

CHAPTER 3

Risk Management in Employment

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We live and work in a litigious society.¹

Box 3-1

In the healthcare workforce, race was cited in 2,934 (39.6%) bias claims, followed by 2,642 (35.7%) claims of “retaliation.” Disability bias was alleged in 2,074 (28%) complaints, sex bias was alleged in 1,812 (24.5%) of complaints, age bias was alleged in 1,560 (21.1%) of complaints, and national origin bias was alleged in 794 complaints (10.7%). Violations of Title VII of the Civil Rights Act were alleged in 5,278 (71.3%) of all bias complaints filed in the healthcare sector.²

To insulate organizations, employees, patients, and the public from harm and liability, we must develop and enact policies and procedures in the workplace. The procedures by which an enterprise selects, appoints, promotes, demotes, disciplines, and separates employees often define its vulnerability to risk and litigation. Risk can emanate from a host of compliance issues across a broad range of areas, including age, color, disability, gender, race, and sexual orientation (Title VII of the Civil Rights Act). Various statutes impose obligations on employers (e.g., Consumer Credit Protection Act of 1968, Employee Retirement Income Security Act of 1974, Fair Labor Standards Act of 1938, Family and Medical Leave Act of 1993, Health

Insurance Portability and Accountability Act of 1996, Immigration Reform and Control Act of 1986, National Labor Relations Act of 1947, Occupational Safety and Health Act of 1970, Sarbanes-Oxley Act of 2002). Despite well-publicized laws and regulations and notorious gaffes by healthcare employers over the years, history continues to repeat itself, and our litigiousness remains well fed.

LESSONS STILL TO BE LEARNED

Before a survey of trends in legal risk management is undertaken, incredulity is a key response to a review of several cases over the last few years. These examples serve as an instructive reminder of how easily employers can create liability and, conversely, how easily they can avoid it.

In January 2010, an assisted living center paid a \$43,000 settlement to the Equal Employment Opportunity Commission (EEOC) to resolve a complaint wherein a Muslim housekeeper was fired rather than allowing her to wear her hijab (head scarf).³ The employer chose to make the employee decide between her religious beliefs and her job.

Takeaway: Insensitivity to the employee’s personal rights and needs proved costly, and

rigidly bureaucratic adherence to dress standards prevailed over providing a simple accommodation.

One regional EEOC office estimates that one-third of the prospective plaintiffs who intend to file a complaint bring some sort of digital evidence—emails, text messages, live recordings.⁴ The classic example of resort to electronic support for a plaintiff's case harkens back more than a decade to the 1996 Texaco case of race discrimination in which the company was embarrassed and had to pay in excess of \$140 million in damages and other program changes.⁵

Takeaway: Training, enforcement of affirmative action policies, and an equal playing field would have avoided this costly humiliation.

Box 3-2

In 2004, Abercrombie and Fitch agreed to pay \$40 million to class-action litigants (employees, would-be employees, and minority job candidates) who claimed they had been dissuaded from applying for positions. The company also paid \$10 million in costs, changed its marketing, and agreed to desist from creating a predominantly white sales staff.⁶

In an age discrimination complaint, an absence of management documentation supporting the personnel changes relating to the plaintiff and willful indifference—if not active participation—by upper management in a scheme to pare the workforce that created a hostile working environment through allegations of poor performance of older workers, supported punitive damages in an award totaling almost \$2.5 million.⁷

Takeaway: Integrity in management and conscientious documentation ensure ethical and justifiable decisions.

Healthcare employers that accede to patients' requests or demands for white caregivers will be found liable for race discrimination.⁸ The current trend is to emphasize patient satisfaction, but it may not take precedence over discriminatory demands.

Takeaway: Prioritizing customer preferences over the maintenance of a hostile working environment will result in liability.

In 2009, the California Supreme Court upheld compensatory damages of \$500,000 and punitive damages of almost \$2 million for reprehensible conduct by a supervisor. The manager told an employee who had been diagnosed with a medical condition that she was “disgusting” because she dug her nails into her arms as a result of a nervous disorder, criticized her body odor (which was caused by medication she was taking for a panic disorder) in front of coworkers, and ostracized her by ignoring her greetings and not including her when the supervisor brought in specialty food items, holiday trinkets, or travel souvenirs. Upper management knew of this treatment and did not respond to the employee's complaint, constituting “management malfeasance.”⁹ It is often said in such cases that Title VII of the Civil Rights Act, which prohibits recognized types of illegal discrimination, is not a civil code.

Takeaway: Tolerance of harsh or relentless incivility can result in liability for discrimination.

Two nurses, who were responsible for quality assurance and regulatory compliance, anonymously reported a physician to the state medical board, alleging that he had sutured a rubber scissors tip to a patient's finger, used an unapproved olive oil solution on a patient with a highly resistant bacterial infection, failed to diagnose appendicitis, and conducted a skin graft in the emergency room without surgical

privileges. They did not name the patients in their complaint, but referenced patient numbers. Winkler County Memorial Hospital in Texas terminated the nurses' employment. In an unprecedented case, the physician persuaded his friend, the sheriff, to obtain a search warrant and found the anonymous allegations on their computers. The nurses were indicted for misuse of official information, but a jury held in their favor after only one hour of deliberations. The hospital settled the case with the nurses for \$750,000. The hospital was subject to administrative fines for violations of Texas laws regarding the regulation of hospitals from the Texas Department of State Health Services based on its on-site investigation pursuant to the nurses' complaints.¹⁰

Takeaway: Miscreants must be recognized and their incompetence and manipulation stopped. Employers must resist knee-jerk responses to employees who report alleged wrongdoing in good faith.

