

Physicians Allowed to Proceed with Discrimination Claims Against Health System, Despite Being Employed by Physician Service

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A recent decision out of a federal court in Pennsylvania demonstrates that large corporate health systems who rely on the use of subsidiaries to limit liability for employee misconduct do so at their own peril. In *Ginsburg v. Aria Health Physician Services*, E.D. Pa., No. 2:12-cv-1140 (Aug. 31, 2012), the federal judge found that a health system qualified as an “employer” for purposes of state and federal discrimination laws — even though the plaintiffs’ direct employment relationship was with a subsidiary of the health system — because the health system exerted control over the plaintiffs through work rules and discipline.

The plaintiffs in the case were two physicians. The physicians were directly employed by a physician service, but the physician service was a subsidiary of a larger health network. The two physicians were therefore assigned as staff anesthesiologists at one of the health system’s Philadelphia hospitals. Notably, it was the health system — not the physician service — who established the workplace policies and Code of Conduct for the two physicians. Problems began when a third physician in the anesthesiologists’ department began making insulting comments and exhibiting threatening behavior because of the two physicians’ national origins (Israeli and Russian) and religion (Jewish). The physicians reported the issue to their supervisors at the health system but received no response, and went so far as to attempt to schedule a meeting with the health system’s chief operating officer, but were unsuccessful. As a result, the anesthesiologists filed suit against the physician who allegedly harassed them and against the health system, alleging violations of state and federal discrimination law based upon the hostile work environment and the health system’s failure to correct the situation.

The health system sought to have the complaint dismissed in the trial court, arguing that the plaintiff physicians were employed not by the health system but rather by its subsidiary, the physician service. “The issue,” Judge Shapiro of the U.S. District Court for the Eastern District of Pennsylvania observed, “is whether plaintiffs have pled facts showing [the health system] is an ‘employer’ subject to Title VII, ADA, and [the Pennsylvania Human Rights Act].” Judge Shapiro found that yes, the health system, in this case, was an “employer”, under both of

two available tests. First, under the principles of common-law agency, the judge found that the health system was an employer because, “through its workplace policies and Code of Conduct,” the health system exhibited the “common-law touchstone of control” over the plaintiffs and the allegedly harassing physician. Second, under a “joint employer” test, the judge found that the health system and physician service were both employers of the physicians; the health system, specifically, was an employer because it had authority to hire and fire the physicians, to perform day-to-day supervision of the physicians, and to exhibit control over their records. As a result, Judge Shapiro concluded, the health system “[w]as an employer subject plaintiffs’ Title VII, ADA, and [Pennsylvania Human Rights Act] claims.”

This case should serve as a notice to health systems — or other large corporate employers — that rely on the use of subsidiaries to prevent or limit corporate liability: just because a professional is directly employed by a subsidiary (i.e., a physician service) rather than the larger corporation does not mean that the larger system is insulated from liability for his or her conduct. As long as the health system exhibits some control over the employee in his or her working environment, the health system could be found liable as an “employer” under state and federal law. Health systems concerned about their liability should review their discipline and workplace policies, and should consider rewriting work rules for implementation at the subsidiary level.

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Discrimination, Title VII