



Electronic Dispatch

Health Care Law Information Memo

March 2008

[Go to BS&K Healthcare Law Home Page](#)

HOSPITAL QUALITY CONTROL PROGRAMS MAY CREATE EMPLOYMENT RELATIONSHIP WITH PHYSICIANS

A recent decision by the United States Court of Appeals for the Second Circuit, which has jurisdiction over Federal courts in New York, opened the door for courts to treat physicians with staff privileges as hospital employees, possibly exposing hospitals to liability for Federal and State employment discrimination claims filed by physicians. The Second Circuit Court of Appeals recently determined that in some situations, the degree of control exerted by a hospital over a physician by way of a quality control or peer assessment program may be enough to deem a physician a hospital employee for purposes of employment discrimination laws.

The case, *Salamon v. Our Lady of Victory Hospital*, No. 06-1707 (2d Cir. 2008), was brought by Dr. Barbara Salamon, a board-certified gastroenterologist and internist, who enjoyed staff privileges at Our Lady of Victory Hospital ("OLV") in Buffalo. Dr. Salamon alleged that she was sexually harassed by OLV's Chief of Gastroenterology, and that when she complained about the harassment to hospital officials, she was retaliated against in the form of increased and unwarranted scrutiny and criticism of her medical practice. She alleged that this increased scrutiny ultimately ruined her reputation in the medical community, resulting in a loss of patient referrals from other physicians, and the inability to find other work opportunities. She sued the hospital, the alleged harasser, and several hospital administrators for employment discrimination, including sexual harassment, under both Federal and New York State employment discrimination statutes.

Dr. Salamon's case was dismissed by the trial court, which held that she was an independent contractor of the hospital, not an employee, and therefore was not protected by Federal or State employment discrimination laws. She appealed to the Court of Appeals, arguing that the degree of control exerted over her by the hospital converted her into an employee for purposes of anti-discrimination laws. The Court of Appeals reversed the lower court, concluding that a hospital quality control program can, in some instances, give a hospital enough control over a physician to create an employer-employee relationship.

As a physician with staff privileges at OLV, Salamon set her own hours and patient load, subject to an on-call requirement. She decided which patients to see and treat, and whether to admit them to OLV. She was allowed to maintain privileges at other hospitals, and she did so. OLV did not pay her wages, benefits or any compensation. Salamon and the hospital billed patients separately for their services.

Salamon was subject to the hospital's rules and regulations, and was required to participate in quarterly staff meetings. Most significantly, Salamon was required to participate in the hospital's "quality assurance program" as a condition of hospital privileges. Under this program, hospital practitioners reviewed procedures conducted in the hospital on a quarterly basis. Procedures flagged as "potentially problematic" were discussed at mandatory meetings. A peer review process was used to examine the practice of doctors whose cases were flagged under the program. Importantly, Salamon alleged that the hospital's quality standards did not merely measure the quality of patient treatment outcomes. Rather, she maintained that they mandated performance of certain procedures and the timing of others, as well as impacted her choices about which medications to prescribe, not in the interest of medical judgment, but to maximize hospital profit.

Salamon also alleged that after she complained of sexual harassment, the supervision of her practice intensified. Her cases were reviewed and criticized, and she was subjected to extra scrutiny beyond that of the typical quality assurance program – including a re-review of older cases that had already been peer reviewed. The additional reviews led the hospital to require Salamon to undergo a three-month "reeducation" and mentoring program or face suspension of her privileges.

[Bond, Schoeneck & King, PLLC](#) ▪ [New York](#) ▪ [Albany](#) [Buffalo](#) [Garden City](#) [Ithaca](#) [New York](#) [Oswego](#) [Syracuse](#) [Utica](#) ▪ [Kansas](#) ▪ [Overland Park](#)
[Bond, Schoeneck & King, P.A.](#) ▪ [Florida](#) ▪ [Bonita Springs](#) [Naples](#)

This document may be considered "Attorney Advertising" under the rules of some states.
The hiring of a lawyer is an important decision that should not be based solely upon advertisements.



The Court of Appeals concluded that the hospital's quality control program allowed the hospital to exercise enough control over physicians to create the possibility of an employment relationship. The court's analysis focused on the degree to which the hospital had the right to control the "manner and means" of the physician's work. It rejected the notion that simply because a doctor with staff privileges must exercise a high degree of professional judgment, the hospital could not exercise enough control to create an employment relationship. Rather, according to the court, the hospital exercised control by using its "quality assessment program" to dictate which treatments should be used and the timing of procedures, and criticized Dr. Salamon when her practice did not coincide with the hospital's preferred treatment methods.

The court in the *Salamon* case recognized that hospital policies which merely reflect professional and governmental regulatory standards will not impose the type of control over doctors needed to establish an employment relationship. It cautioned, however, that peer review programs that go further and delve into a doctor's treatment methods may create an employment relationship.

Hospitals should evaluate their quality control and peer review programs in light of the *Salamon* decision to determine whether they cross the line from a mere implementation of professional and regulatory standards to a means of control over physicians. Excessive control over patient treatment methods will subject a hospital to Federal and State employment law liability. If you have any questions or wish to discuss options for appropriate courses of action, please contact:

In the Capital District, call 518-533-3000 or e-mail:

Hermes Fernandez hfernandez@bsk.com

In Central New York, call 315-218-8000 or e-mail:

Larry P. Malfitano lmalfitano@bsk.com

In Garden City, call 516-267-6300 or e-mail:

Terry O'Neil toneil@bsk.com

In the New York Metro area, call 646-253-2300 or e-mail:

Louis P. DiLorenzo ldilorenzo@bsk.com

In Northern New York, call 315-218-8000 or e-mail:

Larry P. Malfitano lmalfitano@bsk.com

In Western New York, call 716-566-2800 or e-mail:

Robert A. Doren rdoren@bsk.com

BS&K Health Care Practice Group

The competitive environment for health care, and the increased regulatory initiatives of public agencies, have increased the needs of health care providers for a wide array of legal services, and BS&K is well qualified to provide those services. Our Group is a multi-disciplinary team whose lawyers serve as either general or special counsel to:

- Hospital and medical centers
- Home health care providers
- Long-term and subacute care facilities
- Individual physicians and other licensed practitioners
- Health insurance underwriters and third-party administrators
- Physician practice groups

The depth of our experience is illustrated by the fact that we have helped create a major community hospital and an integrated delivery system, and our attorneys have served as president and general counsel of a medical center as well as in-house general counsel to a major health care insurer. We represent more than 41 Hospitals, 62 Long Term Care facilities, 15 Home Care organizations and 45 Physician Practice groups across New York State.

Visit our web site – www.bsk.com