Cases of this nature abound, even though they are easily avoided through prudent and reasonable management. Employers need to refocus their responses in an age where supervisors abuse their authority and employees know their rights. An examination of several current banner issues of liability follows.

WRONGFUL DISMISSAL OR DISCHARGE

A rapidly growing area of employer liability centers on allegations of wrongful dismissal or discharge. Approximately 65% to 70% of the workforce are considered "employees at will," meaning that "an employer may dismiss an employee hired for an indefinite period of time for any reason or no reason at all without incurring

liability to the employee."¹¹ The Minnesota Court of Appeals, in *Stagg v. Vintage Place, Inc.*,¹² held that when an employee handbook includes a specific progressive disciplinary policy, an employee's at-will status is modified and some job security is presumed.

Nevertheless, an employer may not discharge an employee for an unlawful reason, such as racial discrimination. Historically, employers had broad powers to dismiss employees who were employed at will (i.e., without any contract). Those guidelines permit termination of an employee for a bad reason, a good reason, or no reason at all.¹³ In recent years, however, courts and state legislatures have whittled away at this previously untouchable doctrine. Exceptions to the employment-at-will rule have been expanding based on a variety of legal concepts, including claims in contract, torts (civil wrongs), and the fact that a particular termination violates public policy (e.g., termination after whistleblowing in defined statutory instances,¹⁴ or covered health and safety matters, or retaliation).¹⁵

A number of courts have found an implicit contract assurance of job security in employer communications such as employer policies, handbooks, oral assurances, industry customs, employer conduct, and the duration of employment. Most frequently, the claim is based on a personnel manual or handbook.¹⁶ A disclaimer in an employee handbook may, in some cases, override other provisions that appear to recognize proprietary rights in an employee.¹⁷ Although courts do not always find that these documents establish contracts between an employer and its employees, employment contracts have been inferred from them in some instances; the more detailed the document's descriptions of disciplinary procedure, the more likely it will be

found to be an implied contract.¹⁸ Furthermore, courts have used the legal concept of an implied covenant of good faith and fair dealing to find an existing contractual relationship restricting an employer's decisions to dismiss an employee.¹⁹

Employees cannot be terminated in violation of public policy, even at-will employees. To make a valid claim for such a violation, the employee must present clear and convincing evidence that he or she engaged in an act encouraged by public policy, or refused to act in a way prohibited or discouraged by public policy,²⁰ and that employer retaliation for this act was the factor motivating the discharge. To qualify as a discharge in violation of public policy, the issue at stake must affect the public at large, not just the individual employee. Moreover, the public policy relied on must be unambiguous; in some jurisdictions, it must be based on a statute. Statutes cover wide-ranging public policies including discharge or discipline for exercising statutory rights based on FMLA, worker's compensation, pregnancy, disability, gender, and sexual orientation; these laws vary by state and among smaller government entities. In some states, termination in violation of public policy exposes the employer to punitive damages. The wide-ranging potential for liability is not clearly defined, as illustrated in cases where violations of certain public professional ethics codes serve as a basis for such liability.²¹

SEXUAL HARASSMENT AND GENDER DISCRIMINATION

Sexual harassment in healthcare workplaces presents a unique challenge as a result of the intimate nature of patient care as well as the physically close working environment of healthcare workers. As in most workplaces, the existence

of a power differential also creates a clear and present danger.

“Hostile environment” sexual harassment occurs when conduct has the purpose or effect of unreasonably interfering with a person's work environment based on actions or word with a sexual connotation.²² “Quid pro quo” sexual harassment emerges when conduct causes a “tangible employment action” or a change in terms and conditions of employment based on a refusal to comply with a supervisor's sexual demands.²³ The key is the existence of a tangible employment action; under *Faragher v. City of Boca Raton*,²⁴ an employer is vicariously or per se liable for sexual harassment when such a situation exists. Where no such adverse employment action occurs, the employer may defend itself based on a bifurcated affirmative defense: (1) It exercised reasonable care to prevent and correct any sexually harassing behavior (generally assumed to mean having a written and promulgated policy with training and promptly and thoroughly investigating claims of which the employer receives cognizable notice²⁵) and (2) the employee failed to bring the complaint to the employer's attention. Healthcare employers must exercise conscientiousness to preserve this defense; notice of potentially actionable behavior has been recognized in the filing of a complaint, the oral recital of a complaint to a supervisor or a person empowered to investigate, the service of a summons, or pervasive sexual harassment in the organization (the employer “knew or should have known about the conduct”).²⁶ Anecdotally, it appears that hospitals often serve as the foci for claims—many meritorious—of sexual harassment.

In 2009, Flushing Hospital Medical Center was found vicariously liable for the sexual harassment of a nurse by an attending physician

Box 3-3

Lutheran Medical Center in Brooklyn, New York, ignored the complaints of eight nurses who claimed that a physician in the hospital's Employee Health Center engaged in inappropriate medical exams and asked invasive questions during the pre-employment process. When the hospital did not respond to their complaints, the nurses sought relief from the EEOC, which interviewed many nurses who had been recently hired. The EEOC determined that the physician, who eventually lost his license to practice medicine in New York, engaged in similar conduct on a continuing basis. The hospital settled the matter in 2003 for \$5,425,000 distributed to 51 nurses and instituted reforms to deter future violations. The new chief executive officer (CEO) initiated training for employees, an anonymous hotline, female chaperones for all employment-related exams, and a rule prohibiting breast and gynecological exams in pre-employment screening.²⁷ This expensive lesson could have been averted if the corporate culture had been one that was committed to upstanding conduct and did not gloss over rank-and-file employees' concerns.

when its medical director, who had allegedly witnessed the errant physician spinning her around and trying to force a kiss onto the plaintiff nurse, and who was subsequently chosen to handle the investigation and correct any improprieties, took no action. Moreover, the plaintiff alleged that the doctor had assaulted her at other times and that his proclivities were well known to hospital management, which did nothing to curb his behavior. After a jury trial, the plaintiff was awarded \$8 million in damages, plus \$5.5 million in punitive damages. The first award was reduced to \$750,000, and the punitive damages were dismissed because the hospital—under the direction of the same medical director—obtained the doctor's resignation within four days of the plaintiff's written

complaint.²⁸ This case illustrates that turning a blind eye to unfiled charges amplifies liability but that prompt action upon receiving actual notice may facilitate diminution of damages, especially where, as here, the hospital was “teetering near financial ruin.” Nonetheless, the “blind eye culture” that prevails in many hierarchical hospital settings can contribute to the prevalence of such claims.

