

IN A PRECEDENT-SETTING CASE, FEDERAL COURT OF APPEALS UPHOLDS HOSPITAL'S DISCHARGE FOR BREACH OF PATIENT CONFIDENTIALITY RULE

The United States Sixth Circuit Court of Appeals recently ruled that neither an employer's rules of behavior nor its investigation of workplace misconduct have to be perfect to avoid employment discrimination claims. When a long-service nurse obtained her granddaughter's X-rays without a written release, a hospital terminated both her and the radiology transcriptionist who provided the medical records for violating its patient confidentiality rule. The former employees filed a lawsuit claiming illegal age discrimination because the hospital's rule did not specify that a release had to be in writing; the patient's mother gave an oral release to the grandmother to get the X-rays; the hospital had implemented a cost-cutting strategy which traded more-expensive, older employees for less-expensive, younger ones; and through a reduction in force ("RIF") and other for-cause separations, the hospital eliminated more employees over the age of 40 than under.

The hospital defended by demonstrating that other employees in radiology knew that a written release was necessary to give out an X-ray; while the hospital was conducting its investigation, the transcriptionist contacted the grandmother for her to ensure the existence of a written release or she would be "in trouble;" and the grandmother then signed a written release with the mother's name, backdated it, and placed it in the file to make it appear as if the release was authorized in writing. More important, the hospital successfully argued that the discharge issue was not whether the release actually was authorized but whether the hospital held an honest belief that the former employees committed a terminable offense at the time it made its discharge decision. In so doing, the hospital proved that no employee, regardless of age, received better disciplinary treatment under the confidentiality rule, and that it conducted a reasonable investigation of the particularized facts upon which it relied to make its decision. With respect to the cost-cutting strategy, the hospital successfully argued that plaintiffs' position actually was premised on the view that the hospital eliminated more senior and expensive employees which was legally permissible because years of service is analytically distinct from age. Further, the hospital demonstrated that it employed more employees on a percentage basis over the age of 40 after the RIF than it did before the RIF. Finally, it successfully argued that plaintiffs failed to isolate and identify any specific employment practice that produced an alleged disparity they created from a distorted statistical analysis.

As the weakened economy forces more employers to consider job eliminations, it is becoming more complicated to defend employment discrimination claims. Employers need to review their work rules and conform them to how they actually are enforced. For example, if employees are trained that something must be in writing, then any related work rule should conform to the training even if the training materials are in writing. Before discipline is assessed against any employee, an employer should conduct an adequate investigation, document it, and make a decision on the particularized facts uncovered. Discipline decisions should not be made on supposition, and the discipline assessed should be consistent with discipline meted out for similar rule violations. Finally, if an

employer must implement a reduction in force, a statistical analysis of the impact of the reduction on protected groups, including age-protected individuals, must be conducted to identify any disparities and the reason(s) for it. If there is a disparity and the reason either relates to subjective decision making or a neutral criteria that focuses on a protected group, then an employer must consider other methods that avoid the disparity or the reason causing the disparity. If the same outcome cannot be achieved, then the employer should consider releases and the payment of severance to support the releases if it is affordable.

If you have any questions or comments regarding this E-flash, please contact Post & Schell, P.C. Labor and Employment Attorney Vince Candiello who regularly defends health-care employers in complex litigation matters and who defended the hospital noted above in *Allen, et al v. Highlands Hospital Corporation, No. 07- 6414 (United States Courts of Appeals for the Sixth Circuit, October 21, 2008)*. Vince can be reached at 717-612-6024 or at vcandiello@postschell.com.

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