

MEDICAL GROUP LIABLE FOR MISLEADING REFERENCE

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June 19, 2008

In *Kadlec Medical Center v. Lakeview Anesthesia Associates*, Case No. 06-30745 (5th Cir. 2008), the U.S. Court of Appeals for the Fifth Circuit determined that a medical practice and its shareholder-physicians were liable for sending misleading reference letters on behalf of their former colleague.

Dr. Berry was an anesthesiologist and shareholder with Lakeview Anesthesia Associates ("LAA"), the exclusive provider of anesthesia services to Lakeview Medical Center, LLC ("Lakeview Medical"). Lakeview Medical investigated Dr. Berry concerning his alleged excessive withdrawals of Demerol and lack of documentation for those withdrawals. Lakeview Medical advised LAA of its findings, and Dr. Berry's fellow shareholders apparently put a plan in place to address the situation. A few months later, however, Dr. Berry failed to answer a page and was found in Lakeview Medical's call room asleep, groggy and not fit for work. Lakeview Medical no longer wished to have Dr. Berry practice at its facility, and LAA terminated him. The termination letter stated, in part:

[You have been fired for cause because] you have reported to work in an impaired physical, mental, and emotional state. Your impaired condition has prevented you from properly performing your duties and puts our patients at significant risk. . . . [P]lease consider your termination effective March 13, 2001.

Dr. Berry obtained *locum tenens* work and at some point applied for *locum tenens* privileges at Kadlec Medical Center in Washington State ("Kadlec"). As part of the credentialing process, Kadlec requested referral letters from Lakeview Medical and LAA. Two of the LAA shareholders who signed Dr. Berry's termination letter wrote reference letters, one stating that Dr. Berry was an excellent clinician and that he would be an asset to any anesthesia service, and the other stating that he highly recommended Dr. Berry as an anesthesiologist. These letters were written only 68 days after the authors fired Dr. Berry for behavior that put "patients at significant risk."

Kadlec also sent Lakeview Medical a request for credentialing information on Dr. Berry. Lakeview Medical's response consisted of little more than confirmation of the dates that Dr. Berry was on its Active Medical Staff.

Kadlec ended up credentialing Dr. Berry, and he began working there. Several months later, Dr. Berry got into a car accident and suffered a back injury. When he returned to Kadlec, nurses thought he appeared sick, and he exhibited mood swings. On one occasion, Dr. Berry gave a patient too much morphine during surgery, requiring her to be revived with Narcan. On another occasion, Dr. Berry failed to resuscitate a patient who came in for routine surgery, and she is now in a permanent vegetative state. Dr. Berry admitted to using Demerol since his accident and being addicted to it. The family of the patient in the vegetative state sued Dr. Berry and Kadlec, and each of their insurance companies settled.

Kadlec and its insurance company then sued LAA, its individual shareholders, and Lakeview Medical, asserting Louisiana state law claims for intentional misrepresentation, negligent misrepresentation, strict responsibility misrepresentation, and general negligence. They claimed that the defendants' unlawful conduct led to the hiring of Dr. Berry and the resulting millions of dollars it had to spend settling the lawsuit. A jury awarded Kadlec and its insurer \$8.24 Million, the approximate amount of the settlement (\$7.5 Million) plus their attorneys' fees, costs and expenses incurred to reach settlement (approx. \$744,000). Fault was apportioned as follows: One LAA shareholder: 20%; another LAA shareholder: 5%; Lakeview Medical: 25%; Kadlec: 17%; Dr. Berry: 33%.

The Court of Appeals held: (1) after choosing to write referral letters, the LAA shareholders assumed a duty not to make affirmative misrepresentations in the letters; (2) the LAA shareholders' letters were misleading; and (3) the letter from Lakeview Medical was not misleading. The judgment against Lakeview Medical was reversed. LAA and its shareholders were not so fortunate. The Court wrote:

A party does not incur liability every time it casually makes an incorrect statement. But if an employer makes a misleading statement in a referral letter about the performance of its former employee, the former employer may be liable for its statements if the facts and circumstances warrant. Here, defendants were recommending an anesthesiologist, who held the lives of patients in his hands every day. Policy considerations dictate that the defendants had a duty to avoid misrepresentations in their referral letters if they misled plaintiffs into thinking that Dr. Berry was an "excellent" anesthesiologist, when they had information that he was a drug addict. Indeed, if defendants' statements created a misapprehension about Dr. Berry's suitability to work as an anesthesiologist, then by "volunteer[ing] to speak and to convey information which . . . influence[d] the conduct of [Kadlec], [they were] bound to [disclose] the whole truth." In other words, if they created a misapprehension about Dr. Berry due to their own statements, they incurred a duty to disclose information about his drug use and for-cause firing to complete the whole picture.

We now review whether there is evidence that the defendants' letters were misleading. We start with the LAA defendants. The letter from Dr. Preau stated that Dr. Berry was an "excellent anesthesiologist" and that he "recommend[ed] him highly." Dr. Dennis's letter said that Dr. Berry was "an excellent physician" who "he is sure will be an asset to [his future employer's] anesthesia service." These letters are false on their face and materially misleading. Notably, these letters came only sixty-eight days after Drs. Dennis and Preau, on behalf of LAA, signed a letter terminating Dr. Berry for using narcotics while on-duty and stating that Dr. Berry's behavior put "patients at significant risk." Furthermore, because of the misleading statements in the letters, Dr. Dennis and Dr. Preau incurred a duty to cure these misleading statements by disclosing to Kadlec that Dr. Berry had been fired for on-the-job drug use.

The Court of Appeals sent the case back to the District Court to consider reassessing damages against LAA and its shareholders in light of its finding that Lakeview Medical was not liable.

This case illustrates the difficulties healthcare providers face when providing references. It is important to the credentialing process that providers share information about one another. Yet, there is risk that negative comments will result in a defamation lawsuit. Even in states like Indiana that have "reference immunity" statutes and a common law qualified privilege, a provider cannot necessarily avoid all risk of defending a lawsuit. Consider an Authorization to Release Reference Information, carefully tailored to your state's laws, to manage your risk.

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