

Medical Facility: Cure Thyself. Look for the Symptoms of Employment Discrimination

By **Kathryn L. Feldman**

Partner

Labor and Employment Group

Ater Wynne LLP



As health care providers, medical facilities (rural clinics and others) are focused primarily on the care of their patients. However, medical facilities are also employers. As such, they should routinely examine the health of their employment practices.

Discrimination complaints are a common area for concern. Discrimination claims can result when a medical facility employer:

- Passes over a job candidate for a receptionist job on the basis of disability, “because dealing with a disabled person might make our patients uncomfortable.”

- Fails to promote a qualified person to an open position, “because she has four kids and won’t be able to focus on the added responsibilities of the job.”

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Kathryn L. Feldman, Partner
Labor and Employment Group
Ater Wynne LLP

- Terminates an employee who wears a headscarf and/or asks for permission to pray each day at prescribed times, “because she looks like a terrorist and/or the rest of us can’t be expected to pick up the slack.”

Discrimination takes place when an otherwise qualified employee (or class of employee) is treated less favorably in the workplace simply because he or she possesses a legally protected attribute like race, sex or gender, national origin, religion, age, disability – or even pregnancy.

Individuals in some protected classes are entitled to not only equal treatment, but also reasonable accommodations by the medical facility employer. Failure to provide reasonable accommodations also constitutes a form of employment discrimination.

Employment discrimination is not limited to hiring and firing decisions; it also includes decisions on promotions, raises, segregation, work assignments and harassment.

Race discrimination: By now, employers know that it is unlawful under state and federal law to discriminate against an otherwise qualified employee on the basis of race. What many do not know is that this also applies to color within racial groups. For example, it is illegal to favor – on the basis of skin color alone -- a lighter skinned individual over a person of the same racial group who has darker skin.

Sex or gender discrimination: An employer cannot discriminate in treatment of an otherwise qualified candidate or employee on the basis of sex or gender. Discrimination can take place both ways -- as a preference for or

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against women, or for or against men.

Sexual harassment lawsuits also fall under the heading of discrimination based on sex or gender. There are two types:

- *Quid pro quo* sexual harassment refers to situations where an employee must submit to sexual advances to get, advance in or keep a job. The employer is automatically liable.
- *Hostile environment* sexual harassment refers to a sexually-charged atmosphere that is so pervasive that it interferes with the working environment or creates an intimidating, offensive work setting.

National origin discrimination: As immigration increases, and there are more immigrants than ever before in the work force (especially in the healthcare industry), there are a growing number of claims based on national origin discrimination. In a post 9/11 environment, such claims increasingly overlap with religious discrimination.

Religious discrimination: To support a religious discrimination claim, an employee must prove that he or she has a *bona fide* religious belief, that the employer was informed of the belief, and that the employee was threatened with or subject to discriminatory treatment because of this belief. An employer is required to consider a request for and provide

religious accommodation – where reasonable.

Age discrimination: The law protects those age 40 and older from age discrimination in the workplace. As the baby boomers age and want to keep working (out of either desire or necessity), employers are likely to see an increase in lawsuits based on age discrimination.

Disability discrimination: State and federal laws protect the rights of qualified disabled employees who can perform the essential function of their jobs – with or without reasonable accommodation – unless doing so would result in an “undue hardship” for the employer.

Reasonable accommodation can include physical accessibility; job structuring; flexible work schedules; reassignment to another position; modification of examinations, training materials or policies; provision of qualified readers or interpreters and similar accommodations; and/or provision for unpaid leave for necessary treatment.

To prevent potentially costly claims of discrimination, a medical facility employer should create and implement the necessary policies, procedures and practices. This includes educating your employees on how to complain about potential discrimination so the employer can promptly investigate workplace disputes – before they become lawsuits.

In addition, a medical facility employer should pay close attention

to the documents kept in an employee’s personnel files – or elsewhere. Stick with objective statements; subjective remarks made about an employee can prove dangerous in litigation.

Employers must assume that all email is a permanent record that may be discoverable in the event of a lawsuit. When used as a formal method of documenting employee performance, email should be carefully reviewed prior to sending -- as if it will be seen by a judge or jury. Forensic computer experts can locate email on computer backup files.

Finally, a medical facility employer should be aware that employees who report discrimination in the workplace are legally protected against retaliation. Even something as simple as the “cold shoulder” from a passing doctor has been interpreted by the courts as retaliation.

Medical facility employers should be absolutely clear about what constitutes employment discrimination under state and federal laws. If not, they should consult with an attorney.

Kathryn L. Feldman is an employment lawyer with the Seattle-based law firm Ater Wynne LLP (www.aterwynne.com), where she develops preventive strategies to help employers create a loyal workforce and avoid litigation. For more information, contact her at (206) 623-4711 or klf@aterwynne.com.