

## Double Trouble – Disruptive Physicians and Hostile Work Environments

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The First Circuit's August 29, 2011 decision in *Tuli v. Brigham & Women's Hospital* depicts the harsh financial consequences that may arise when a hospital fails to investigate and reign in a disruptive physician. The jury awards against the Hospital of \$600,000 for retaliation and \$1,000,000 for hostile work environment underscore the need for hospitals to promptly address and respond to complaints of disruptive behavior, including discriminatory or retaliatory conduct.

In 2002, the Hospital hired Dr. Tuli, a female, as an associate surgeon in its neurosurgery department, and Dr. Day, a male, as vice-chairman of the department.

In 2002-2003, Tuli became the departments' representative to the Hospital's quality assurance committee and had to investigate some of Day's cases. She was critical of Day's care and some of his cases were reported to the state licensing board.

In 2004, after two colleagues left and Tuli was the only spine surgeon, she, unlike previous male counterparts, was not promoted to the position of Director of Spine.

Between 2005 and 2007, Tuli reported concerns about Day's inappropriate and demeaning behavior to the Hospital's chief medical officer, Dr. Whittemore. No investigation was conducted and no actions were taken to eliminate the offensive behavior.

In 2007, Day was appointed department chair and became Tuli's supervisor. When Tuli's credentials came up for review, Day presented Tuli's case to the credentials committee, stating that Tuli had mood swings, that various operating room staff did not want to work with her, and that she needed anger management training. The committee then conditioned Tuli's reappointment upon obtaining a psychological evaluation and counseling by an outside agency.

When concerns were raised about the lack of specificity in Day's presentation about Tuli, the credentials committee requested a second presentation. Whittemore provided a

more balanced presentation, but still relied upon and presented unverified information from Day. Whittemore also failed to report Tuli's prior complaints against Day. The committee upheld its earlier decision.

Tuli then sued the Hospital for, among others, gender discrimination, hostile work environment and retaliation. Tuli was awarded \$1,000,000 for hostile work environment, \$600,000 for retaliation, and \$1,352,525.94 in attorneys' fees.

On appeal, the First Circuit affirmed the judgment.

#### Hostile Work Environment.

The First Circuit found ample evidence to support the jury's verdict as to hostile work environment, based upon the conduct of Day, as well as another physician, Dr. Kim. The conduct the court found sufficient included (1) Day's multiple references to Tuli as a "little girl", questioning whether "girls can do spine surgery" or "big operations", barring Tuli from spine oncology research because he had "a guy in mind," frequent demeaning interruptions of Tuli's lectures; and giving Tuli prolonged hugs; (2) Day's and Kim's requests that Tuli table dance or belly dance; (3) Kim's frequent sexual comments to Tuli, about her being "hot," imagining her naked, and wanting "the opportunity to sexually harass" her; and (4) Tuli being assigned residents less-experienced and unhelpful residents, including one who threw her into the scrub sink and then the garbage.

The First Circuit noted that: "The

accumulated effect of incidents of humiliating, offensive comments directed at women and work-sabotaging pranks, taken together, can constitute a hostile work environment." Further noting that Tuli made repeated complaints about these acts, but the Hospital did nothing to prevent them from continuing, the court concluded that the jury was entitled to find that the Hospital was liable for tolerating a hostile workplace.

The First Circuit rejected the Hospital's claim that Tuli's lawsuit should have been dismissed because she failed to seek corrective action by filing a formal complaint, finding that Whittemore had discouraged Tuli from filing a formal complaint, and had conceded his knowledge of Tuli's reasonable fear of retaliation. The court also rejected the Hospital's claim that acts occurring more than 300 days before Tuli filed her complaint with the Massachusetts Commission Against Discrimination should not have been considered, finding that the cumulative acts of Day and Kim, including those occurring outside the 300-day window, constituted a continuing violation and a single hostile environment claim.

The First Circuit also rejected the Hospital's claim of erroneous admission of evidence bearing on the hostile workplace claim. The court found that comments attributed to Day and Kim, and testimony about Day having a penis statue and a cookie jar with underpants in his office, and downloading sexual drawings on another female employee's Palm Pilot were admissible to show "notice to the Hospital and toleration of a general climate of offensive remarks and displays."

#### Retaliation

On Tuli's retaliation claim, the First Circuit rejected the Hospital's claim that it was entitled to judgment as a matter of law. The Hospital admitted that the complaints Tuli had made about Day were "protected conduct," but disputed that Tuli had suffered "an adverse employment action" or that "a causal connection existed between the protected conduct and the adverse action."

The court found that the jury could deem the consequences of the obligatory counseling ordered by the credentials committee – "invasion of privacy, potential stigma, and possible impact on employment and licensing elsewhere" – sufficient to constitute "adverse action." The court also found that, even though there was no evidence that those involved with the credentials committee, other than Day, harbored any retaliatory motive, and the hospital was required to respond to complaints about Tuli to safeguard patients, there was evidence that the Hospital failed to do so in an unbiased manner. That Day, in making his presentation about Tuli, failed to advise the committee that Tuli had complained about his conduct and had issued adverse reviews of his patient care was sufficient to allow a jury to conclude that he misled the committee. The jury was not bound to find the causal chain broken when Whittemore gave the second presentation, because Whittemore relied on unverified information from Day and also failed to advise the committee of Tuli's complaints about Day. Two committee members testified that knowledge of Tuli's complaints against Day would have been "important information."

## Lessons to Be Learned

Hospitals, as part of their peer review processes for members of the medical staff and as employers, must have policies and procedures in place that they routinely follow to deal with disruptive, discriminatory, harassing, or retaliatory conduct. As employers, hospitals are precluded from tolerating a hostile work environment and must take prompt action to dismantle a hostile work environment if one is found to exist. As *Tuli* illustrates, complaints of discrimination and hostile work environment require immediate investigation and remediation. Had the Hospital in *Tuli* complied with its internal policies protecting employees against discrimination, retaliation and hostile work environment, *Tuli* may not have had a legal basis on which to proceed.

Hospitals, who frequently have both employed and non-employed physicians on their medical staff, should make sure that both the policies and procedures developed by the medical staff and those developed by Human Resources for dealing with disruptive conduct and hostile work environment issues are consistent with each other. Especially in the case of employed physicians engaging in improper behavior, both the medical staff and Human Resources may be involved in inves-

tigating and taking appropriate action to eliminate the bad behavior. Hospitals should have appropriate mechanisms in place for Human Resources and the medical staff to promptly share complaints regarding disruptive physician behavior with each other and to assure that the appropriate committee or department promptly investigates.

## Honesty and Transparency Above All

Hospital peer review committees must exercise care to make sure that presentations made about a physician whose credentials or quality of care are being evaluated are scrutinized for bias and completeness. As *Tuli* demonstrates, hidden personal agendas have no place in presentations to such committees. Day clearly had a personal agenda against *Tuli*, and failed to disclose that *Tuli* had previously been critical of his care and had lodged complaints about his conduct. Whittemore then compounded the problem by also failing to disclose his knowledge of *Tuli*'s adverse reviews of Day's cases, or her complaints about Day's conduct and fear of retaliation. Committee decisions adverse to a physician that are based on incomplete and misleading information may prove not only unsustainable but also incorrect, very detrimental to the physician,

and very costly to the hospital.

## Professional Collaboration is Encouraged

Medical Staff Peer Review Committee members may be well versed in the medical staff bylaws and medical staff policies, but may not be as conversant with the legal standards that govern a hospital workplace. When complaints about physician behavior arise in the workplace setting, consultation with Human Resources and/or outside employment counsel is encouraged.

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