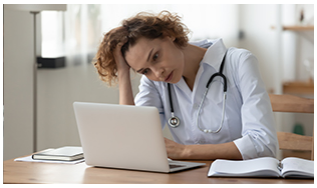

Mind legality of firing MD for embarrassing the practice; better to go no-cause

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Physician contracts

The recent dismissal of a physician who bothered his employer with a self-published book is a good reminder that providers can affect your practice by their actions outside the office, and that you should be prepared for it in their contract terms.

Generally, physicians who get into legal trouble or have certain kinds of behavioral issues that are not strictly illegal, such as alcoholism, will also have trouble with their licensing boards, and when their license to practice medicine is suspended or encumbered as a result, that will give their employer a reason to cut them loose (*PBN 8/3/20*). But some physician issues aren't that cut-and-dried.

A Mayo Clinic doctor, Steven Weiss, M.D., got in the papers recently when he self-published a book called "Carnage in America: Covid-19, Racial Injustice, and the Demise of Donald Trump," in which he identified himself as a Mayo Clinic doctor. Weiss was later fired. Mayo Clinic explained that it let Weiss go for "reasons beyond the publication of a book," according to reporting in USA Today. However, the paper published part of the correspondence between Weiss and Mayo Clinic authorities, in which the latter cited "unauthorized use of confidential business information, self-identification as a Mayo employee without appropriate approval, inappropriate use of patient identifiers, and derogatory and unprofessional commentary placing Mayo in a negative light" among their issues with Weiss.

The morals clause

The terms of Weiss' contract are not known, but it's not unusual for practices to stipulate that doctors are expected not to embarrass their employers — what is sometimes referred to as a "morals clause," of the sort that gives Hollywood production companies and brand managers the right to break contract with a performer or endorser whose behavior redounds unfavorably to them.

"If the language includes any disparagement or morality clause, typically covering any actions considered detrimental to the practice, termination is likely a protected action," says Travis Cox, an attorney with the Chamblee Ryan law firm in Dallas.

Such a clause needs to be clear about the need to protect the "goodwill and reputation" of the practice, says Elisaveta "Leiza" Dolghih, a partner at Lewis Brisbois Bisgaard & Smith LLP in Dallas.

Complaints of being "cancelled" by employers are common today. But remember that while "the First Amendment protects our freedom of speech from intrusion by the government, private actors are not subject to the First Amendment," says Anna L. Schroeder, attorney with Eastman & Smith Ltd. In Toledo, Ohio.

That doesn't mean that employees of private employers have no rights, Schroeder says. Under the National Labor Relations Act, for example, employees have "the right to discuss unlawful conduct occurring in the workplace, like discrimination or harassment, for example."

Also, some states such as California have laws that "protect political speech of private employees," says Dolghih, and you and your legal team will want to gauge how far that protection extends to your physicians in any given case.

Robert L. Kilroy, partner, chair of the labor, employment and employee benefits group at Mirick O'Connell in Westborough, Mass., offers a scenario: "If, for example, someone is speaking out in a way that's adverse to the Republican party or the Democratic party and the CEO or the Board is of the other persuasion, and they make a decision based on what might fit within politically protected speech under state law."

Also, Kilroy says, while it's understandable that practices don't want their physicians bad-mouthing them in public, you have to be very careful about appearing to retaliate against speech that has to do with a legitimate gripes that might have legal implications — like a whistleblower case.

"By way of example, if you had a physician going to leadership and complaining about a quality-of-care issue and it falls on deaf ears such that leadership ignores the concern and takes no action, and ultimately, the physician gets so frustrated they say something that gets some public airing, then if the employer were to fire the physician, you can almost certainly expect a whistleblower claim," Kilroy says. "And if I'm defending the hospital employer, it becomes very difficult then,

because a jury is going to say, 'Wait a minute, were you fired because of a social media post or were you fired in retaliation for raising the underlying quality issues?'"

