Avoiding Employment Related Liability

By Eugene Hollander, © 2006

I. STEPS TO TAKE PRIOR TO HIRING

One of the biggest mistakes a physician can make even *before* he hires an employee is not obtaining employer's liability insurance. While almost no physician would practice "naked," without malpractice insurance, most physicians and employers do not even consider procuring employer's liability insurance. In terminating an employee, the physician may face a claim for breach of contract under state law, or for discrimination under municipal, state or federal laws. An employer's liability insurance policy may cover judgments for claims such as sexual harassment or age discrimination, in addition to paying for legal fees. Even if the physician successfully defends the claim, it may cost tens or hundreds of thousands of dollars in legal fees to defend. Worse yet, a judge or jury may find against the physician. While under federal law, most awards of compensatory and punitive damages are capped at a level determined by the number of employees employed by the physician, there may be no such cap if a claim is brought under state law. Even if there is some kind of cap to limit the medical practice's liability, there usually is no such restriction on the prevailing party's award for attorney's fees. Thus, the award could be devastating.

In one recent case decided by the Seventh Circuit Court of Appeals, the Court resolved a dispute concerning attorneys' fees in a Title VII sexual harassment case. In Farfaras v. Citizens Bank, 433 F.3d 558 (7th Cir. 2006), Plaintiff obtained a $200,000 verdict against an employer. The verdict was reduced to $50,000 post-trial. Plaintiff sought reimbursement of $501,338.68 in attorney's fees and costs. Defendant objected

and suggested an amount of $69,334.25. The district court judge ordered that Defendant pay $436,766.75 in attorney's fees and costs. This amount was affirmed on appeal.

II. HIRING EMPLOYEES

Now that you are prepared to hire an employee for the practice, the decisionmaker must be careful what to ask in an interview. By asking improper questions, if the candidate is not hired, the group may be exposed to a lawsuit. In general, you should be uniform in questioning candidates. Also, do not overpromise the position or give the candidate false expectations concerning the job.

A. General Discriminatory Questions

A fertile area for mistakes is asking discriminatory questions. One cardinal rule is to not inquire as to a person's protected status. For instance, while it may be proper to ask if a person is 18 years or older to determine if a person is legally old enough to perform a job, it is unlawful to ask how old the person is. Similarly, while an employer is permitted to ask if a candidate is legally authorized to work in the United States on a full-time basis, it is unlawful to inquire as to a person's ethnicity. Do not ask the candidate what religious beliefs she or he has.

B. Disability Discrimination

The ADA poses the employer with a quandary when hiring. To keep it simple and lawful, however, the general rule of thumb is that it is permissible to ask a candidate what his or her abilities are, but not what their disabilities are. One way to insure that you do not run afoul of the law is to have an accurate job description for the position, and ask the applicant how she intends to perform the job. This way, if the applicant needs a reasonable accommodation, she can tell you at the outset of her employment. If you do

not have a reasonable belief that the candidate has a disability, do not ask if she requires an accommodation.

[1] Unlawful Questions

According to the EEOC, the following questions should never be asked in an interview:

- Have you ever had or been treated for any of the following conditions or diseases…?
- Have you ever been hospitalized?
- Have you ever been treated by a psychiatrist or psychologist?
- Have you ever been treated for a mental condition?
- Do you suffer from any health-related condition that might prevent you from performing your job?
- Have you had any major illnesses in the past five years?
- How many days were you absent in the last year because of illness?
- Do you have any physical defects that preclude you from doing certain types of things?
- Do you have any disabilities or impairments that might affect you from performing the job?
- Are you taking any prescribed drugs?
- Have you ever been treated for drug addiction or alcoholism?
- Have you ever filed a worker's compensation case?

[2] Lawful Questions

The following questions are permissible, according to the EEOC:

- Can you perform all job functions?
- Can you meet our attendance requirements?
- What are your professional licenses and certifications?
- Do you currently use any illegal drugs?

III. EMPLOYMENT CONTRACTS

One way that an employer can determine the terms and conditions of its employment with one of its physician employees is through an employment agreement. By having the physician execute an employment contract, the employer can fix the terms of compensation, determine benefits, and limit its exposure through various means.

