

Legally Interviewing, Hiring & Terminating Employees



Daniel J. Sullivan

MD, JD, FACEP





POLL # 1 - Choose from the following

- I am an employee with an independent fee for service group.
- I am an independent contractor with an independent fee for service group.
- I am an employee of the hospital.
- I am not employed by the hospital but am part of a hospital practice group.
- Other



Overview

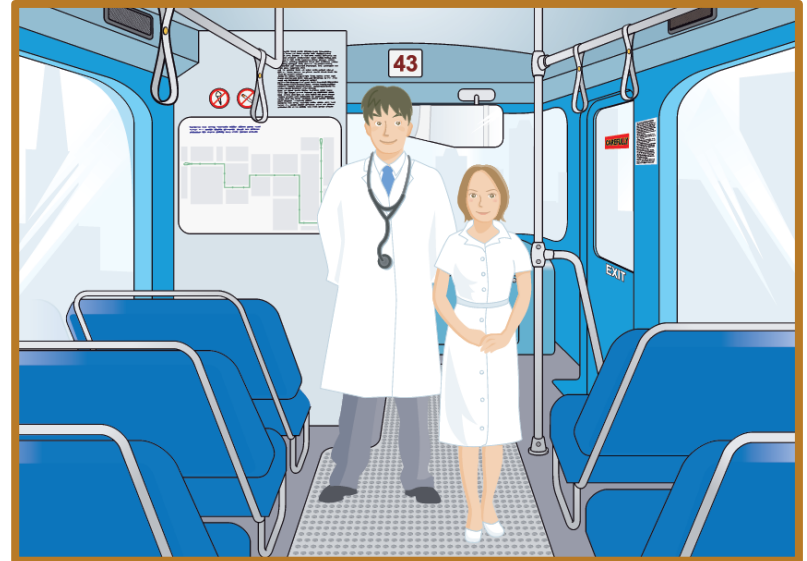
- It's all about the people.
- Work hard to get the hiring process right.
- Know that sometimes despite your best efforts you will be wrong.
- Know that you are personally and professionally at risk.
- Learn how to manage this process.





Get The Right People On The Bus

- Application process
- Interviews
- Hiring
- Performance evals
- Intervention
- Termination





POLL # 2: Right at this moment:

- I definitely have one or more problem individuals I would like to get off the bus.
- I have all the right people on the bus, no problems here.



Laws You Need To Be Aware Of

- Title VII of the Civil Rights Act
- Age Discrimination in Employment Act
- Equal Pay Act
- Fair Labor Standards Act
- Family Medical Leave Act





Laws You Need To Be Aware Of

- Americans With Disabilities Act
 - ADAAA (2008)
- Pregnancy Discrimination Act – Amends Title VII





Title VII Of The Civil Rights Act Of 1964

- Prohibits discrimination based on race, color, religion, sex or national origin.
- Sex includes pregnancy, childbirth or related medical conditions.
- It makes it illegal for employers to discriminate in hiring, discharging and compensation, or in terms, conditions, and privileges of employment.



Title VII – Sexual Discrimination

- Title VII's broad prohibitions against sex discrimination specifically cover:
 - Sexual Harassment - This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment.
- The "hostile environment" standard applies to harassment on the basis of race, color, national origin, religion, age, and disability.



■ Definition:

- Sexual harassment is any unwelcome sexual advance or conduct on the job that creates an intimidating, hostile, or offensive working environment.
- Any conduct of a sexual nature that makes an employee uncomfortable has the potential to be sexual harassment.
- Touch case review





Pregnancy Discrimination Act

- Amends Title VII.
- It is gender discrimination to treat an employee differently because of:
 - Pregnancy
 - Childbirth
 - Related medical conditions





Hypothetical (Not Really)

- A physician tells you he is afraid of another department physician (protected class based on ethnicity).
- You meet with him (2 people) and he tells you the other physician is abusive and harassing him and has been doing so for the past 1½ years. He tells you the other physician is questioning this provider's medical care and refuses to accept sign-outs from him. He also alleges that the physician has made racial remarks.

WHAT DO YOU DO?



Action

- Tell the physician that he has a right to a work environment that is safe and free from abuse and harassment.
- Tell him you will investigate allegations and report back to him.
- Request that he advise you of any additional issues with the other physician.