The Flushing Hospital message was not transmitted to Brigham & Women's Hospital in Boston. In the latter facility, a physician was victimized by other physicians, putting into perspective the notion that liability can arise only when the relative power of the parties is plainly disparate. A jury awarded a neurosurgeon \$1 million based on a hostile sexual environment, \$600,000 for retaliation, and more than \$1.3 million in attorneys' fees and tortious interference with advantageous relations; the Federal First Circuit Court of Appeals affirmed the awards in total.²⁹ The court also termed the conduct of one doctor “blatantly sexist and offensive.” Its recital of some of the facts and its conclusions are instructive:

2002–03: Day ignores Tuli at conferences by stating, “[L]et's ask the spine guys, Eric and Marc, what they think,” and omitting her despite the fact that she is also a spine surgeon.

2004: At a graduation dinner and in front of a female resident, Day asks Tuli, “Can you get up on the table to dance so you could show them how to behave?”

2004: In the summer, Tuli attends a bachelorette party for a coworker and sees a blow-up doll with a picture of her face attached to it.

2004: Day makes comments on different occasions: “You're just a little girl, you know,

can you do that spine surgery?” “Oh, girls can do spine surgery?” “Are you not strong enough to use the hand instruments?”

2005: In February or March 2005, with his arm on Tuli’s back, Kim says, “Why don’t we leave this place and go to the Elliott Hospital so I can give you an oral exam”; “I think you’re really hot”; and “I imagine you naked.”

2005: Early in 2005, Day sits in on Tuli’s teaching conference and disagrees with Tuli’s lecture. He does this more than once, and Tuli does not believe that he did so during male doctors’ teaching conferences.

2005: Residents, who are supervised by Day as residency director, ignore Tuli’s pages, fail to assist her on rounds, and fail to show up for clinical duties. In the summer, Tuli notices that she is given less-experienced, junior residents for her cases.

6/05: Tuli becomes aware of a hospital-affiliated party planned with “strippers and cages and beer kegs.” Although it was supposed to celebrate the incoming chief residents, a new female chief resident was excluded. Day approves of the party and of outside funding for it.

2005: In September or October, Day and Tuli meet to clear the air, and Day says, “Our relationship is like that of lovers and you’ve cheated on me,” with his hand on her arm; he also calls her “deranged.” When she attempts to shake his hand at the end of the meeting around 10:00 P.M., he gives her a prolonged hug.

11/05: A resident throws Tuli into the scrub sink and then the garbage.

12/06: Kim states, “Oh, could you wear one of those belly dancing outfits and show us a dance?”

2007: Kim states that he would “like to have the opportunity to sexually harass” Tuli; Tuli observes him fondling a physician assistant at a department event.

5/07: Day looks in on Tuli’s spine surgery and makes “some comment to the effect of whether [she] was able to do that case because [she] was a girl, are you sure you can do that, you’re just a girl, something to that effect.”

8/07: Day bars Tuli from spine oncology research, saying that he had “a guy in mind” for the job.

. . . Tuli also reported that Day had given her other prolonged hugs and had held her hand as they walked at work. She also testified that Day had questioned her authority in multiple teaching conferences and had made comments repeatedly about Tuli “being a little girl” and questioning whether she could do a “big operation”; the incidents noted here were particular examples of this recurrent behavior for which she could remember specific dates.

The “accumulated effect of incidents of humiliating, offensive comments directed at women and work-sabotaging pranks, taken together, can constitute a hostile work environment.” *Tuli repeatedly complained about these acts, but the hospital did nothing to prevent their repetition* [emphasis added]. That Tuli managed to get her work done despite the harassment does not prevent a jury from finding liability. The jury was entitled to find that a hostile workplace had been tolerated and that the hospital was liable.

This case serves as a stark reminder that ignoring such disrespectful conduct will no longer pass muster. Allowing such conduct to continue with impunity invites litigation. The case was

exacerbated by the fact that an alleged harasser was directly involved in the credentialing process, buttressing his malevolent imprimatur on her professional aspirations; his input resulted in Tuli's referral for anger management and a requirement to obtain approval from the Physician Health Service, an outside agency that would evaluate her and recommend a course of action. These machinations should be red flags for any healthcare employer. Hospitals that directly employ physicians should take note.