A. Arbitration Provisions

One point that cannot be stressed enough is that employment litigation is expensive. One way of saving many thousands of dollars in legal fees is to insert a clause for binding arbitration in the employment contract. Binding arbitration will avoid jury trials, which generally favor employees, and streamline the litigation process, thus reducing attorneys' fees. With clerical or support staff, a binding arbitration provision may be incorporated into an employment application. While the law is continually evolving in this area, the agreement must generally be fairly drafted, and not onerous, *i.e.*, requiring the employee to pay all costs of arbitration. To avoid a successful challenge to the arbitration agreement, the physician may wish to assume all costs of the proceeding.

B. Non-Compete Agreements

The practice should also incorporate a legally enforceable non-compete or non-solicitation agreement into the employee-physician's employment agreement. If the physician employer has not secured that protection, the departing employee may seek to

raid his former employer's patient base, or lure away key employees. In order to provide the maximum protection under applicable state law, the physician should retain counsel to determine what restrictions are permitted under the local jurisdiction. Generally, the restrictions must be reasonable in time and geographic scope. For instance, a two year time limitation with a 15 mile radius of any of the physician's offices may be deemed reasonable to enforce. From the employee's perspective, he should attempt to avoid such a clause, arguing that it may threaten his livelihood in the event that he leaves the practice group. The employer may also with to insert a confidentiality provision in the contract, requiring the physician not to disclose marketing strategies, billing practices, or other confidential information.

IV. AVOIDING CREATING A CONTRACT OF EMPLOYMENT

A. At-Will Policy

In most jurisdictions, the employer may enter a relationship with an employee in one of the following ways: 1) as an independent contractor, 2) through an "at-will" relationship, or 3) through an express or implied contract. If the employee is an independent contractor or is employed "at-will," the employee or employer may terminate the employment relationship at any time for any reason. "At-will" means that, in the absence of an employment contract or collective bargaining agreement defining grounds for discharge or a definite term of employment, an employer can generally discharge an employee with or without notice, for any reason, or for no reason at all.

Congress, the states' legislatures, and the courts have created a number of exceptions to the at-will employment rule. For instance, an employer may not fire an at-will employee for a discriminatory reason, if that employee claims protection as a

member of a protected class. *See*, 42 U.S.C. § 2000e-2(k)(1)(A)(i). A person is a member of the protected class if they were discriminated against on the basis of his or her race, sex, age, color, religion, or national origin, or if he is a qualified individual with a disability, or is over the age of 40 years old. Id., 42 U.S.C. § 12111(8); 29 U.S.C. § 621.

Another exception to the at-will doctrine is that the employer cannot retaliate against an employee if he engages in protected activity for pursuing rights guaranteed by law or public policy. Traditionally, this action has been limited to the employee's assertion of rights under various states worker's compensation schemes.

An employment contract can be established through an express written or oral contract, or alternatively, through certain express or implied promises made by the employer to the employee. These promises can be made through the employer's handbook of company policies and procedures.

B. Handbooks As Express Or Implied Contracts

A contract of employment may be based upon an employee handbook. *See for example*, Duldulao v. Saint Mary of Nazareth Hospital Ctr., 115 Ill.2d. 482, 505 N.E.2d 314 (1987).

An employee handbook may be found to constitute a binding contract if the following circumstances exist:

1) the language of the document contains a promise clear enough that the employee would reasonably believe that an offer of employment was made;

2) the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and believes it to be an offer; and

3) the employee must accept the offer by commencing or continuing to work after learning of the policy statement.

If the handbook sets forth language making certain provisions discretionary, however, the employer will generally not be held bound to the provision. Thus, where a policy lists "recommended" penalties for violating certain this will generally not be considered an implied employment contract. The handbook, under certain circumstances, may be found to be binding upon the employer, though the employee may not have read or received the manual. Most courts, however, will require dissemination to the employee. If, however, the employee does not reasonably believe that the policy language constitutes an offer, the court will not find that an employment contract exists. Written employee contracts which incorporate by reference employee handbooks will also bind employers. On the other hand, contracts, however, which only reference certain portions of the handbook, will not necessarily bind the employer to the entire document.

Employment litigation over handbooks often revolves around enforcement, or failure to abide by, the employer's corrective action policy. Generally, an employer may disregard progressive disciplinary procedures only if a handbook expressly provides for an employer's *complete* discretion in implementing said procedures.

C. Probationary Period

The employer's handbook may contain a provision specifying a certain probationary period for new employees. As a practical matter, however, where the employer intends to maintain an at-will relationship for all of its employees, creating a separate status for new employees may not make much sense. If the contemplated provision is that a probationary employee may be terminated for any reason without notice, the implication is that non-probationary employees are afforded a more protected status. A non-probationary employee may argue, post-termination, that he should have

been afforded corrective action. In other words, the employer may have created an internal inconsistency in the handbook, which could be a costly problem later on.