Action

- Meet with alleged abuser/harasser (2 people).
- Advise of allegations and ask for response.
- Advise him he is not the physician's supervisor, he has no right to reprimand another provider, and that any issues should be addressed to you directly as Medical Director.
- He is to have no more independent meetings with the threatened physician.
- Ask if he can act professionally with the physician.



Action

- Circle back with complaining physician.
- Explain that:
 - You discussed with other provider and requested that all issues be brought to Medical Director's attention and not handled directly.
 - You advised no more meetings between the two.
 - The other provider promised to treat him professionally and in collegial manner.



Sexual Harassment Policy

- Sexual Harassment Policy should:
 - Define sexual harassment
 - State that sexual harassment will not be tolerated
 - State that wrongdoers will be disciplined or fired
 - Set out clear procedure for filing sexual harassment complaints
 - State that you will investigate and not retaliate





WWW. [thesullivangroup.com](#)

(630)268-1188 Client Login

[HOME](#)
[SERVICES & SOLUTIONS](#)
[ABOUT US](#)
[NEWS & EVENTS](#)
[RSQ® CORNER](#)
[CONTACT US](#)

RISK RESOURCES

CME Manager



The TSG Continuing Education Manager is a free service that TSG provides to all health care professionals. State Continuing Education requirements are stringent and we want to assist you with a user-friendly method of keeping track of all of your continuing education credits. This tool allows you to view your credit hours, print them as needed, and quickly locate your CME certificates.

EM Toolbox



The TSG Emergency Medicine Risk and Safety Toolbox is meant to provide emergency practitioners with forms, ideas, policies and anything else that we can think of to assist in improving patient safety and reducing practitioner risk. Check back periodically, we will update the toolbox on a regular basis. If you have any requests or recommendations please contact us at comments@thesullivangroup.com.



RSQ® SOLUTIONS

- H ENTERPRISE +
- X HIGH-RISK +
- P EMR DECISION SUPPORT +

Call us for more information
1-855-RSQ-INFO



Stories From The Workplace (All = Hostile, Intimidating, Offensive)

- The chapel
- The back rub
- The invitation to the call room
- No filter
- Asking nurse out constantly
- “Honey,” “sweetie”





Stories From The Workplace (All = Hostile, Intimidating, Offensive)

- The pole dance
- Jerk off with your right arm
- Holding the package
- Bull riding the patient in status epilepticus
- The tongue seizure
- “Your daughter has trich, she must like...”



Good Ideas

- Physician / Nurse relationships.
- Take it outside.
- Don't just tell the troops about sexual discrimination, give them examples or they won't understand.
- Keep your hands off.





Poll # 3: I have some older practitioners and am struggling with patients per hour and other issues:

- True
- False



Age Discrimination In Employment Act (ADEA)

- Prohibits employers from discriminating against individuals 40 and older.
- Key Point: Essential job functions.





HEALTH

Three doctors in their 50s sue Hackensack University Medical Center for age discrimination

Lindy Washburn NorthJersey.com

Published 4:31 a.m. ET Nov. 1, 2021



Age Discrimination Case

- 3 pediatric EM docs, all in their 50s, claim they were fired because of their age.
- The remaining 5 peds EM docs under 40 had been hired in the prior 18 months.
- They were told in Feb 2021 they were terminated for business (COVID) reasons.
- No apparent basis to coincidentally single out the oldest physicians for termination.



Equal Pay Act

- Protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.
 - Jobs need only be substantially equal for Equal Pay Act to kick in.
 - Equal pay means equal in all things including benefit structure.
 - May be differences unrelated to age; for example, night differential.



Americans With Disabilities Act (ADA) & The ADAAA (2008)

- Enacted to eliminate discrimination against those with handicaps.
- It prohibits discrimination based on a physical or mental handicap.
- ADAAA is a dramatic extension of the reach and protections of the ADA.