According to the EEOC, Grays†Harbor Community Hospital in Aberdeen, Washington, failed to take appropriate action despite repeated complaints to upper-level management that a supervising pharmacist was sexually harassing at least four pharmacy technicians. The agency's investigation found that the supervisor made offensive sexual comments, inflicted details of his sex life and masturbation habits on the technicians, and showed explicit material from the Internet to the women. He also was known to approach a woman from behind to whisper in her ear, block her pathway, and rub her back, legs, and arms, the agency said. The hospital agreed to a \$125,000 settlement in 2011.³⁰

In response to complaints from 10 current and former employees, according to the EEOC, California's Garfield Medical Center allegedly retaliated or terminated the workers in lieu of taking action on their complaints. One male Admitting employee subjected them to inappropriate touching, propositions for sex, graphic discussions of sexual activities, obscene pictures, and comments regarding female body parts, including those of underage patients. He was not terminated for two years. As a result of this combination of alleged nonfeasance and malfeasance, in 2011 the hospital, without admitting

Box 3-4

A male nurse, who eventually was promoted to a supervisory position, made unwanted sexual advances and sexual jokes and innuendos to female colleagues and subordinates. Women who rejected the advances or complained about harassment were given more difficult job assignments and had their work performance unfairly disparaged. A nurse who made a written complaint detailing acts of alleged sexual harassment by the supervisor was fired the following day. Another woman was given a poor evaluation because she complained about harassment. The settlement terms required First Street Surgical Partners to pay \$210,000 in relief to compensate three women who filed charges of discrimination with the EEOC. Additionally, \$80,000 was distributed among other current and former employees and contract workers who may have been subjected to sexual harassment or retaliation, and the male nurse whose actions provoked complaints was permanently barred from working for First Street. The decree also required other corrective actions, including the demotion of the director of nursing, the hiring of a human resources specialist, and training designed to prevent future acts of sexual harassment or retaliation.³¹ In this case, an unhappy corporate culture issue rears its ugly head once again.

any wrongdoing, agreed to pay the 10 women \$430,000 and to establish a fund of another \$100,000 for any unidentified victims.³²

AIDS AND THE HEALTHCARE WORKPLACE

AIDS in the healthcare workplace has patient implications as well as inspires employment concerns. "Persons living with HIV/AIDS have to endure not only archaic attitudes that they present a health threat, but also moral disapproval of their behavior. Patients and coworkers often stubbornly hold onto these stereotypes."³³

Due to the combination of fear and moral disapproval, workplace discrimination against those diagnosed with HIV is considerably greater than discrimination against other disability groups.³⁴ AIDS, however, is classified as a disability under the Americans with Disabilities Act and the Rehabilitation Act.³⁵

Not much has changed with respect to AIDS in the healthcare workplace since the decision in *State University of New York v. David Young*.³⁶ In *Young*, a respiratory therapist intentionally injected the same needle into two patients, twice, thereby placing the already gravely ill patients at further risk of contracting AIDS or hepatitis. This egregious violation of patients' rights and the consequent exposure to transmission of disease were the primary motivations for the court to reverse the arbitrator's reinstatement of the employee and uphold the hospital's proposed penalty of termination.

The concern surrounding the contagiousness of AIDS continues to inflame healthcare employers' responses to employees with the condition, although the recent case law is sparse. In *Couture v. Belle Bonfils Memorial Blood Center*,³⁷ a phlebotomist in training disclosed that he was HIV positive, and management sought to place him in a different position, that of a product management technician, where the pay rate would be comparable. The plaintiff was not happy in the new position and sought to return to his phlebotomist role, but that was not made available. The plaintiff resigned. The court held that leaving the employ of the blood center was the plaintiff's choice; reassignment to an undesirable job may constitute an adverse, employment action, thereby triggering potential discrimination, but reassignment to a position to which the plaintiff initially consents but does not desire does not qualify. Because no adverse

employment action had been taken, the court ruled, no discrimination had occurred. This case remains good law, but it should be considered in the context of other settled law that fear or aversion to a person who is an employee is not a satisfactory basis for taking adverse employment action; blind reliance on customer preference without some intervening bona fide occupational qualification will not survive judicial scrutiny.³⁸

The wisest course for healthcare employers is to educate employees so as to dispel myths about the disease. This topic appears to meld naturally with the mandated annual review of universal precautions. Moreover, there are concerns, within the framework of informed consent, about whether HIV-infected physicians performing invasive procedures must disclose this status to patients.³⁹

DUE PROCESS

Every healthcare employer will confront absenteeism, tardiness, negligence, insubordination, theft, falsification of records, or substance abuse at some point in time. Discipline or termination may be warranted in such cases. Fairness and predictability should govern any response if the employer wishes to avoid legal liability. "Due process" requires that there be (1) a clear rule against the misconduct; (2) a reasonable rule; (3) a thorough and objective investigation in which the employee has the opportunity to offer his or her side of the story; (4) notice of the charges and penalty sought; and (5) an opportunity to respond or appeal in some fashion. To achieve these zones of relative safety, employers usually apply progressive disciplinary rules that include ascending penalties where feasible. If these procedures are observed

evenhandedly, the employer is in a strong position to defend itself against a claim of lack of due process. Note, however, that application of progressive discipline may subvert an employee-at-will status.

WORKER'S COMPENSATION _____

Worker's compensation is a mutually beneficial social insurance system whereby the employer agrees to underwrite an injured employee's medical costs and a significant portion of a worker's salary in exchange for the waiver of the employee's right to sue the employer.⁴⁰

Worker's compensation is an expensive program that has not fully realized its potential. More than merely a shield for employers against employee lawsuits and a concomitant safety valve for injured workers, it can be used to avoid accidents and create a safer and more efficient workplace. This effort has generally not been undertaken,⁴¹ to the detriment of struggling healthcare employers and injured workers. When one considers the overall costs of worker's compensation to healthcare employers,⁴² it behooves them to reduce the associated costs through reasonable means.