One Illinois case, Duldulao v. St. Mary of Nazareth Hospital, 115 Ill. 2d 482, 505 N.E.2d 314 (1987), dealt with the issue of the different statuses of probationary and non-probationary employees. In Duldulao, the hospital had an employee handbook which it distributed to its employees. In the handbook, the hospital differentiated probationary employees, and non-probationary employees. For the latter class, the handbook provided that "permanent employees" could only be discharged with proper notice and three warning notices. The employee was terminated, and subsequently brought a breach of contract action against the hospital. The supreme court sided with the employee in finding that a breach of contract occurred.

D. Use of Disclaimers To Prevent Creation Of Implied Contract

While employer handbooks may serve many useful purposes, the manual may impose unanticipated liability upon the employer if a termination takes place, and a court later finds that the document is an enforceable contract. The court will more likely find that the handbook constitutes an enforceable contract, and the disciplinary policy must be followed in the absence of a disclaimer. To avoid such liability, the employer should include an explicit disclaimer in the beginning of its handbook, as well as at critical points in the manual.

The following points should be made in the disclaimer:

1. The manual is not intended to be a contract of employment, and the employee should have no reasonable expectation that it is an enforceable contract;

2. The document is only to be used for informational purposes or merely as a guideline;

3. The employee is considered “at-will;”

4. The employer may deviate from the manual at any time without notice to the employee;

5. The employer can withdraw, modify, amend or revoke, any provision of the handbook, or even the document in its entirety;

6. The employer, in its sole discretion, may apply the personnel policies;

7. The manual is as complete as the employer could reasonably make it at the time.

The employer should consider incorporating sample language similar to the following:

DISCLAIMER

THIS MANUAL IS NOT AN OFFER OF EMPLOYMENT OR A CONTRACT, BUT IS INTENDED SOLELY TO PROVIDE EMPLOYEES A SHORT DESCRIPTION OF THE WORKING CONDITIONS AT THIS PLACE OF EMPLOYMENT. THIS MANUAL IS AS COMPLETE AS THE COMPANY COULD REASONABLY MAKE IT. THE MANUAL IS NOT ALL-INCLUSIVE AS UNANTICIPATED SITUATIONS MAY ARISE DURING THE COURSE OF YOUR EMPLOYMENT.

NOTHING SET FORTH IN THIS MANUAL SHOULD GIVE THE EMPLOYEE ANY REASONABLE EXPECTATION THAT THIS MANUAL IS AN EMPLOYMENT CONTRACT, OR THAT IT IN ANY WAY CHANGES YOUR STATUS AS AN “AT-WILL” EMPLOYEE. **THE PERSONNEL POLICIES SET FORTH IN THIS MANUAL ARE APPLIED AT THE SOLE DISCRETION OF MANAGEMENT**. THE POLICIES DESCRIBED IN THIS MANUAL, INCLUDING THIS MANUAL IN ITS ENTIRETY, MAY BE WITHDRAWN, REVOKED, AMENDED, OR MODIFIED AT ANY TIME, WITH OR WITHOUT ANY NOTICE TO THE EMPLOYEE.

As the disclaimer above, the language must be unequivocal that the manual is not a contract.

In order to be a valid disclaimer, the provision must be *conspicuous*. We recommend highlighting the disclaimer and printing it in capital letters. The disclaimer provision should be displayed distinctly and separately from the other provisions of the handbook, or the disclaimer may be ineffective. The employer should not only include this at the outset of the manual, but also at these significant junctures of the document: 1) corrective or disciplinary action, 2) grievance or appeal rights, and 3) severance policies.

Thus, in addition to the content of the disclaimer, the employer should consider the following in order to comply with the requirement of being conspicuous:

1. Placing the disclaimer on a separate page;
2. Titling the provision "Disclaimer;"
3. Using bold face type with the title and key passages of the provision;
4. Using larger type to distinguish the clause;
5. Underlining or highlighting important words;
6. Using capital letters.

The disclaimer should be displayed prominently in the front of all future editions of the handbook. The employer may also wish to include disclaimer language on each page of the handbook, especially if it is formatted in a loose-leaf notebook.

E. Necessity Of Consistent Application Of Policies

It is important that the employer not only have an explicit and conspicuous disclaimer at the outset of the manual, and at crucial junctures, but it is also important that the language of the document be consistent. Even with an explicit disclaimer, the employer may invite unanticipated liability, for instance, if it promises that it "will," or "must," follow certain steps of a progressive disciplinary policy.

