

The Legal Angle

Winter 2008

**An Electronic Newsletter from Davis & Davis, P.C. Covering Legal Issues
for Healthcare Providers.**

INSIDE THIS ISSUE

Recent Court Rulings Make Hiring/Promotion Decisions Riskier for Employees
FMLA Update
Joint Commission to Further Study Revised MS 1.20
Firm News

RECENT COURT RULINGS MAKE HIRING/PROMOTION DECISIONS RISKIER FOR EMPLOYERS

Two recent court rulings, one from the U.S. Fifth Circuit Court of Appeals, which decides all the appeals from federal courts in Texas, and the other from the U.S. Supreme Court, have raised the stakes for employers making hiring and promotion decisions. In the first decision, the U.S. Supreme Court disapproved of an existing legal standard which had previously made it more difficult for employees to prevail in lawsuits claiming discrimination in hiring or promotion. In the second decision, the Fifth Circuit Court of Appeals refused to dismiss a case by an employee claiming to have been denied a promotion based on racial discrimination. In making its decision, the Fifth Circuit reviewed the qualifications of the two candidates for the promotion in detail and ultimately disagreed with the employers' determination about which candidate was better qualified. This case, along with the earlier Supreme Court ruling, signals that courts are going to be less likely to defer to an employers' decision about which candidate is better qualified in hiring and promotion situations and that employers should anticipate more scrutiny from the courts of their hiring and promotion decisions.

RECOMMENDATIONS

In light of these recent decisions, the following recommendations are made to employers making hiring and promotion decisions, particularly in situations where there are two comparably qualified candidates for a position that are of different race, ethnicity, or gender, or with a significant age disparity:

- Preserve all hiring and promotion records, including those showing the relative qualifications of the candidates. Employers that commonly have multiple job openings with multiple applicants should make sure that records are kept in such a manner that it is easy to determine which candidates applied for which jobs, and that all documentation regarding each candidate is kept together.
- Well written job descriptions and job postings that accurately explain the experience and skills you are looking for in a job candidate are helpful
- Most importantly, accurately document your reasons for the hiring or promotion decision at the time the decision is made. If the decision is being made based on qualifications, this documentation is your opportunity to make sure you can clearly articulate why the chosen candidate had better qualifications and that the determination is supportable based on the available information about each candidate. Also, if the decision is based on something less tangible than training or experience, those reasons should be carefully documented. For example, if a candidate with less experience is being chosen for a job because that candidate has better communication skills, or because the other candidate has a poor attitude, those reasons should be documented and supported by examples or other facts.

FMLA UPDATE

There have been two recent Family and Medical Leave Act developments.

The first development is that the FMLA has been amended to provide for additional leave for family members of military personnel. The new provisions allow for up to 26 weeks of unpaid leave in a 12-month period for eligible employees, who are a spouse, child, parent, or nearest blood relative, to care for a service member who has incurred a “serious illness or injury” in the line of active duty. The amendments also create a type of active duty leave for relatives of service members. These provisions allow an eligible employee with a spouse, child or parent who is on, or who has been called up for, active duty to take up to 12 months of unpaid leave upon experiencing a “qualifying exigency.” The FMLA amendments do not define the term qualifying exigency but leave it up to the Department of Labor to define the term in upcoming regulations.

The second development is that the Department of Labor issued new proposed regulations regarding the FMLA on February 11, 2008. These proposed regulations contains a number of changes that, if included in the final version, should be of some help to employers. At this point, however, the regulations are only proposed and the Department of Labor, after receiving public comment, will issue final regulations in some form at a future date.

JOINT COMMISSION TO FURTHER STUDY REVISED MS 1.20

As many of you are aware, in 2007 the Joint Commission approved revisions to Standard MS 1.20, which relates to medical staff bylaws. The revisions, which are significant, do not become effective until July 1, 2009. In November of 2007, Joint Commission held a teleconference regarding the revised MS 1.20 in which Joint Commission officials discussed their interpretation and perceived effect of the revised standard. Joint Commission has now announced that it has appointed a task force to examine issues surrounding revised MS 1.20 and that it anticipates receiving a report from the task force at the end of February 2008. Whatever the results of the work of the task force, it seems likely that the revised standard, if it becomes effective as written, will necessitate revisions to hospitals' medical staff bylaws.

KEY CHANGES TO MS 1.20

Some of the key changes to MS 1.20 are as follows.

- The revised standard now requires that medical staff bylaws indicate what authority the medical staff has delegated to the medical staff executive committee, and how that authority is delegated and removed.

- The revised standard now requires that the medical staff have the ability to adopt medical staff bylaws, rules and regulations, and policies and propose them directly to the governing body, even if the subject matter had been delegated to the medical staff executive committee.

- The revised standard clarifies what must appear in the medical staff bylaws, and what may appear either in the bylaws or in rules and regulations or policies.

- In delineating what is and is not required to appear in the bylaws, the revised standard distinguishes between “processes” and “procedural details”. The revised standard requires that all processes set out in the standard appear in the bylaws, but allows for some of the procedural details to be included in

rules and regulations or policies. A “process” is defined as a series of steps taken to accomplish a goal, while a “procedural detail” describes in detail how each step in the process is to be carried out. The revised standard also clarifies that all processes and procedural details contained in the bylaws must be approved by the entire organized medical staff, but approval of procedural details not contained in the bylaws can be delegated to the medical executive committee.