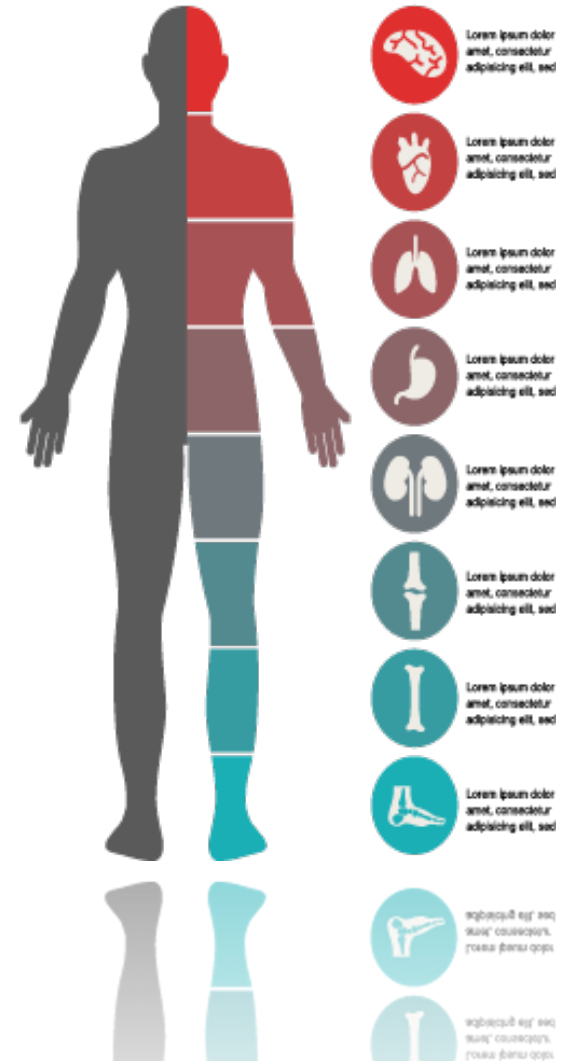
An Individual With A Disability Defined

- A person who has a physical or mental impairment that substantially limits one or more major life activities.
- This was originally activities that an average person can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, learning, and working.



ADA – An Individual With A Disability

- New – Impairment of bodily functions that might limit major life activities:
 - Immune system
 - Digestion
 - Bowel or bladder function
 - Endocrine...





Qualified Individual With A Disability

- Someone who satisfies skill, experience, education, and other job-related requirements of the position held or desired, and who, with reasonable accommodation, can perform the essential functions of that position.
- Example: Amplified stethoscope for a hearing-impaired physician.



Reasonable Accommodation

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities:
 - Job restructuring
 - Modification of work schedules
 - Providing additional unpaid leave





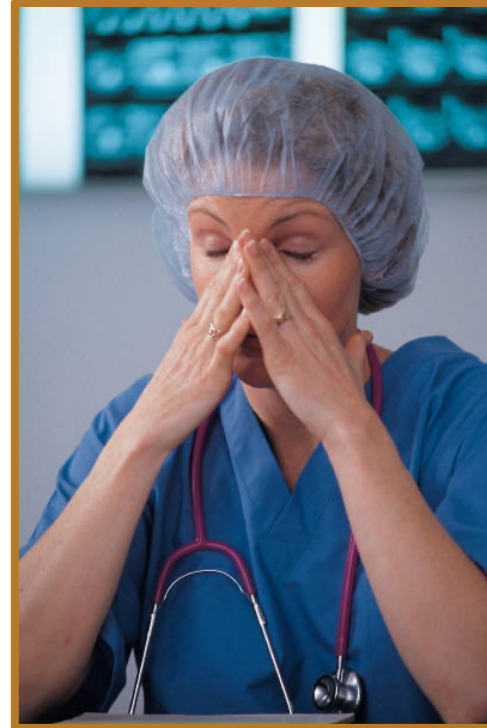
Reasonable Accommodation

- Not required to lower production standards to make an accommodation.
- Not required to impose an undue hardship on the operation of the employer's business (i.e., significant difficulty or expense).



Disability Stories From Your ED?

- The shaking doctor
- Others???





Hypothetical (Not Really)

- Charge nurse notifies you that 3 nurses are concerned because a physician is administering narcotics to patients. Physician orders meds; she tells the nurse to give her the meds and she will administer to patients.
- A nurse advises you that one of her patients told her that he only got one of the two meds ordered for him.