Various portions of the manual may suggest that the employer take particular action. In particular, these provisions may relate to corrective action, grievance procedures, or appeal rights. The employer should stringently avoid the following words which may bind it to an enforceable contract, or otherwise explicitly contradict plain disclaimer language when describing certain procedures: "just," "good cause," "permanent," "long term," "guaranteed," "must," "fair," or "shall." Rather, the employer should couch as many policy statements in the permissive – i.e., "the employer *may* consider…"

If the handbook states that an employee can be discharged only for good cause only, and later defines what "cause" means, the employer will likely be bound by the handbook. In one case, the handbook provided that the employee could be discharged for reasonable cause and with notice, and also provided that counseling would be afforded to correct any performance deficiencies.

F. Retaining The Right To Revise The Handbook

As discussed, in Section D., ***supra***, the employer should always insist on retaining the right to revise or even revoke the handbook in its entirety.

What can the employer do if it has an old employee handbook floating around, but wishes to reduce its potential contractual liability? An employer, of course, may still modify an existing handbook to add contract disclaimer language and at-will clauses. In the event that the change substantively modifies the existing handbook, however, the employer must provide the employee some additional consideration for the change. The consideration may be a relatively modest sum or benefit which the employee would not normally be entitled to. The employer may consider giving the employee a small raise,

cash payment or extra time off. Courts will generally not inquire into the adequacy of the consideration. Many courts have found continued employment to constitute adequate consideration.

G. Obtaining Acknowledgment Form From Employee

Every time that the employer distributes an employee handbook, it should routinely obtain an executed acknowledgment form from the employee. With every subsequent revision, the employer should have all employees acknowledge receipt of the modification. The employer should place a copy in the employee's personnel file. On the acknowledgement form, it should indicate the following: 1) the date that the employee received the handbook, or the revision, 2) that the employee has had an opportunity to review it, 3) that the employee acknowledges receipt of a copy, 4) that the employee agrees to be bound by the handbook or the change, and 5) re-affirming, where applicable, that the employee understands that he is an employee at-will, and that he further acknowledges that the provisions of the handbook do not constitute a contract.

V. AVOIDING SEXUAL HARASSMENT CLAIMS

A. Introduction.

Current statistics show that at least 40% of all women report being sexually harassed at some point in their career, and men currently account for 11.6 % of all sexual harassment cases filed with the EEOC. In the late 1990's, the United States Supreme Court handed down a series of decisions which greatly shaped current sexual harassment law. There are two types of sexual harassment claims – the creation or maintenance of a sexual hostile work environment and quid pro quo harassment.

For a hostile work environment claim, the employee must establish that she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other nonverbal or physical conduct of a sexual nature. Parkins v. Civil Constructors of Illinois, 163 F.3d 1027, 1032 (7th Cir. 1998). In determining whether conduct reaches the level of a hostile work environment, all the circumstances must be considered, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

Quid pro quo harassment involves the explicit tying of job benefits to sexual acts or to submission of sexual conduct. Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994). In either case, if a claim is brought, the Plaintiff may recover backpay damages, compensatory and punitive damages, front pay damages and reasonable attorney's fees and costs.

Generally, an employee will only be able to file a federal sexual harassment complaint against the practice if the office employees 15 or more individuals. If it is a smaller office than that, an employee may still be able to bring a claim against the employer depending on what state or local law permits.

B. Recent Sexual Harassment Cases and Their Impact on State and Federal Law.

Perhaps the most noteworthy decision was Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998). In Oncale, the plaintiff was employed on an oil-rigging rig owned by Sundowner Offshore Services. Oncale alleged that three male co-workers subjected him to sexual assaults and sexual harassment. Oncale further

contended that the men attacked him in the shower and that they said they wanted to have sex with him. According to Oncale, the men said that they would continue their conduct as long as Oncale worked on the rig. Oncale claimed that he complained to supervisors who took no action. Oncale then filed a lawsuit under Title VII of the U.S. Code. The Supreme Court held that the issue had to be judged by a reasonable person based upon the circumstances.

