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## EMPLOYMENT LAW LETTER

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### HOSTILE WORK ENVIRONMENT

## Straight from the heart: Nurse files claims over operation incident

by Lance Rich

*This case comes at you straight from the heart, literally. Read on to find out how a nurse attempted to turn an incident involving a piece of tissue flung during heart surgery into claims that her rights under the First Amendment to the U.S. Constitution and Title VII of the Civil Rights Act of 1964 were violated and how the court surgically examined her claims.*

### **The pericardium incident**

Sonya Morris worked as a registered nurse for Memorial Health System, an entity maintained by the city of Colorado Springs, Colorado. She eventually joined Memorial's "Heart Team," a group assigned to perform heart surgeries at the hospital.

Morris claims that Dr. Bryan Mahan, a surgeon on the Heart Team, made a number of demeaning comments to her. She also claims that he flicked her in the head with his finger on two separate occasions in the summer of 2008. In an incident later that summer, Mahan removed a piece of pericardium tissue surrounding a patient's heart and threw it in Morris' direction. Although he claims he intended to throw the tissue on the floor behind him, the tissue hit her on the leg. He then joked about completing "cultures" on the tissue. Morris was wearing scrubs, but she was not wearing reinforced protective gear that would have prevented body fluids from soaking through her clothing.

A few days later, Morris reported the pericardium incident to the director of surgery, who in turn reported the incident to Carlene Crall, Memorial's head of HR. Crall investigated the incident by interviewing the people present in the operating room during the surgery. As a result of the investigation, Memorial issued a memo to members of the Heart Team, alerting them that Mahan would not be in the operating room until further notice

and that all members of the Heart Team would participate in a team-building program led by an outside professional.

Three months later, Morris submitted a notice of claim to Memorial stating that she had suffered damages as a result of the pericardium incident and would pursue claims against the city and Mahan for outrageous conduct and battery. A week later, Crall sent Morris a letter recognizing the filing of the notice and stating that she would be removed from the Heart Team so her work environment would be more comfortable.

Six months later, Morris filed suit against Memorial in federal district court, arguing that her First Amendment right to petition was violated when she was removed from the Heart Team for submitting her notice of claim. She also asserted a claim under Title VII alleging that Mahan engaged in unlawful gender-based harassment and created an abusive and hostile work environment. After the district court dismissed both of those claims without a trial, Morris appealed the decision to the U.S. Tenth Circuit Court of Appeals (whose rulings apply to Utah employers).

### **Court examines heart of First Amendment retaliation claim**

A government employer cannot condition public employment on something that infringes on the employee's constitutionally protected interest in freedom of expression under the First Amendment. That protection extends to the right to petition for the redress of grievances. However, the interests of public employees in commenting on matters of public concern must be balanced with the employer's interest in promoting the efficiency of the public services it performs. To achieve that balance, the court examines the following five factors:

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- (1) whether the speech was made pursuant to the employee's official duties;
- (2) whether the speech was on a matter of public concern;
- (3) whether the government's interests, as an employer, in promoting the efficiency of the public service are sufficient to outweigh the employee's free speech interest;
- (4) whether the protected speech was a motivating factor in the adverse employment action; and
- (5) whether the employer would have reached the same employment decision in the absence of the protected conduct.

The Tenth Circuit found that Morris' retaliation claims failed on the second prong because she couldn't show that her notice of claim addressed speech on a matter of public concern. The inquiry on whether speech pertains to a matter of public concern must consider the content, form, and context of a given statement. The heart of the inquiry must focus on what is actually said. The court determined that Morris' notice setting forth a description of the pericardium incident was framed to provide notice of potential claims she would file against the hospital and Mahan arising out of *her own* working conditions. In other words, the notice concerned a personal dispute or grievance and did not pertain to a matter of public concern.

While the pericardium incident was the subject of a great deal of media coverage, that alone doesn't make it a matter of public concern. The notice was framed as a complaint about an employment dispute and not in a manner calculated to ignite public interest. Therefore, the court concluded that the district court had properly dismissed Morris' First Amendment claim.

### ***Did doctor's actions create a hostile environment?***

The court then examined Morris' hostile work environment claim. Under Title VII, she could establish a claim of gender discrimination based on a hostile work environment if she showed (1) she was discriminated against because of her gender and (2) the discrimination was sufficiently severe or pervasive that it altered the terms or conditions of her employment and created an abusive work environment. Because the court found that her claim failed the second prong of this test, it didn't address whether she could show that the alleged discrimination was based on her gender.

In deciding that the alleged discrimination wasn't sufficiently severe or pervasive, the court noted that Title VII doesn't establish a general civility code. An employee must show that the work environment was both objectively and subjectively hostile or abusive. While Morris claimed that Mahan flicked her in the head twice

within a two-week period, the court found that the incidents were isolated. Although she also pointed to the pericardium incident, there wasn't any other remotely similar incident affecting her during her employment at the hospital.

After Morris lodged her complaint about the pericardium incident, the hospital took corrective measures that allowed her to work with Mahan without any difficulty. While she also complained that Mahan yelled at and demeaned her at work, she didn't elaborate on the few examples she provided, and the court didn't find his comments sufficiently pervasive.

Morris argued that the harassment in her case was severe, but the court disagreed. While the court said that Mahan's conduct was unquestionably juvenile and unprofessional and that the pericardium incident was particularly distasteful, it didn't find the incident sufficiently severe. It noted that in the surgical setting, workers regularly encounter human tissue, blood, and other bodily fluids. Morris acknowledged that this wasn't the first time she had blood on her scrubs when she wasn't wearing protective gear. Also, she continued to work with Mahan for roughly three months after the incident. Therefore, the court concluded that the trial court correctly dismissed her hostile work environment claim without a trial. *Morris v. City of Colorado Springs*, 2012 WL 130672 (10th Cir., January 18, 2012).

### ***Postoperative cleanup***

There are several lessons to be learned from examining the court's dissection of Morris' claims. First, with respect to a government employee's right to free speech, the fact that an incident may be publicized doesn't necessarily mean it's a matter of public concern. Thankfully, the law provides some protection against a typical personal employment dispute that is flung into the media and happens to stick with some media outlets that elect to cover the story. Second, with respect to potential hostile work environment claims, employers should note that the hospital's actions in temporarily suspending the doctor and bringing in an outside professional for team-building purposes reduced the likelihood that the nurse would prevail on her claim.

Also, the court recognized the fact that the nurse was able to work with the doctor without further trouble for roughly three months after the pericardium incident. Had there been similar flicking or flinging occurrences, it is possible that the court wouldn't have viewed the doctor's earlier actions as merely isolated incidents. It's best for employers to take sufficient protective measures when dealing with a potentially messy employment dispute so that any future lawsuits will not soak through and cause harm.

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