXIS 19116 (E.D. Pa. 1997).

Plaintiff, a non-employee physician diagnosed with attention deficit disorder, was suspended from the medical staff at defendant-hospital.

Plaintiff brought suit under Title III of the ADA, which prohibits discrimination on the basis of disability in public accommodations, including hospitals.

In granting summary judgment for the defendant, the court rejected the plaintiff's Title III claim, saying that to hold for the plaintiff would require a tortured interpretation of the Act (i.e., that health care providers serve or otherwise "accommodate" a "public" of potential staff physicians).

The court indicated that the plaintiff's claim would seem to fall more appropriately under the ADA's Title I prohibition against employment discrimination. However, since plaintiff was an independent contractor and thus not an employee within the meaning of the Act, such a claim would likewise fail.

The Family Medical Leave Act (FMLA)

Recent Cases

- Thomson v. The Ohio State University Hospital, 1998 U.S. Dist. LEXIS 6602 (S.D. Ohio 1998).

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Court addressed jurisdictional question of whether plaintiff could bring suit under the FMLA against the hospital of a state supported public university.

The hospital moved to dismiss plaintiff's claim for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), claiming sovereign immunity from suit in federal court under the Eleventh Amendment to the United States Constitution.

In granting the defendant's motion, the court held that the FMLA was not a valid exercise of Congress' enforcement power under § 5 of the Fourteenth Amendment, and concluded, therefore, that Congress had not effectively abrogated the Eleventh Amendment immunity of states from suit under the FMLA.

The court expressly rejected several decisions of district courts in other circuits in which federal subject matter jurisdiction over FMLA claims against state hospitals was granted. See, e.g., Biddlecome v. University of Texas, 1997 U.S. Dist LEXIS 3170 (S.D. Tex 1997); and, Joliffe v. Mitchell, 986 F. Supp. 339 (W.D. Va. 1997).

- Hopson v. Quitman County Hospital and Nursing Home, Inc., 119 F.3d 363 (5th Cir. 1997).

The Fifth Circuit held that summary judgment for the defendant was improper on an FMLA claim brought by a hospital unit coordinator who was discharged for taking unapproved leave after her request to reschedule previously approved leave for breast reduction surgery was denied.

The court held that the jury should have been allowed to decide whether a change in the employee's insurance coverage, requiring surgery to be performed by a certain date to be covered, was a "change in circumstances" under the FMLA. The lower court erred as a matter of law by requiring that a change in circumstances must be medically related or a medical emergency.

According to the Fifth Circuit, it was the jury's role to assess the adequacy of the employee's notice to her employer and the reasonableness of her effort to schedule her surgery so as not to disrupt unduly the hospital's operations.

- Victorelli v. Shadyside Hospital, 128 F.3d 184 (3d Cir. 1997).

Plaintiff, a hospital technician, was fired in 1994 for violating her employer's attendance policy when she took a sick day due to peptic ulcer disease.

The Third Circuit reversed the lower court's grant of summary judgment for the hospital, and held that ongoing but treatable medical conditions that result in occasional use of sick leave can still be "serious medical conditions" included under the FMLA.

The court held that the "intent of the FMLA is not simply to protect those whose condition causes continual incapacity. It is also intended to protect those who are occasionally incapacitated by an on-going medical problem."

- Clark v. Allegheny University Hospital, No. 97-6113 (E.D. Pa. Mar. 4, 1998).

After first suspending the plaintiff with pay from his job in the environmental services department, the hospital fired him for excessive absenteeism and tardiness.

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Plaintiff brought suit against the hospital, claiming his absence had resulted from his own medical problems and his need to attend to his son's psychotic condition.

The district court granted the hospital's motion for summary judgment, holding that the FMLA did not cover the plaintiff because he did not work the minimum number of hours in the 12-month period prior to his termination.

Employees must work at least 1,250 hours to qualify for leave under the FMLA. Clark had worked only 1,037 hours.

The court rejected the plaintiff's argument that the hours spent on medical and disciplinary leave should be added to the hours actually worked when calculating employee eligibility.