Also, in 1998, the United States Supreme Court decided Burlington Industries v. Ellerth, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998). Through both decisions, the high court clarified the definition of *quid pro quo* sexual harassment. The Supreme Court held that employers are strictly liable for a supervisor's sexual harassment when the employee's immediate supervisor takes a tangible employment action against the employee, such as termination, failing to promote, or changing benefits. In Faragher, the high court also found that Boca Raton's sexual harassment policy was insufficient to constitute a defense as it was not disseminated to employees and did not have a provision to bypass supervisors. What do these decisions mean for a physician's medical practice, and how can the office attempt to insulate itself against such claims? These important issues are discussed below.

[1] Employer's Obligation to Take Prompt Remedial Action

When faced with a complaint of sexual harassment, the employer may raise a certain affirmative defense – that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior. Ellerth, 118 S. Ct. 2257, 2270; Faragher, 118 S. Ct. 2275, 2293. If established, the plaintiff's complaint of sexual harassment may be

extinguished. This defense will generally not be applicable where the harasser is the supervisor, but rather, may apply where the harasser is a co-worker or a customer.

The employer may wish to consider incorporating certain procedures in its employee handbook regarding sexual harassment policies and procedures. The handbook may define what sexual harassment is, what is prohibited conduct in the workplace, what the employees obligations are in reporting the alleged harassment, and what the employer will do to investigate the claim. The employer should set forth a "zero tolerance" policy. If the company has employees whose primary language is not English, have your sexual harassment policy translated or communicate it to them in their primary language. Insure that the employee signs an acknowledgement that he or she received the employee handbook. Regarding any investigatory steps, the employer should refrain from using mandatory language, such as using words like 'guarantee' or 'will.' Rather, the employer should implement permissive words such as 'may.' Otherwise, in subsequent litigation, the employee may, for example, attempt to argue that she was guaranteed an investigation within ten days, and that the employer breached its own policy by not undertaking such a promised inquiry.

[2] Duty of the Employee

The Ellerth and Faragher decisions imposed certain obligations upon the employee as well, and may pose an additional defense for the employer – did the aggrieved employee unreasonably fail to take advantage of an employer's preventative or corrective opportunities policy, or to avoid harm otherwise?

It is recommended that employers incorporate specific complaint procedures into their employee handbooks. The employer should draft a policy with reasonable

requirements; otherwise, it may be rejected by a court. The company should afford different routes that employees can take to file complaints, such as calling a hotline, contacting the human resource department, or by contacting their supervisor. Also, the employer should give the employee the option of talking with a male or female company representative. In conjunction with its policy, the employer should conduct periodic training sessions with its employees regarding sexual harassment law and its policy.

The simple fact that the employer has such a policy, however, does not guarantee a win for the employer. For instance, if other employees followed the policy and were retaliated against, the employee may very well be relieved from adhering to the policy. Similarly, if the employee was harassed by senior management of the company, such as the President, the officer will be treated as the alter ego of the corporation. *See*, Harris v. Forklift Systems, 510 U.S. 17 (1993).

[3] Investigation and Documentation in Sexual Harassment Claims

The employer should conduct investigations promptly and thoroughly. Advise all supervisors to immediately report complaints of sexual harassment. A supervisor's intentional failure to suppress information from the company about an employee's complaints, may give rise to liability. Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). Depending upon the company and the allegations, the company may wish to consider hiring an outside investigator or experienced employment attorney to conduct the investigation. The investigator should interview all witnesses separately.

After the dispute is resolved, a follow-up should be done with the employee to ensure that no one has suffered retaliation. The company should insure that its sexual

harassment policy spells out clearly that retaliation against an employee for filing a sexual harassment complaint is illegal and will not be tolerated. The employer should always document the results of any sexual harassment complaint or investigation. The appropriate human resources representative should not only document the results, but document any corrective action that she asked the employee or supervisor to take. The representative should follow-up on any corrective action, so the employer can document if the employee failed to take advantage of the company's polices/procedures or any corrective action that the company took to prevent the sexual harassment from occurring again in the future.

C. Same-Sex Harassment

The teachings of the Oncale decision are significant for the employee and the employer. The Supreme Court held that men can sexually harass other men, and women are capable of sexually harassing other women. In addition, the sexual orientation of the individual is not important; rather, the key ingredient is that the harassment be perpetrated 'because of sex.' The high court ruled that the harassment will be evaluated on a "reasonable person" standard. The harassment will be obviously judged on a case-by-case basis.

The bottom line of Oncale is that a heterosexual man/woman can sexually harass another heterosexual man/woman. A homosexual man/woman can sexually harass a heterosexual man/woman. Therefore, the sexual orientation of either party should not be an issue when the employer investigates a complaint of sexual harassment. In fact, the parties do not even need to be sexually interested in each other for sexual harassment to occur.

