February 2008

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Second Circuit Holds That a Physician with Staff Privileges May Qualify as an Employee Under Title VII

The United States Court of Appeals for the Second Circuit has recently held that a physician with staff privileges at a hospital may qualify as an employee under Title VII of the Civil Rights Act of 1964 (Title VII) (*Salamon v. Our Lady of Victory Hospital*, 2d Cir., No. 06-1707, Jan. 16, 2008). The court, in its January 16, 2008, decision, reversed the lower court's ruling that the physician was an independent contractor, and held that a hospital's peer review program may, in some instances, create enough control by the hospital over the physician to create an employer-employee relationship.

The plaintiff, Dr. Salamon, a board-certified gastroenterologist and internist, had been a member of the medical staff at Our Lady of Victory Hospital (OLV) since 1994, with privileges to see and admit patients; use the hospital facilities, including access to OLV's endoscopy equipment; and utilize OLV employees, such as nurses and support staff, to assist her in treatment of patients. Dr. Salamon was free to set her own hours and maintain her own patient load.

Dr. Salamon maintained staff privileges at other hospitals in addition to OLV, although the vast majority of her practice was at OLV. Dr. Salamon billed her patients directly and received no remuneration from OLV. OLV did not bill patients for Dr. Salamon's services nor did the hospital pay Dr. Salamon for her services. In fact, the hospital did not provide her with any salary, wages, benefits, or any other monetary compensation.

Nonetheless, as an OLV medical staff member, Dr. Salamon was required to comply with Staff Rules and Regulations and Hospital by-laws, participate in one-hour staff meetings every three months, and spend a certain amount of time "on-call," which obliged her to treat OLV patients, regardless of whether or not they were her patients. Additionally, as a condition of her privileges at OLV, Dr. Salamon was required to participate in the hospital's "quality assurance program," whereby different hospital practitioners would review procedures that had been conducted during the quarter. Cases flagged as potentially problematic as a result of the review would be discussed at mandatory Gastroenterology Division meetings. OLV further maintained a peer review process for

examining doctors' practices whose cases had been flagged through the quality assurance program.

Dr. Salamon alleged that in 1996, Dr. Michael Moore, an OLV hospital administrator, sexually harassed her by repeatedly making inappropriate comments and unwanted sexual advances. Dr. Salamon alleged that following her complaint to the hospital regarding the alleged conduct, Dr. Moore retaliated against her by using his powers as a hospital administrator to give her negative performance reviews. Dr. Salamon further alleged that other physicians at OLV, in support of Dr. Moore, retaliated against her by using the hospital's assurance program to require that she unnecessarily undergo a "re-education" and participate in a mentoring program, or face suspension. Dr. Salamon alleged that as a result of these purported wrongful actions, her reputation suffered, and talk about the poor quality of her work spread throughout the area. She contended that as a result, she received no job offers for other positions in the area for which she had applied.

Dr. Salamon first filed a charge alleging sexual harassment and retaliation with the EEOC. The Commission dismissed the charge on the grounds that Dr. Salamon was not an employee of OLV and thus not protected by Title VII. Thereafter, Dr. Salamon filed a civil action complaint in federal district court, alleging violation of both Title VII and the New York Human Rights Law (NYHRL). The district court granted OLV's motion for summary judgment on the Title VII and NYHRL claims, finding Dr. Salamon was an independent contractor and not an employee of OLV, and therefore was not covered by either law. Dr. Salamon appealed.

On appeal, Dr. Salamon argued that she should be considered an "employee" under Title VII because OLV exercised sufficient control and authority over her, thereby converting OLV's relationship with her into one of employer-employee. The United States Court of Appeals for the Second Circuit reversed the lower court's decision, finding that an issue of fact existed as to whether OLV exercised sufficient control over Dr. Salamon for her to be considered an employee for purposes of Title VII. The court analyzed Dr. Salamon's status under the test articulated by the Supreme Court in *Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989), which among other things, requires the court to consider the extent to which the putative employer has the right to control the "manner and means" by which the work is accomplished.

The Second Circuit opined that the most important factor in determining the existence of an employment relationship is the actual control, or right to control, by the employer, which characterizes the relation of employer and employee and differentiates the employee from the independent contractor. The court emphasized that while physicians, like other professionals, must be afforded wide latitude to determine a course of action, the mere existence of that latitude "is not dispositive of the manner-and-means test." The court reasoned that "[t]here is nothing intrinsic to the exercise of discretion and professional judgment that prevents a person from being an employee, although it may complicate the analysis. The issue is the balance between the employee's judgment and the employer's control."

Applying the manner-and-means test, the court held that summary judgment was inappropriate because the record demonstrated that OLV exercised substantial control over the details and methods of Dr. Salamon's work, including control over the treatment outcomes of her practice. The court reasoned that the re-education program was designed to change the methods by which Dr. Salamon arrived at diagnoses and treatment. The court recognized that hospital policies that merely reflect professional and government regulatory standards do not typically impose the kind of control to establish an employment relationship. It held, however, that those hospital policies may nevertheless create an employment relationship when they are aimed at maximizing a hospital's revenue or supervising treatment requirements.

In holding that a hospital policy on peer review may be sufficient to establish an employer-employee

relationship between a hospital and physician for purposes of Title VII, the court acknowledged that other circuits have held that peer review programs do not constitute exercises of control over the manner and means of physician practice. Specifically, the Court of Appeals for the Fourth, Fifth, Sixth and Seventh Circuits have held that a hospital's peer review program does not establish enough control over a physician with staff privileges to establish an employer-employee relationship. The court's decision in *Salamon* is also in conflict with a recent decision by the Court of Appeals for the Eighth Circuit in *Wojewski v. Rapid City Reg'l Hosp., Inc.*, 450 F. 3d 338 (8th Cir. 2006), where that court held that a physician with staff privileges at a hospital does not qualify as an employee under the Americans with Disabilities Act (ADA) even where the hospital exercised a "heightened level of personal control" over the physician.

The *Salamon* decision is significant in that the Second Circuit has parted from decisions of other circuits in holding that a physician with staff privileges has the potential to be deemed an employee of the hospital for purpose of federal and state employment laws. The effects of the *Salamon* decision are significant, and hospitals in New York, Connecticut and Vermont should be wary of terminating the staff privileges of any physician who makes allegations of sexual harassment, or other conduct prohibited by federal law. In such a situation, the hospital must first evaluate to what extent it exerts, or is permitted to exert, control over the physician to assess potential Title VII liability. The decision appears to be another in the emerging line of cases that blur the distinction between independent contractors and employees in the employment law arena. Increasingly, workers who would traditionally be considered independent contractors are being classified as employees. In the wake of *Salamon* hospitals, particularly in New York, Connecticut and Vermont should seek counsel before terminating the privileges of a physician.

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Please feel free to contact Maxine Neuhauser in the firm's Newark office at (973) 639-8269 or mneuhauser@ebglaw.com if you have any questions or comments. Daniel R. Levy, an associate in the Labor and Employment Department, assisted in the preparation of this Alert.