Florida Society Of Ambulatory Surgical Centers

OPERATION: TERMINATION

• RECONCILING GENERAL RISK MANAGEMENT PRACTICES AND EMPLOYMENT LIABILITY RELATED RISK MANAGEMENT PRACTICES IN VARIABLE SETTINGS

PRESENTED BY:
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AGENDA

- EMPLOYMENT LAW BACKGROUND
- DOCUMENTING YOUR INVESTIGATIONS
- INTERSECTION BETWEEN EMPLOYMENT AND PERSONAL INJURY CLAIMS
- DISCOVERY ISSUES
EMPLOYMENT LITIGATION STATISTICS

• IN 2016:
  • 91,503 CLAIMS FILED WITH EEOC NATIONWIDE
  • TOP STATES: TEXAS, FLORIDA, CALIFORNIA

• TOP ISSUES:
  • 35.3% RACE
  • 29.4% SEX
  • 23% AGE
  • 26.5% DISABILITY
    • MOST DANGEROUS CLAIMS

EMPLOYMENT RELATED CLAIMS

• DISPARATE IMPACT
• DISPARATE TREATMENT
• RETALIATION
  • OPPOSITION CLAIMS
  • PARTICIPATION CLAIMS
• DISABILITY
  • FAILURE TO ACCOMMODATE
MR. “PC”

[Image of a building]

INSULT SLING ER

[Image of a sign: created by Bill Lawrence]
TORT CLAIMS

- MEDICAL NEGLIGENCE
- ORDINARY NEGLIGENCE
- NEGLIGENT HIRING
- NEGLIGENT RETENTION
- NEGLIGENT TRAINING
- NEGLIGENT SUPERVISION

LET’S KEEP THINGS ETHICAL, SHALL WE?
WHO’S THE BOSS?

FOCUS OF INVESTIGATION

• GENERAL RISK CONTEXT: CAUSE FOR ADVERSE OUTCOME, QUALITY ASSURANCE, IMPROVING CARE OR SERVICE, ASSESSING LIABILITY EXPOSURE. ALMOST ALWAYS DONE IN ANTICIPATION OF LITIGATION.

• HUMAN RESOURCES CONTEXT: EMPLOYEE DISCIPLINE AND EMPLOYEE ADHERENCE TO COMPANY POLICY. STANDARD BUSINESS PRACTICE TO MANAGE PERSONNEL. OUTCOMES NOT DIRECTLY TIED TO EMPLOYEE DISCIPLINE.
KEEP YOUR HANDS TO YOURSELF!

LET'S KEEP THINGS ORTHODOX
INVESTIGATION OF EMPLOYEE MISCONDUCT

• GENERAL RULE IN HUMAN RESOURCES: DOCUMENT, DOCUMENT, DOCUMENT
• KEEP HR INVESTIGATIONS SEPARATE FROM EMPLOYEE PERSONNEL FILES
  • THESE INVESTIGATIONS DO NOT HAVE SAME PRIVILEGED STATUS AS ADVERSE INCIDENT INVESTIGATIONS
• DO NOT INCLUDE ADVERSE OUTCOMES OR CAUSATION IN HUMAN RESOURCES MATERIALS
• MAINTAIN PATIENT CONFIDENTIALITY

HYPOTHETICAL #1: HOSPITAL “HELL”
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• HOSPITAL POLICY THAT SECURITY GUARD MUST “SWEEP” ALL FLOORS EVERY HOUR
• SECURITY GUARD TAKES A TWO HOUR LUNCH BREAK, WITHOUT CALLING FOR REPLACEMENT
• PATIENT IS BATTERED IN ROOM BY AN INTRUDER

HYPOTHETICAL #1 – DIFFERENT FACTS

• GUARD PREVIOUSLY ADVISED EMPLOYER HOSPITAL HE HAD CHRONIC MEDICAL CONDITION REQUIRING FREQUENT BATHROOM BREAKS
• GUARD REQUESTED EMPLOYER HOSPITAL PROVIDE METHOD BY WHICH HE COULD CALL ANOTHER GUARD TO RELIEVE HIM FOR BATHROOM BREAKS ONCE PER HOUR
• EMPLOYER HOSPITAL REFUSED TO PROVIDE ACCOMMODATION
HYPO THE TICAL #2 – NURSING HOME NIGHTMARE

• NIGHT SHIFT REGISTERED NURSE JANE HAS COMPLAINED TO HER MANAGER THAT ONLY MALE NURSES ARE PROMOTED TO NURSE MANAGER ON MULTIPLE OCCASIONS

• ANONYMOUS CALL MADE TO HOTLINE THAT NIGHT SHIFT NURSING STAFF IS ALTERNATELY IGNORING A PATIENT OR YELLING AT A PATIENT TO “SHUT UP” AND PATIENT IS CRYING, LEFT IN DIRTY LINENS, FALLS AND REMAINS ON FLOOR
HYPOThETICAL #2 – ADDITIONAL FACTS

• INVESTIGATION CONDUCTED AND REVEALED:

  • NURSE JANE SCREAMED AT PATIENT TO “SHUT UP”
  
  • NURSE RICHARD IGNORED PATIENT CALL BELL MULTIPLE TIMES WHILE HE PLAYED CANDY CRUSH ON CELL PHONE
  
  • NURSING ASSISTANT ALICE DOCUMENTED PATIENT WAS CHANGED TWICE AND SURVEILLANCE FOOTAGE REVEALED SHE DID NOT GO IN HIS ROOM

RIC HARD’S DISCIPLINE NOTE

• NURSE RICHARD VIOLATED ABC HEALTHCARE’S CELL PHONE POLICY BY USING HIS CELL PHONE AT HIS WORK STATION ON FEBRUARY 1, 2015, IGNORING A PATIENT PRESSING A CALL BUTTON BECAUSE HE WAS PLAYING CANDY CRUSH. PATIENT WAS FOUND LYING ON THE FLOOR AFTER HAVING FALLEN.

VS.

• NURSE RICHARD VIOLATED ABC HEALTHCARE’S CELL PHONE POLICY BY USING HIS CELL PHONE AT HIS WORK STATION ON FEBRUARY 1, 2015.
HYPOTHETICAL #3 – CRITICAL CARE CHAOS

• ICU PERSONNEL ARE REQUIRED TO WEAR PROPER SAFETY GEAR AT ALL TIMES (i.e. GLOVES, GOWNS, FACE MASKS)
• SUPERVISORS REQUIRED TO PERFORM SAFETY EQUIPMENT CHECK TWO TIMES PER DAY
• EMPLOYEE NURSE IS ACCIDENTALLY SPLASHED BY PATIENT’S BLOOD AND CONTRACTS HEP C
• EMPLOYEE NURSE WAS NOT WEARING SAFETY GEAR AT THE TIME
HYPOThETICAL #3 – ADDITIONAL FACTS

• SUPERVISOR MADE NO SAFETY CHECK ON THE DATE OF INCIDENT
• WIDESPREAD KNOWLEDGE THAT OTHER SUPERVISORS HAVE NOT CHECKED EQUIPMENT USE AS REQUIRED
• SUPERVISOR IS OLDEST SUPERVISOR EMPLOYED BY THE HOSPITAL

HYPOThETICAL #3 – ADDITIONAL FACTS, CONT'D.

• DRUG TEST AT HOSPITAL REVEALS EMPLOYEE NURSE TESTS POSITIVE FOR COCAINE, LSD AND DOES NOT WEAR REQUIRED FACE MASKS
INVESTIGATION OF EMPLOYEE MISCONDUCT

• CONSIDER RETAINING COUNSEL TO PERFORM INVESTIGATION IN HIGH-STAKES CASES

They're bringing in
A CONSULTANT!!

AVOIDING EMPLOYEE LITIGATION

• IN ADVERSE OUTCOMES—DO NOT CONTEST CLAIMS FOR UNEMPLOYMENT IF TERMINATION OCCURS

• IF PRECEDENT—OFFER EMPLOYEE OPPORTUNITY TO RESIGN WITH SEVERANCE PACKAGE AND EXECUTION OF RELEASE OF EMPLOYMENT RELATED CLAIMS IN LIEU OF TERMINATION
THAT COULD HAVE GONE BETTER

DISCOVERY ISSUES
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• DISCOVERY OF PERSONNEL FILES
  • CAN EMPLOYER ASSERT EMPLOYEE RIGHT TO PRIVACY ON BEHALF OF EMPLOYEES IN JURISDICTION
  • EMPLOYMENT: MAY BE RELEVANT AND DISCOVERABLE AS COMPARATOR EVIDENCE
  • TORT: RELEVANT TO CLAIMS OF NEGLIGENT HIRING, NEGLIGENT CREDENTIALING, NEGLIGENT RETENTION
  • DISCIPLINE FOR ADVERSE INCIDENT: SUBSEQUENT REMEDIAL MEASURE?

DISCOVERY ISSUES

• IF LIKELY TO BE DISCOVERABLE—ASK FOR NARROW SCOPE OF DISCLOSURE
  • REQUEST CONFIDENTIALITY/NON-DISCLOSURE ORDERS TO BE ENTERED IN EMPLOYMENT LITIGATION
  • SEEK PROTECTIVE ORDERS FOR SCOPE OF DEPOSITION—LIMIT TO EMPLOYMENT ISSUES, SEEK ORDER PRECLUDING QUESTIONS REGARDING ADVERSE PATIENT OUTCOME
DISCOVERY ISSUES

• USE OF PATIENT/CUSTOMER RECORDS
  • COMPLIANCE WITH PRIVACY LAWS
  • CONCERN FOR NEGATIVE PUBLICITY/ELICITING LITIGATION
  • REDACTION: IS IT POSSIBLE?

• REQUEST FOR PERMISSION—BALANCE NEEDS OF EMPLOYMENT LITIGATION WITH RISK OF TORT LITIGATION

QUESTIONS?
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