D. Preventative Measures to Take In Regard to Sexual Harassment Claims.

An employee can do the following to prevent sexual harassment:

1) Request the individual to stop his or her untoward actions.

2) Document all behavior which you deem to be offensive.

3) If the harasser persists, consult the employee handbook for complaint procedures.

4) In accordance with the complaint procedures in the handbook, make the requisite complaints in writing. If the company has an EEO department, file a complaint with it.

5) Request a prompt and thorough investigation.

6) If necessary, file a charge of discrimination with the state department of Human Rights and/or the EEOC.

To prevent claims of same-sex harassment, the employer should consider the following steps:

1) Update the company's sexual harassment policies to include same-sex harassment. Communicate this policy to all of the employees.

2) Educate the company's supervisors about same-sex harassment.

3) Educate the company's employees that sexual harassment means sexual discrimination.

4) Promptly investigate all forms of sexual harassment. If necessary, hire an outside investigator or attorney to insure impartiality.

5) Take prompt remedial measures – if the investigation warrants it, terminate the alleged harasser.

E. Retaliation

[1] Introduction

Title VII of the United States Code prohibits an employer from retaliating against an employer from engaging in protected activity – making a complaint of harassment to

her employer. Retaliation claims are viewed as a claim in and of itself, and an employee must file a charge of discrimination with state department of Human Rights within 180 or 300 days (depending on state law), or 300 days with the EEOC to insure that she is timely. If the employee fails to file the charge within that time frame, the claim will generally be barred. Oftentimes, the retaliation case will be easier to prove than the sexual harassment case.

[2] Elements of Proof

To establish a case of retaliation, a plaintiff must prove: (1) she was engaged in statutorily protected expression, (2) an adverse employment action; (3) a causal link between the protected expression and the adverse action. Dey v. Colt Construction and Development Co., 28 F.3d 1446, 1457 (7th Cir. 1994). In other words, the Plaintiff must claim that she made a complaint of sexual harassment, and suffered materially on the job for doing so.

It is important for the employer to carefully document any performance issues with an employee prior to discharge – otherwise, if the employee complains, there may be a genuine dispute as to whether the discharge was for performance reasons or was related to the complaint of harassment.

A material adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. Burlington Indus. v. Ellerth, 524 U.S. 742, (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different

responsibilities, or a decision causing a significant change in benefits."). Oftentimes, mere reassignment to a different job or department without diluting the employee's job responsibilities will not qualify as an adverse job action.

The employee also needs to establish that her complaint caused her to be discharged, for example. Claims arising many months after the complaint will generally be far less successful.

[3] Defenses

In the event that the employee establishes the three requisite elements, the burden will fall to the employer to explain that the change in the employee's job had nothing to do with the complaint of harassment. In other words, the employer will have to come up with a legitimate business reason for the termination. The employee will generally have to disprove this reason, or show that it is a lie. The employer should also carefully examine the timeline involved to see if the plaintiff's claim is not timely.

VI. DISCRIMINATION AND WAGE CLAIMS

In addition to sexual harassment claims, the practice group may be subjected to a number of other discrimination or wage claims. In the former category, the employee may claim that she was discriminated against on the basis of gender, age, race, nationality, religion or disability. In any of these types of claims, the employee will generally have to show that he suffered an "adverse job action," in other words, that he suffered a material change in the terms and conditions of his employment. While a termination, demotion, or failure to promote may form the basis of such a claim, receiving a negative review will generally not suffice. Concerning wage and hour claims, the employee may claim that he was not paid all of his worked hours, or that he worked

overtime, and did not receive all of those wages. We will briefly touch on these types of claims. Note that while the discussion will focus on federal employment claims, the employee may have other state or other local remedies available which might be more expansive in nature.

A. Gender Discrimination.

Under federal law, an employee may bring a claim against the practice group claiming that she was being discriminated against on the basis of gender. The practice group will only be subject to federal jurisdiction under Title VII of the United States Code where it employees 15 or more individuals.

B. Age Discrimination.

In order for an employee to maintain an age discrimination case against the practice group, the employee must establish that she was over 40 years of age at the time of the unlawful act, and that the employer employs 20 or more individuals. Unlike other types of federal employment claims, a successful employee may not recover compensatory damages if she is successful in litigation. However, if the employee can show willfulness, a liquidated damage award will be twice the amount of the backpay accrued. For a highly compensated physician, the damages could reach over seven figures.