WHAT DO YOU DO?



Action

- Call counsel.
- Conduct a chart audit to review physician history of prescribing narcotics.
- Put physician billing on hold – potential fraud and abuse issue.
- After results – meet with physician (2 people), review performance and reiterate policy that physicians do not administer narcotics to patients.
- Document meeting.
- Continue to monitor and evaluate.



Still More

- You receive 2 more notes from nurses regarding your provider's continued request for narcotics to administer directly to patients.

NOW WHAT?



Action

- Another meeting (again 2 people present) advising of the nurses' concerns, reiterating earlier meeting and policy on physicians administering narcotics.
- Express concern re: substance dependency issue.
- If willing to disclose, offer to get her help (in this case, she denied).
 - Not required to offer this because action was tied to misconduct on job.



Still More!!!

- You receive a patient complaint claiming that same physician took 3 Percocet pills out of the patient's pill bottle without consent.
- The patient reported the incident to the nurse and the hospital is investigating.

WHAT DO YOU DO?



Action

- Call physician and advise of the allegation (again with 2 people) – give opportunity to respond to allegation.
- Take off schedule until investigation concluded.
- Once hospital and ED group concludes investigation, meet again (2 people) and advise as to decision.
 - Here it was termination w/ cause unless she wanted to resign effective immediately in writing; ED group agreed to waive the notice period.



Fair Labor Standards Act

- Primary federal law governing wages and hours.
- Our issue is the rules for overtime pay for APPs.
- For ‘non-exempt’ hourly workers, overtime is paid at time and a half.
- Hotly debated, but recent court decisions look to the Dept. of Labor which holds that APPs must be paid on a salary basis to be exempt from overtime pay.



Family Medical Leave Act

- Under the FMLA, employer required to allow up to up to 12 weeks of unpaid leave:
 - To care for a new child
 - To care for a seriously ill family member
 - To recuperate from serious health condition
- Requires return to same or similar position after leave.



Religious Accommodation

- An employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose a hardship.
- Obligation arises when provider makes the inquiry (no unilateral duty to take action).





Examples

- Single coverage, leaves five times per shift to pray. Has not discussed with you.
 - Needs every other weekend off.
 - Cannot work after sunset.
 - Case: A physician leaves the fast track in the middle of his shift to go pray for an hour.
-
- **Others?**



Tattoos and Piercing

- However, there are no current laws that prohibit discrimination against people with visible tattoos, body piercings, unnatural hair colors, unique hairstyles, and so on. There have been some grassroots efforts to make body art and body modification protected classes, but those efforts have not been successful.
- Almost across the board, employers have the legal right to discriminate against tattooed employees and create policies related to workplace dress, unless they conflict with religious accommodations.



State Statutes

- State statutes also provide extensive protection from employment discrimination.
- Some laws extend similar protection as provided by the federal acts to employers who are not covered by those statutes.
- Other statutes provide protection to groups not covered by the federal acts.



Equal Opportunity Employment Commission (EEOC)

- Interprets and enforces:
 - Equal Pay Act
 - Age Discrimination in Employment Act
 - Title VII
 - Americans With Disabilities Act

Application for Employment

Please indicate any accommodations for persons with disabilities in the hiring process. If your disability prevents you from completing this form, please let us know, and we will provide assistance.

Name: _____ Date of Application: _____
 First Name: _____ Middle Initial: _____
 City: _____
 Are you 18 years of age or over?
 Yes No If No, Date of Birth: _____
 Education: _____

Education: _____
 Date of Birth: _____

Recruiting, Interviewing & Hiring





Permissible Scope Of Inquiry

- Questions should be focused on whether the applicant meets the job requirements.
 - Education
 - Expertise
 - Training and work experience
- Essential job functions.
- GOOGLE for litigation!!!