- The revised standard sets out which procedural details are required to be in the bylaws by reference to the various Elements of Performance (“EP”) which must be addressed by the bylaws. The revised standard now contains 33 separate Elements of Performance. EPs 9 – 33 relate directly to the medical staff bylaws and all of the processes required by EPs 9 – 33 must be contained in the bylaws. Additionally, the revised standard states that any procedural details associated with EPs 9 – 33 must also be contained in the bylaws, but procedural details associated with the processes listed in EPs 26 through 33 can be either in the medical staff bylaws, or in rules and regulations or policies.

IMPLEMENTATION AND EFFECT OF Ms 1.20

The revised standard has raised a number of issues and concerns, which are expected to be addressed by the task force and by Joint Commission.

One such issue is the requirement that the entire medical staff have the ability to adopt changes to the medical staff bylaws and, in effect, bypass or override the medical executive committee. Some commentators have expressed concern that this will cause greater conflict or disruption, possibly by a small group of the medical staff who have their own separate agenda. In response to these concerns, Joint Commission officials, in the November 2007 teleconference, stated that the purpose for this requirement is to ensure that the medical executive committee truly represents the views of the entire medical staff and that they believe instances where the entire medical staff will need to override the medical executive committee will be rare. Joint Commission officials also stressed that EP 18 requires that the bylaws delineate which practitioners are allowed to vote on amendments to the medical staff bylaws and that through this mechanism, a medical staff could designate only part of its members as voting members. Thus, the bylaws can restrict voting rights to only those medical staff members who are sufficiently active at the hospital or to those

who do not have a conflict of interest based on affiliations outside of the hospital. Of course, restrictions on the voting rights of medical staff members would, in itself, require an amendment to the bylaws, which might be difficult to accomplish.

Another area of concern are the requirements regarding the inclusion of processes and certain procedural details in the bylaws and the uncertainty over exactly what will be required to be in the bylaws. One example is the requirement of EP 10 that the process and all associated procedural details regarding privileging licensed independent practitioners should be contained in the bylaws. This requirement, together with the 2007 changes to the Medical Staff Standards, which included new privileging requirements regarding Focused and Ongoing Professional Practice Evaluation, have raised questions about just how much detail will need to be included in the medical staff bylaws. A literal reading of these new requirements indicates that all details regarding focused and ongoing evaluations of privileges is required to be in the bylaws. Comments from Joint Commission officials during the November 2007 teleconference, however, indicate that medical staff bylaws may not need to contain that level of detail. Instead, according to these officials, surveyors will look to see whether a particular element of performance is addressed in the bylaws at all, and whether the medical staff and the governing board concur on the level of detail needed in the bylaws on that particular issue. The Joint Commission officials stressed that, as long as all elements of performance are addressed in the bylaws, surveyors will not second guess the joint decision of the medical staff and the governing board on what level of detail is needed in the bylaws on each issue. Although these comments provide some reassurance regarding the flexibility that will be allowed in drafting revisions to medical staff bylaws and rules and regulations, they are still some unanswered questions. Hopefully the task force and Joint Commission will provide additional clarification on how to implement the revisions to Standard MS 1.20. Joint Commission accredited hospitals should carefully review and consider both the 2007 revisions to the Medical Staff Standards as well as the new MS 1.20 and any forthcoming guidance from Joint Commission to determine whether amendments to their medical staff bylaws are required.

Firm News

Davis & Davis would like to welcome a new associate, Nadia L. Jafar. Ms. Jafar has hospital Risk Management experience, as well as physician and hospital medical malpractice defense experience. She was admitted to the State Bar of Texas in November 2003. She is a member of Austin Bar Association, Health Law Section, Administrative Law Section, and Civil Litigation Law Section; Hispanic Bar Association of Austin; Austin Young Lawyers Association; and Travis County Women Lawyers Association.

Congratulations to Davis & Davis attorney Craig Carter for recently becoming Board Certified by the Texas Board of Legal Specialization in Health Law. Craig is also Board Certified by the Texas Board of Legal Specialization in Labor and Employment Law.

Congratulations to shareholder Mark Keene for recently winning a three-week jury trial in Brownsville, Texas on behalf of a local psychiatrist and hospital facility. The plaintiffs alleged that the defendants were negligent in failing to properly monitor the patient's Lithium levels and kidney function while he was being treated for bi-polar disease. The plaintiffs also alleged that the defendants negligently failed to recommend alternative drugs that would treat the disease without the risk of kidney damage present with Lithium. The jury found no negligence and returned a verdict for the defense.

The Firm also wishes to congratulate Mark A. Keene on again being selected as one of Texas' Rising Star Super Lawyers. This honor was bestowed on less than 2.5% of all lawyers in Texas. The honor was published in an issue of Texas Monthly regarding Super Lawyers in the State.

About Our Firm...

Davis & Davis, P.C. is known for exacting standards, attentiveness to clients large and small, cost-efficient and aggressive representation, and a degree of legal sophistication more common in the nation's largest cities.

C. Dean Davis established the Firm in Austin Texas in 1961. The Firm continues to be A.V. rated and attributes its success to well-respected clients and the issues that concern them.

More information on Davis & Davis can be found on the Internet at:

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If you have any questions or comments regarding this newsletter, including suggested topics to be covered, or if you no longer wish to receive this newsletter, please contact [Alex J. Fuller, Jr.](#) or contact [A. Craig Carter](#) with any questions or comments regarding the above articles.