However, employee speech and beliefs "aren't absolutely protected," Schroeder says. For one thing, if the doctor were an at-will employee rather than contracted — as most of your non-clinical staff and, indeed, most U.S. employees are — they could be fired for pretty much any non-protected speech. And their free speech rights don't mean they can break the law, as when doctors breach HIPAA in social media (*PBN 6/6/13*).

Tash Benjamin, principal and business manager of communications firm TKing Enterprises in Brooklyn, N.Y., says depending on what the physician says in his book or other outlet "there may be other laws that apply, such as defamation, fraud, etc., that may give the employer the right to terminate the employment contract for legally sound reasons."

Point to the code

One possible defense against physician behavior that egregiously sullies the practice's reputation — for example, controversial or even racist remarks out of the office — is an overt reference to well-established physician ethical standards in their contract.

Savera Sandhu, partner and health care practice leader at Newmeyer Dillion in Las Vegas, counsels her clients who draft physician contracts "to use the code of medical ethics given by the American Medical Association, and include it as part of the policies and procedures that each applicable employee receives."

Sandhu refers to Chapter 9 and Chapter 10 of the AMA Code of Medical Ethics, which respectively describe a physician's requirement to self-regulate and inter-professional relationships.

The code calls on physicians to "uphold standards of professionalism," Sandhu notes, and contains a directive "that the physician not only apply the code of ethics to his or her professional standards of practice but also to society at large. Arguably, a provision in a physician's contract that provides for practice standards and ethical compliance could apply the AMA's language along with the institution's own environment of respect, inclusion and professionalism."

Referring to the authority of your policies and procedures in a contract isn't uncommon; most physician contracts "include something to the effect that the physician agrees to uphold professional standards and conduct as provided in the [organization's] policies and procedures in addition to federal and state as well as local laws," Sandhu says.

Contracts and policies and procedures aren't the only instruments that bind employees and partners, says Michael B. Brohman, shareholder with Roetzel & Andress in Chicago.

"You'll probably have an employee handbook that is binding upon all employees," Brohman says. "And it's not unusual for an employment contract to have a provision that says if there's any inconsistency between what's in your employment contract and in the employee manual, the employee manual will govern the conditions of employment. Most employee manuals are really aimed at the staff, but they could be applied to physician employees as well. And there can be provisions in the manual about social media" and other areas.

"If a physician makes a [racist] comment outside of the office, [contract terms] are still triggered because you've got the responsibility to uphold the professional practice of medicine and to maintain the regard of your profession and your community," Sandhu says. "One could argue that includes not making racist comments."

The no-cause approach

But while morals clauses, P&P references and similar employer protections do show up in contracts, "you're not going to typically see a termination-with-cause provision which allows for immediate termination based on the physician making a statement in social media or, you know, some other public context," Kilroy says. "You just don't see that much, in part because it's pretty squishy — it's hard to identify exactly what you're talking about, what specific type of statements would constitute cause, and so on."

Instead, Kilroy says, "we're more likely talking about a termination without cause, which in the vast majority of physician agreements will say something like, after five years of employment the physician has rights to a year's notice before you terminate, and earlier may be three months' notice."

In such cases, "the contract/employment agreement could be drafted in a manner that allows the employer to avoid retaining the physician during the notice period, however, by permitting the employer to accelerate the separation date and pay the physician for the notice period, but without having the physician actually work (and remain an employee) during such notice period," Kilroy adds.

It's no-fuss, no-muss, and the practice doesn't have to get into the potentially thorny issue of why they're parting company with the physician — a good alternative if you can afford it.

One word of advice: If you take that approach, "don't assign the employee to do any services during that period of time," Brohman says. "Pay the person and basically instruct them to stay home — because you don't want somebody who knows they're leaving to be around other employees."

Resources

USA Today, "'Didn't expect to be fired;' Mayo dismisses Wisconsin doctor who wrote book on COVID pandemic," July 2, 2021: www.usatoday.com/story/news/health/2021/07/02/mayo-clinic-fires-doctor-who-wrote-book-covid-pandemic-experience/7835833002/

AMA Code of Ethics: www.ama-assn.org/delivering-care/ethics/code-medical-ethics-overview

BACK TO TOP