Unfortunately, worker's compensation fraud is rather simple to perpetrate, and the surrounding circumstances tend to offer incentives to those who understand its lack of priority in many circles. For instance, many cases of "soft fraud" involve claiming false injuries, malingering, filing claims based on injuries actually received off the job, and inflating the alleged harm. The allure of these deceitful actions can be better understood in light of recent surveys. According to the Coalition Against Insurance Fraud, one in five American adults—approximately in 45 million people—says it is

acceptable to defraud insurance companies under certain circumstances, although four of five adults think insurance fraud is unethical.⁴³ Nearly one of four Americans says it is not unusual to defraud insurers (8% say it's "quite acceptable" to bilk insurers, and 16% say it's "somewhat acceptable").⁴⁴ This environment intertwines with the fact that "[m]any insurance companies unwittingly encourage fraud by paying suspicious claims rather than fighting them. Insurers sometimes reason that paying the suspicious or nuisance claim is less expensive than paying the legal fees to fight it. Insurers also fear fighting suspect claims for fear of paying multi-million dollar 'bad faith' lawsuits if they lose."⁴⁵ Because most companies carry worker's compensation insurance, their motivation to aggressively pursue wrongdoers is significantly diminished. Finally, worker's compensation fraud is viewed by those who engage in it as a low-risk activity because investigative conscientiousness is rarely implemented, and the eventual penalties are generally relatively lenient.⁴⁶

Healthcare employers can reduce costs significantly through a determined return-to-duty program that detects credible red flags.⁴⁷ Their resolve should also be reinforced with investigations where reasonable cause exists to believe that an employee has made a false claim. The workplace culture should be developed to encourage personal accountability for the team and individual goals. Supervisory training should inculcate the professional obligation to root out miscreants, and this responsibility should be explicitly included as part of supervisors' performance expectations. Using trusted medical providers to assess the genuine extent of objective medical injury buttresses these efforts, as does vigorous pursuit of disciplinary charges and, where appropriate, criminal

sanctions. A clear deterrent effect has been observed in workplaces that target this misconduct.⁴⁸ Healthcare employers that fail to engage these tools relinquish an important source of morale and revenue.

RETALIATION

“Revenge turns a little right into a great wrong.” —German proverb

“Before you embark on a journey of revenge, dig two graves.” —Confucius

The unique quality of retaliation law arises because even when the underlying charge of discrimination or wrongdoing is not proved, because retaliation may still take on a life of its own. It can survive the defeat of a plaintiff’s underlying claim and continues to represent a potential liability. Moreover, the claim of retaliation can be more easily proved, because retaliation does not require proof of repugnant racism, sexism, ageism, or other inherently repulsive form of employment practice, and the underlying elements of the claim are within every juror’s life experience.

Box 3-5

A retaliation claim includes three elements: (1) the claimant engaged in protected activity-opposition or participation activity; (2) the employer took adverse action against the employee; and (3) a causal connection exists between the protected activity and the adverse employment action.⁴⁹

This exposure is magnified when one considers that the EEOC received double the number of retaliation charges over the past decade compared to prior decades and more

charges of retaliation than any other type of complaint. Today a claim is rarely lodged for any form of discrimination without appending a claim for retaliation. The offense in such cases can arise from any kind of discrimination—race, color, gender, sexual harassment, disability, age, religion, sexual orientation, and so on. Because many charges cross over several types of discriminatory acts, retaliation can also follow suit and replicate itself.

Plaintiffs often prevail in retaliation claims where they have not succeeded with respect to the primary claim of discrimination; that is, the secondary charge takes on a life of its own. The reasons for this counterintuitive result are not difficult to understand: Retaliation does not require proof of discrimination. More to the point, juries empathize with persons who are the subject of retribution and often reward them with generous damages,⁵⁰ occasionally (depending on the statutory provisions) punitive damages that can increase the employer’s exposure.⁵¹

The reasons for this evolution are clear. People—perhaps, especially supervisors—are human, and the default response to claims of wrongdoing generally involves some knee-jerk reaction that provides the named wrongdoer with a sense of “evening up the score.” Some supervisors resort to this behavior because they deliberately wish to create a hostile environment for the person making the charge; others may do so at a subconscious but nonetheless legally cognizable level. Recently, for example, UBS lost a verdict of \$10.6 million based on sexual harassment claims that were met with retaliation.⁵² The damages—\$10 million for punitive damages, \$350,000 for sexual harassment, and \$242,000 for retaliation—would eventually be pared down to conform to the statutory cap for punitive damages of \$500,000.

Unless supervisors are trained and then pointedly reminded at the point when an employee files a complaint that retaliation is not only prohibited but also an easy trap to fall into, the EEOC retaliatory count will continue to grow.⁵³ Employer liability is at risk if these steps are not adopted to ensure the vitality of a policy against retaliation.

In *Yanowitz v. L'Oreal USA, Inc.*,⁵⁴ a male manager of a cosmetics company, dissatisfied with the attractiveness of a female sales associate, instructed the associate's immediate supervisor to terminate her and "get [him] somebody hot." When he later returned and found that the inadequate sales associate was still working, he directed the immediate supervisor to an attractive blonde woman and instructed her to replace the dark-skinned sales associate with an employee who looked like the blond woman. She refused. This series of exchanges occurred shortly after the plaintiff had been named "Sales Manager of the Year," and she began to experience implied threats of termination, reformulation of how she should supervise her sales district, and an undermining of her managerial effectiveness. She left the company, claiming stress, and sued based on retaliation. The California Supreme Court held that the case should be heard by a jury because refusal to follow what the plaintiff reasonably believed was a discriminatory directive is protected conduct, and it affected the terms and conditions of her employment. The plaintiff did not have to utilize legal terminology or file a complaint to qualify for shelter from retaliation.⁵⁵ In 2005, this finding was an expansion of retaliation law; since then, the U. S. Supreme Court has further extended the reach of the prohibition.