Beware Casual Comments

- “How old are you”
- “So tell me about your home life.”
- “How many children do you have?”
- “How many children do you intend on having?”
- “Are you married?”
- “Tell me about your social activities”



Impermissible Scope Of Inquiry

- Direct or indirect inquiries related to:
 - Age, race, color, national origin, disability and sexual orientation.
 - Marital status, number and age of children, future childbearing plans and plans for childcare.
 - Medications, health problems, hospitalization
 - Birthplace, height, weight, religion, citizenship, native language



Impermissible Scope Of Inquiry

- Membership in organizations related to race or religion
- Information concerning prior arrests
- Compensation history, financial status - including home ownership
- Graduation dates for education (i.e., age)



Corporate Carelessness

- Duty to use reasonable care in hiring employees.
 - Negligent hiring
 - Negligent retention
- Third party can sue you for failing to use reasonable care in hiring employees.
- Example: Conviction for sexual offense.



Termination





Documentation

- Personnel files should contain hiring, promotional, disciplinary, orientation and termination paperwork.
- All paperwork should be acknowledged by employees before being placed in file.
- Refusal to sign should be witnessed by two managers.
- Keep files for 6 years in the event of breach of contract claim.



Steps To Termination

- Will the employee be surprised by the decision?
If so, not enough groundwork has been done.
- Does an objective look at the employees file support termination?
- Is the employee in a protected class?
- Review the contract for severance agreements.
- Consider giving notice with a pre-arranged notice period rather than termination.



How To Fire

- Termination decision should be communicated in person.
- Two employer representatives should be present to ensure that there is a witness.
- Document the discussion immediately after its conclusion.
- No positive comments regarding job performance.



How To Fire

- Don't debate the decision.
- No detailed discussions of the reason for termination.
- Allow the employee to leave at any time to avoid false imprisonment accusations.
- Make assurances about benefits owed.



How To Fire

- Recommended to immediately pay all wages through the date of termination at the time of termination.
- Have financials prepared prior to the meeting.
- Provide information regarding COBRA health benefits, stock information, etc.
- Consider a resignation severance package in exchange for a Settlement Agreement and Release.



Termination

- The cost of litigation is far more than a separation agreement.



Someone Else Is Hiring An Employee





Intentional Misrepresentation – A Positive Reference Could Cost Millions

- Anesthesiologist was a member of a medical group.
- He was found to be abusing Demerol.
- Hospital stopped allowing him to practice and the medical practice fired him.
- Termination letters stated “... 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 your patients at significant risk...”
- The anesthesiologist applied for a job at a facility in another state.



- The facility initiated a background check, including examining referral letters from the prior medical practice and hospital where the doctor previously practiced.
- Letters from two partners stated that the doctor “was an excellent anesthesiologist” ... “recommended him highly” ... and that he is sure to be “an asset to the facilities anesthesia service.”
- The hospital’s response was brief: “Our records indicate that he was on the Active Medical Staff ... in the field of Anesthesiology from (date)...(date).”



- The facility hired the physician.
- A short time later one of this doctor's patients was severely injured.
- He admitted that he had been diverting an using Demerol... and that he had become addicted..."
- The injured patient's family sued the doctor and the facility in cases that were settled.
- The facility and its insurer then filed suit against the doctor's former medical practice and the hospital charging "intentional misrepresentation, negligent misrepresentation, and general negligence."



- A jury awarded the facility and the insurer \$8.24 million.
- A US Appeals Court found the hospital was justified in providing “name, rank, and serial number” in its reference letter.
- It exonerated the hospital because it had no affirmative duty to disclose negative information about the doctor.
- However, the court upheld the decision against the medical practice. “The defendants owed a duty to avoid affirmative misrepresentation in the referral letters.”



- “although a party may keep absolute silence and violate no rule of law or equity,.. If he volunteers to speak and to convey information which may influence the conduct or another party, he is bound to disclose the whole truth.”
- Kadlec Medical Center v. Lakeview Anesthesia Associates and Lakeview Medical Center. US Ct of Appeals (5th Circuit) No. 06-30745



If You Are In This Situation:

- Get professional input (attorney or HR professional)
- State law specific.
- Obtain permission from former employees.
- Stick to the facts, period of employment, positions, duties, salary and whether the individual would be re-employed in the future (if asked)
- Don't do it over the phone, this should be in writing.



Resources

- *The Employer's Legal Handbook*, 15th Ed. NOLO by Fred Steingold.
- *The Essential Guide to Federal Employment Laws*. 6th Ed. By Guerin & DePo.







Thank You

dsullivan@thesullivangroup.com

