

## Privileges

### Doctor's Discrimination Claim Not Supported By Evidence of Racial Animus, Court Decides

A foreign-born doctor failed to produce sufficient evidence of racial animus in a hospital's refusal to renew his medical staff privileges to support his race discrimination claim under federal civil rights laws, a federal court of appeals held May 15, affirming summary judgment for the hospital (*Vesom v. Atchison Hospital Association*, 10th Cir., No. 06-3353, *nonprecedential* 5/15/08).

In a nonprecedential opinion, the U.S. Court of Appeals for the Tenth Circuit held that the district court properly found for defendants Atchison Hospital Association, Dr. Ryan Thomas, Dr. Douglas Goracke, and Dr. Donald Swayze on Dr. Pitt Vesom's claims that the nonrenewal of his staff privileges constituted race discrimination, a violation of federal antitrust law, retaliatory discharge, and intentional interference with contract. Thomas, Goracke, and Swayze were members of the hospital's medical executive committee (MEC), who had refused to recommend renewal of Vesom's privileges.

In addition to the lack of evidence of discriminatory motive, Vesom failed to show any antitrust injury resulting from his ouster from the hospital, the court said in an opinion by Judge Terrence L. O'Brien. Furthermore, it said, Vesom could not make out a claim for retaliatory discharge under Kansas law, because the state's retaliatory discharge statute does not apply to independent contractors. Finally, the court said, Vesom introduced no evidence of interference with contract beyond his own conclusory statements.

Judges Neil M. Gorsuch and Wade Brorby joined the opinion.

#### Nonrenewal of Privileges

Vesom is an American citizen who was born in Thailand. For the better part of 20 years, from 1983 to 2003, he maintained staff privileges at Atchison. His association with the hospital ended in 2003 after the MEC voted not to recommend renewal of those privileges. The reasons it gave for this decision were based on the "disruptive physician" provisions of the medical staff bylaws.

Following internal hearings and appeals that affirmed the MEC's decision, Vesom filed an action in the U.S. District Court for the District of Kansas. He alleged that the individual defendants conspired to deny him privileges because of his Asian background and had reported incidents of professional incompetence committed by other doctors. He asserted discrimination under 42 U.S.C. §1981. He also

claimed violations of the Sherman Act, violations of the Kansas whistleblower protection statute, and intentional interference with business relationships.

The district court granted summary judgment for defendants, and Vesom appealed. The Tenth Circuit affirmed the judgment in its entirety.

### **Race Discrimination**

When a plaintiff, like Vesom, who brings a claim under Section 1981 has no direct evidence of discrimination, a court applies a burden-shifting analysis under which, once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to show a legitimate nondiscriminatory reason for the adverse employment action, the court explained. If the defendant makes this showing, then the burden shifts back to the plaintiff to prove that the proffered reason is a mere pretext, it said.

In the Tenth Circuit, pretext may shown by "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons," the court said. "Evidence tending to show pretext permits an inference that the employer acted for discriminatory reasons," it added.

Vesom argued that the evidence showed that the MEC members decided to recommend nonrenewal of his privileges before they reviewed the bylaws to determine if they had cause. This argument, the court said, "misapprehends" the plaintiff's burden at this stage of the proceedings.

The fact that the MEC may have looked for a bylaw provision justifying its decision after it was made did not prove pretext for purposes of the race discrimination claim, the court said. Instead, evidence that the decision itself was motivated by racial animus was needed.

"Vesom unquestionably established that he was disliked, even hated, by other members of the medical staff and members of the MEC," the court noted. "He also established his renewal application was rejected shortly after he and two other physicians ... complained about the peer review procedures at the Hospital."

However, while Vesom "may believe his race was a factor," he failed to produce evidence of it, the court said. "Indeed, the only evidence of MEC's motivations reveals an ongoing and escalating animosity between the independent physicians (including Dr. Vesom) and physicians employed by the Hospital," it wrote.

### **Antitrust, Other Claims**

Summary judgment for the hospital on Vesom's antitrust claim was proper, the court said, because the physician failed to submit evidence of an antitrust injury resulting from the nonrenewal of his privileges. There was no evidence, for

example, that his unavailability at the hospital drove up the price for the type of his services he provided, it said.

Vesom had no cause of action under the Kansas whistleblower statute, the court added, because the statute plainly and unambiguously applied only to an "employee" discharged for reporting health care services violations by an employer. It was undisputed that Vesom was an independent contractor, the court noted.

Finally, the court found the district court properly granted the hospital summary judgment on Vesom's intentional interference claim, saying the physician failed to present evidence of contracts with patients that were lost due to the hospital's action. For example, it said, Vesom presented no evidence identifying any person who refused to hire him due to his loss of privileges.

Michael J. Gallagher, of Gallagher & Kaiser, Kansas City, Mo., and Charles D. Kugler, of Law Offices of Charles D. Kugler, Kansas City, Kan., represented Vesom. Mark A. Ferguson and Andrew R. Ramirez, of Lathrop & Gage, Overland Park, Kan., represented defendants.

*The full text of the opinion is at <http://op.bna.com/hl.nsf/r?Open=mapi-7eppy7>.* 

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