The U.S. Supreme Court has recently ruled in several significant retaliation cases that have

consistently expanded the rights of plaintiff-employees. According to the decision in *Burlington N. & Santa Fe Railway Co. v. White*,⁵⁶ retaliation occurs when a reasonable employee would have found the challenged action materially adverse, or if it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination. The Court noted that this finding does not immunize the plaintiff from petty slights or minor annoyances that all employees experience: Snubbing and personality conflicts are not actionable. Conversely, changing a schedule of a mother with school-age children may qualify as non-petty and material; excluding someone from a weekly training lunch that fortifies professional advances might deter someone and qualify as retaliation. This standard clarifies and lowers the bar for employee-plaintiffs.

In *Crawford v. Metropolitan Board of Education of Nashville*,⁵⁷ after the plaintiff answered questions honestly in a sexual harassment investigation in which the new employee relations director was the target of investigation, she was subsequently charged with fraud and terminated from employment. So, too, incidentally, were two other witnesses who answered questions in the same inquiry. In essence, the Court decided that the plaintiff need not initiate her own complaint to be protected under Title VII of the Civil Rights Act. The Court held that merely answering questions in an internal investigation without filing a formal complaint is a protected activity. Eventually, the plaintiff received an award of \$1.5 million. Employers should revise their policies if they do not explicitly cover all cooperative witnesses, and they should provide effectual shelter for those employees. This logic requires that healthcare employees remain vigilant when they conduct

investigations, because under *Crawford*, witnesses are instantly transformed into potential plaintiffs if they participate in the process in good faith.

In a case brought pursuant to the Fair Labor Standards Act (FLSA), *Kasten v. Saint-Gobain Perf. Plastics Corp.*,⁵⁸ the Supreme Court determined that an *oral* complaint triggers insulation from retaliation. *Kasten* contended that he was terminated after complaining about the location of time clocks—specifically, that their placement prevented employees from earning credit for time donning and removing work clothes, a subject that is subsumed by the FLSA. He was terminated allegedly for failing to clock in and out after being warned. The language in the statute, “file any complaint,” provides for a broad interpretation that was deemed to include verbal complaints. Federal and state statutes have minute variations that may allow for similar applications, so employers should regard all complaints, including “informal” grievances made to supervisors or managers, as potentially sheltering employees from retaliation.

Supporting another person who is a victim of sexual harassment is also protected conduct.⁵⁹ In the context of a substance abuse rehabilitation facility, this lesson was learned through costly litigation in which the compensatory damage award for emotional distress was reduced to \$175,000 (from \$764,000), the lost wages award was \$421,657, the lost fringe benefits award was reduced to \$11,658, and the punitive damages award was reduced to \$200,000 (from \$350,000). The differences, one can be certain, were made up in attorneys’ fees.⁶⁰ Notably, the only thing the coworker did in *Mugavero* was to inform the supervisor that a coworker intended to bring a sexual harassment

complaint against him, and she thereafter supported it. The supervisor responded by referring her to the New York State Office of Professional Discipline and terminating her. Retaliation complaints beckon.

In *Thompson v. North American Stainless LP*,⁶¹ the Supreme Court greatly expanded the employer’s potential exposure when it ruled that an adverse employment action against the fiancé of an employee who had filed a charge against her employer was cognizable retaliation. By hurting the fiancé, the employer was reaching the employee. Title VII prohibits any action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”⁶² The Court’s “zone of interest” analysis carries a powerful message; it holds that a plaintiff may not sue unless he or she “falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his [or her] complaint.”⁶³ This language has already been interpreted to extend to a husband whose wife filed a disability discrimination complaint. Moreover, the husband worked for a company that was under contract to the original defendant, but the court in *McGhee v. Healthcare Services Group, Inc.*,⁶⁴ held that the two employers were intertwined; “[a]llowing employers to induce their subcontractors to fire the subcontractor’s employees in retaliation for the protected activity of a spouse would clearly contravene the purpose of Title VII. It is effortless to conclude that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her husband would be fired by his employer.”⁶⁵ It has long been held that one who opposes discrimination need not be a member of the statutorily protected group to receive the protection of

prohibitions against retaliation—a rationale that significantly broadens the number of prospective plaintiffs in retaliation cases.⁶⁶ Retaliation is laden with untold layers of potential liability.

Box 3-6

The best advice for employers is to take the following steps:

1. Create red flags to identify employees who may be subject to retaliation.
2. Advise the employee of the policy prohibiting retaliation, the recourse available, and clear directions on how to report it. Document this meeting.
3. Affected supervisors should be admonished not to treat the employee differently after the complaint comes to light. Employers must treat employees who complain cautiously; a good rule of thumb is to treat them similarly to those employees who do not complain about or oppose discrimination, as that fact is not supposed to enter into personnel decisions.
4. Any employment action should be documented with the reason why it is taking place and vetted by a manager who is not emotionally involved in the controversy, preferably someone who is not aware that a complaint has been lodged.
5. Should a supervisor engage in retaliation, or should coworkers take retaliatory measures, the employer must put a stop to those practices and take effective disciplinary action.

WHISTLEBLOWING

A related concern for all employers, especially healthcare employers, is whistleblowing. Many state statutes provide insulation from retaliation for whistleblowers if they fall within protected boundaries. Moreover, several new federal regulations waive the previously sacrosanct notion

that the employee must first complain internally; that safety valve is now a thing of the past.