C. Race Discrimination.

In terms of bringing a race discrimination claim against the practice group, the jurisdictional requirements are similar to those of gender claims. What is noteworthy about these types of claims is that by their very nature, they can be quite incendiary, and unlike most other federal employment laws, there is no cap to punitive damages. Thus, if

the employee is successful on an egregious claim, the jury verdict may be quite substantial.

D. National Origin Discrimination.

Here, the employee may claim that he was discriminated against on the basis of his ethnicity. Jurisdiction is the same as for gender claims.

E. Religious Discrimination.

The employee may claim that he was subjected to an adverse job action because of his religion. These types of claims represent the fewest of the discrimination claims filed.

F. Disability Discrimination.

Of all the federal employment claims, these claims are the most defensible. Statistics show that virtually all of disability plaintiffs will lose their cases. Most disability plaintiffs cannot meet the definition of "disability" under the Americans With Disabilities Act, ("ADA"). Under the ADA, generally, an employee must show that she is substantially limited from performing one or more major life activities. The employee must be able to show that she can perform her job with or without a reasonable accommodation. The reason that most plaintiffs lose their cases is that they are either considered too disabled under the ADA, in that they cannot perform their jobs with or without an accommodation, or that they are not disabled enough to come within the purview of the Act. Generally, the employer's obligation to accommodate an employee with a disability is to engage in an ongoing dialogue with the employee to find a solution to allow her to perform her job.

G. Wage and Hour Claims

The Fair Labor Standards Act, ("FLSA"), requires enterprises engaged in interstate or foreign commerce and state and local governments to pay overtime of $1\ ^{1}/_{2}$ times an employee's regular rate of pay for hours worked in excess of 40 hours in a workweek. The FLSA regulations concerning overtime pay have been revised, effective August 23, 2004. The new salary level required for an employee to be exempt from overtime protection is $455 per week, and the various "white collar" exemptions have been revised. There are several overtime pay requirements outlined by the FLSA and its regulations, such as properly calculating a workweek, when to pay overtime, what notices an employer must post in the workplace, and the fact that the right to overtime protection may not be waived by an employee. In addition, employers must properly calculate employees' regular rates of pay, factoring in additional compensation when necessary.

The practice group must consider situations where an employee works holiday and sick pay, incurs on-call time, and travel time, all without averaging the overtime hours of more than 1 workweek. Typically, a practice group may face potential liability for wage claims brought by a non-professional or executive employee. These claims may include failure to pay all wages worked, or for unpaid overtime. The employee need not establish motive or intent to withhold payment to win. These claims can be devastating for employers as there is virtually no defense available if wages are due and unpaid. An employer may be subjected to double the underlying amount for a willful violation, and attorney's fees. Another reason that the employer may face substantial liability is that if the employer inadvertently failed to pay its clerical staff overtime, they may face

exponential, or even class action liability for all of the workers who were not fully compensated.

VII. DISCIPLINING AND TERMINATING EMPLOYEES

A. Document the Employee's Deficiency.

When confronted with the problem employee, physicians' groups and most smaller employers fail to document the employee's misconduct. This mistake can be fatal. It is important to establish a timeline with respect to the employee's record. If the physician documents the problems, it is more likely that a judge or jury will believe that the employee's conduct was deficient. Further, there are certain state laws which govern the production of personnel files. For example in Illinois, if the employer fails to timely produce personnel documents upon a written request, they will be inadmissible in a subsequent legal proceeding. The physician will not be able to later "re-create" these nonexistent documents.

The employer should not only document all incidents of misconduct, but should have the employee sign and date the form acknowledging responsibility. If the employee refuses to agree with the criticism, the employer should at least attempt to obtain a signature indicating that the offensive conduct was explained to him and that he was given a copy of the memorandum. At a minimum, however, the physician's group should document any performance deficiencies in the employee's annual review. Again, have the employee sign off on the document so that he cannot later argue that he was not advised of any deficiency.

B. Affording The Employee Progressive Discipline.

In conjunction with § A above, a frequent mistake made by physicians is failing to afford an employee progressive discipline. While there is no federal or state law which requires the physician to afford corrective action, the physician's own employee handbook may require it. Even if the handbook explicitly disclaims any requirement that the physician afford the employee and such corrective action, the employer should nonetheless attempt to follow such a policy. Again, while not legally required, there is an element of fairness to the procedure. If the employer first verbally counseled the employee, then provided her a written warning, and then probation, followed by termination, it is less likely that a jury would find against the physician in an employment claim. Additionally, when appearing fair, the employee may be sufficiently deterred in even bringing such a claim.

