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Claims of Negligent Hiring, Supervision or Retention Draw Hospitals into Abuse Cases

Article By:

Sean B. Maraynes

Hospitals are commonly named as defendants in medical malpractice lawsuits for claims arising from alleged injuries within their walls, but what is their exposure to liability for claims that arise from alleged sexual assaults by staff on their premises? In September 2016, the ***Atlanta Journal-Constitution*** released a five-part investigative series examining the alleged epidemic of physician sex abuse in all 50 states. The series examined the purported problem of sexual abuse by physicians, including how licensing bodies discipline physicians, how cases of sex abuse are handled in each state, the ability of physicians to continue to practice despite allegations of abuse, and the effects of such abuse on the victims.

Overall, the series suggests there is an epidemic of “physicians behaving badly” who take advantage of vulnerable patients and are shielded by a system designed to protect their own. Claims of sexual abuse, either substantiated or unsubstantiated, frequently involve a patient rendered unconscious by anesthesia or a female patient alone with a male health care provider during an examination or procedure. Clearly, there are “bad apples” who commit indefensible acts against their patients; however, as defense counsel we must be cognizant that, sometimes, these salacious but unsubstantiated allegations can open the floodgates to the plaintiff’s bar and ruin the reputations of physicians before guilt is determined.

In these cases, because the alleged criminal act is *ultra vires* (meaning it falls outside the scope of the employee’s duties), the doctrine of *respondeat superior* rarely applies and the hospital would not be held vicariously liable as the employer. In these types of claims, however, plaintiff’s attorneys often assert a claim for negligent hiring, supervision or retention to keep the deep-pocketed hospital as a defendant. In New York, a claim for negligent hiring, supervision or retention arises when an employer places an employee in a position to cause foreseeable harm ? harm the injured party most likely would have been spared had the employer taken reasonable care in supervising or retaining the employee.

Clearly, if an employee has a history of sexual misconduct the employer either knew about or with a reasonable background check could have learned about, there is potential exposure. Additionally, if the employment file does not contain well-documented periodic evaluations, a plaintiff’s attorney can argue the employee was not properly monitored for misconduct.

Another common allegation is that the hospital (employer) failed to promulgate appropriate policies to prevent sexual misconduct. For instance, a plaintiff may claim a hospital failed to have a proper chaperone policy in place for female patients during the performance of procedures involving an intimate area. Whether this type of allegation is defensible may require an expert review in the medical specialty to support the claim that a chaperone is not a customary or required medical practice.

In sum, although plaintiff's attorneys face an uphill battle when asserting claims against a hospital arising from sexual assault, a hospital may leave itself open to a high-exposure claim, with shock value and negative publicity, without well-documented background checks, periodic evaluations and a thoughtful chaperone policy.

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