Several federal statutes create opportunities for potential whistleblowers. The Elder Justice Act, a part of the Patient Protection and Affordable Care Act of 2010,⁶⁷ requires every individual “employed by” or “associated with” a long-term care facility as an owner, operator, agent, or contractor to report a “reasonable suspicion” of a crime affecting residents or those receiving care. The broader False Claims Act⁶⁸ provides for substantial civil penalties for fraudulent claims for payment or approval by the federal government. The Department of Justice may obtain triple damages of the amounts billed and remove the provider as a Medicare or Medicaid participant.⁶⁹ The law derives much of its power from the *qui tam* provision that permits individuals who bring forth previously undisclosed and significant information of fraud under the statute to receive between 15% and 30% of the total amount recovered through their actions. This specification effectively concretizes the incentive to report. According to some authorities,⁷⁰ a significant portion of the fines imposed have been in the healthcare industry.⁷¹ This development was not unexpected in light of the March 2010 Patient Protection and Affordable Care Act, which significantly broadened fraud and abuse exposure under the False Claims Act.⁷² Anti-kickback provisions now fall under the False Claims Act, and other provisions apply to nursing homes, pharmaceutical manufacturers, and durable medical device makers. Any healthcare enterprise that directly or indirectly receives federal funds through Medicaid or Medicare must participate in compliance programs to minimize exposure.

Qui tam actions are essentially invitations to disgruntled or merely hard-pressed employees

Table 3-1 Whistle Blower Cases

Facility	Claim	Date	Amount Recovered by Government/Claimant
Pfizer, Inc.	Off-market marketing of Bextra and kickbacks to physicians.	2009	\$2,300,000,000/\$51.500,000 ⁸⁰
Nichols Institute Diagnostics	Faulty lab testing kits that led to overtreatment and unnecessary surgeries.	2009	\$302,000,000, which includes \$253 million to settle the <i>qui tam</i> lawsuit, \$9 million to settle other civil lab claims, and \$40 million to settle a felony criminal charge
Christ Hospital, Cincinnati, Ohio	Cardiologists at the hospital ⁸¹ were given time in an outpatient testing unit based solely on the amount of cath-lab revenues they generated for the hospital the previous year. Many of those procedures were billed to Medicare or Medicaid.	2010	\$76,500,000/\$23,500,000
Wheaton Community Hospital, Minnesota	From 1998 to 2004, the hospital admitted patients and kept others admitted in acute care when doing so was not medically necessary and then falsely billed Medicare for the cost of these admissions.	2010	\$846,461/\$203,150 ⁸²
Veteran Affairs Medical Center, Northport, New York	Ran an unaccredited nuclear medicine program for three years.	2010	Program closed ⁸³
LSU Medical Center, Shreveport, Louisiana	Members of its medical school faculty billed Medicare for services they said were done by teaching physicians. The surgeries were actually done by residents—often without a teacher present.	2011	\$700,000/\$200,000 ⁸⁴
25 hospital ⁸⁵	Unnecessarily kept kyphoplasty patients overnight.	2010	\$101,000,000 ⁸⁶

who have access to information that may not conform to strict federal guidelines. Almost \$2 billion in settlements by the Department of Justice were the result of False Claim Act *qui tam* actions in 2009⁷³; of that amount, \$1.6 billion involved healthcare. In 2010, the Department of Justice declared its battle against healthcare fraud to be a “top priority.”⁷⁴ United States Attorneys’ offices opened more than 1,000 new criminal healthcare fraud investigations in 2010 and filed criminal charges in 481 cases through the Health Care Fraud Prevention and Enforcement Action Team (HEAT)⁷⁵ One year earlier, in 2009, U.S. Attorney General Eric Holder and Secretary of Health and Human Services Kathleen Sebelius had announced the formation of HEAT⁷⁶ as a new effort with increased tools and resources and pledged a cabinet-level commitment to prevent and prosecute healthcare fraud.

Box 3-7

The mission of HEAT is: To marshal significant resources across government to prevent waste, fraud and abuse in the Medicare and Medicaid programs and crack down on the fraud perpetrators who are abusing the system and costing us all billions of dollars . . . To reduce skyrocketing health care costs and improve the quality of care by ridding the system of perpetrators who are preying on Medicare and Medicaid beneficiaries. . . . To build upon existing partnerships between [the Department of Justice and the Department of Health and Human Services], such as our Medicare Fraud Strike Forces to reduce fraud and recover taxpayer dollars.⁷⁷

The federal government won or negotiated approximately \$2.5 billion in healthcare fraud judgments and settlements, and it attained additional administrative impositions in healthcare fraud cases and proceedings. The Medicare

Trust Fund received approximately \$2.86 billion during this period as a result of these efforts.⁷⁸ Treble damages, penalties, attorneys’ fees, and possible imprisonment should be effective incentives for employers to follow the protocols.

Recent cases graphically illustrate the vulnerability of healthcare institutions and the incentive for employees with access to information to “blow the whistle” (Table 3-1). Healthcare employers should implement strategies to minimize the risks illustrated by these cases. One method is mandatory arbitration, a little used but court-approved process that circumvents costly litigation in the courts. Employee releases are also potential tools in certain cases to neutralize claims of employees leaving under a funded severance agreement.⁷⁹

SOCIAL MEDIA

Facebook, YouTube, LinkedIn, and blogs are ubiquitous—and many employees use them, both at work and away from the worksite. Should employers be concerned? Given that the NLRA and similar state statutes, discrimination laws, and privacy/freedom of speech considerations⁸⁷ abound, the answer is a resounding “Yes.”

Recruitment

Many employers look online for material posted by or about applicants. While this access may be tempting and may be fair game if the information is in the public domain, several employers have attempted to enter personal pages to obtain more insights.⁸⁸ This approach is inadvisable.

According to a 2010 survey by Jobvite,⁸⁹ more than 80% of employers either routinely or occasionally search for an online profile of job

candidates. Another 13% utilize profiles provided by candidates. The overriding concern in these efforts is that the employer may discover information that is not germane to the job, such as membership in a protected class, disabilities, private associations, and political affiliations. Employers cannot “unring” this bell, and it portends potential claims of improper bias. Therefore, traditional recruitment techniques can be enhanced through use of email and other electronic correspondence, but a proactive methodology to ferret out tantalizing information on the Web will expose employers to liability without any corresponding benefit.