C. Follow The Employee Handbook.

As stated, many practice groups have employee handbooks. The handbook may serve a number of purposes. It may provide the employee with guidelines regarding their terms and conditions of employment, and may also serve as a public relations document for the physician. The handbook, however, may be used as a sword by the employee in employment litigation if the physician does not follow his own policies. For instance, if the handbook requires that the physician follow certain steps in a corrective action setting, and the physician fails to do so, it may give rise to a breach of contract claim, or appear to be discriminatory. Another fertile area for mistakes is the promise for annual reviews where none are given. The group should carefully draft the employment manual.

D. Consult With Counsel Prior To A Termination.

Many potential employment claims can be avoided or diffused if the physician consults with counsel prior to terminating the employee. Counsel may provide critical legal advice as to whether the potential termination may violate state or federal law, and recommend a course of conduct, which if adhered to, may avoid such a costly claim. Counsel may be also instructive on providing the appropriate progressive discipline, drafting a proper severance agreement, general release, or post-employment notices such as a COBRA notification. Further, in some employment claims, it is proper for the jury to consider the physician's failure to consult with counsel in determining whether to award punitive damages.

E. Conduct An Exit Interview With The Employee.

Rather than being abrupt with an employee, the employer should conduct an exit interview. While not required under federal or state law, the few minute procedure may serve several useful purposes. One, it may serve a public relations function in attempting to defuse employee anger and resentment, and by listening to the employee vent, the employer may seek to head off an employment claim. From a legal standpoint, the employee at the time may simply agree with the reason for termination, and her admission at the time might later rebut a claim for discrimination.

Similarly, and for a variety of reasons, the employer may not be truthful when terminating the employee. While not being truthful may not in and of itself give rise to a legal claim, it may provide fuel for the fire in the event that there is a colorable case. For instance, in an employment discrimination claim, the employer's untruthful reason for termination may constitute sufficient pretext to contradict any legitimate reason that the

physician had in terminating the employee. Further, if the employer-physician is not consistent in its reason for terminating the employee, the employer may not appear credible to a jury. Inconsistencies may arise between what the physician told the employee, the Department of Labor, the local human rights agency, and the EEOC. Again, if the employer appears truthful, the employee may be sufficiently deterred in bringing the claim in the first place.

F. Timely Pay The Departing Employee All Compensation Due

A frequent mistake that a practice group may make is not paying the employee all compensation to which he or she is entitled to. These sums may include:

- Regular wages
- Overtime pay
- Bonuses
- Unused vacation time
- Unused personal days
- Retirement benefits

The physician should check with their office or human resources manager, and/or retirement plan trustee, to insure all such sums are timely paid out. If the physician fails to do so, he may be subjected to various claims under state and federal law, as well as by the Department of Labor. Of all types of employment claims, wage and hour claims are the toughest to defend. As the employee need not establish a motive or intent to discriminate, an employer's failure to pay such wages is tantamount to a strict liability claim. While the underlying amounts in those situations may not be significant, the attorneys' fees which the employee may recover can be seen as quite a Draconian penalty.

G. Negotiate A Severance Agreement With A Problematic Or Expensive Departing Employee.

Once the decision to terminate has been made, a practice group should enter into a severance agreement with a terminated employee who is perceived to be litigious, or a physician who commanded a high salary. While the physician may be reluctant to pay the terminated employee any additional compensation, in the long run, it will insulate the practice group from expensive employment related claims. To make the agreement legally enforceable, the physician must provide the employee legal consideration to support the agreement; in other words, compensation to which the employee would not be ordinarily entitled. The physician may be able to obtain many favorable concessions from the employee in such an agreement. Some of those key terms may include:

- Release of all employment claims under federal, state and municipal law
- Acknowledgement that all compensation has been paid in full
- Agreement not to compete for a certain period of time and/or in an appropriate geographic radius
- Agreement not to solicit employees for a certain period of time
- Agreement not to initiate any litigation
- Agreement not to encourage others to initiate litigation
- Agreement to return all company property
- Agreement not to disparage the physician
- Agreeing to arbitrate any provision of a breach of the agreement
- Selection of a forum for litigation/arbitration
- Agreement to cooperate regarding a malpractice claim
- In the event of a breach of the agreement, a provision for the award of attorney's fees and costs