Employee Blogs and Commentary

If an employee blogs about problems at work or satirizes a senior leader, the employer will be inclined to look askance at such behavior and seek to bring an end to the activity or to the employee’s tenure. Employees have a right to free speech, particularly when they are engaging in protected concerted activities.⁹⁰ The NLRB Advice Memorandum in *Sears Holdings (Roebuck)* (December 4, 2009) prohibited references by employees to confidential or proprietary information, sexual references, references to illegal drugs, and disparagement of company products or of competitors. The NLRB advised that these restrictions did not improperly restrict protected concerted activity under the NLRA, and it did not specifically reference social media. However, in *American Medical Response of Connecticut (AMR)*,⁹¹ the National Labor Relations Board decided in late 2010 that where an employee who posted negative comments about a specific supervisor on her Facebook page was discharged after the posting and

responding to other comments from coworkers about the same supervisor and related working conditions, the policy against speaking out in social media was too broad in the face of the statutory protections to engage in concerted activities. The *AMR* ruling therefore modifies the breadth of an employer’s ability to circumscribe online or offline speech.

Some state statutes are even more restrictive and protect employees when they engage in lawful activities on their own time.⁹² However, if employees pose for photos on a company airplane,⁹³ the resultant casting of the employer in a bad light may not be regarded as a protected activity. The laws that govern speech in the workplace are no different when applied to cyberspace.^{94,95}

Employee Use of Social Media During Work Time

According to a 2011 survey by the Health Care Compliance Association and the Society of Corporate Compliance and Ethics,⁹⁶ 42% of respondent companies had disciplined employees for use of social media. With a policy that clearly delineates that use of company computers and time for personal messages constitutes theft of time or services, employers may discipline employees. However, the issue is how to determine whether an employee is abusing such access; information technology is available to assist in this effort. Although policies should advise that there is no expectation of privacy, monitoring employee usage without reasonable and specific cause carries many perils, including invasion of privacy and loss of trust.

Another seminal case that defines an employer’s obligation vis-à-vis social media is

Blakely v. Continental Airlines,⁹⁷ in which the New Jersey Supreme Court held that an electronic bulletin board closely related to the workplace and beneficial to the employer, although not maintained by the employer, that contained defamatory statements about an employee resulting in a hostile work environment, created a duty for the employer to remedy that situation. Enabling access to online communication carries with it a responsibility to monitor its usage.

Bottom Line

Employers should create policies that clearly define what is permitted and what is not permitted during work hours. Confidential information must be defined and ruled out of bounds. Defamation should be prohibited. Moreover, harassment or visiting websites that contain questionable content should be strictly prohibited. Many of these sites can be filtered without danger of invading employees' privacy. To ensure that these policies are promulgated and understood, staff training should incorporate media policies and procedures.

BACKGROUND CHECKS

Negligent hiring is a legally recognized cause of action that requires a plaintiff to prove the following points:

- The subject was an employee
 - The employee was incompetent or posed a foreseeable risk
 - The employer knew or should have known about the incompetence or risk of the employee
 - The employee caused an injury
- The negligent hiring was the proximate cause of the injury, bringing the employee into contact with the damaged party

In such a case, employers may be held directly liable (not merely vicariously liable) when an employee injures a third party and the employer knew or should have known of the danger (*Medical Assurance Company, Inc. v. Castro*).⁹⁸ Aside from the obvious wisdom of conducting background checks on prospective employees to avoid claims of negligent hiring,⁹⁹ many states *require* healthcare providers to do so.¹⁰⁰

“Due diligence” consists of a background check to determine whether the applicant has a criminal record or other disqualifying personal history—but one should not stop there. This process includes checking for valid credentialing of persons who hold a license but has been extended beyond employees to other personnel whom a patient would assume is acting as an employee.¹⁰¹ It goes beyond that technicality as well, to subsume moral or other impairments that may later surface to demonstrate that the employer did not adequately vet the candidate before putting the person in contact with patients, coworkers, or the public: The law requires, as does common sense and the duty of doing no harm to patients, a thoroughly documented risk-based exercise.¹⁰² In addition, concerns must be addressed related to the Federal Sentencing Guidelines for Organizations,¹⁰³ which provide for fines higher than otherwise might be expected for federal crimes, including Medicare and even Medicaid fraud. The implementation of an effective compliance and ethics program¹⁰⁴ will mitigate those fines imposed when a violation is detected.

INCIVILITY AND VIOLENCE IN THE HEALTHCARE WORKPLACE

Box 3-8

In a study published in 2011, 57% of hospital workers witnessed disruptive behaviors by physicians and 52% witnessed disruptive behaviors by nurses; 32.8% of the respondents felt that the disruptive behavior could be linked to the occurrence of adverse events, 35.4% to medical errors, 24.7% to compromises in patient safety, 35.8% to poor quality, and 12.3% to patient mortality. Eighteen percent of employees reported that they were aware of a specific adverse event that occurred as a direct result of disruptive behavior.¹⁰⁵

At the heart of many exposures to legal liability is the ever-present pressure to cater to physicians and other powerful revenue producers—as well as non-revenue producers—who are permitted to engage in uncivil conduct; inadequate response to such behaviors creates a hostile environment that is conducive to more disruptive conduct and violence.¹⁰⁶ The study titled “Silence Kills”¹⁰⁷ documented the effects on patient mortality and adverse events of climates of intimidation and bullying. The key findings in this study included the following:

- Eighty-four percent of doctors have seen coworkers take shortcuts that endanger patients.
- Eighty-eight percent of doctors work with people who show poor clinical judgment.
- Fewer than 10 percent of physicians, nurses, and other clinical staff directly confront their colleagues about their concerns.

The Joint Commission, in its Sentinel Event Alert,¹⁰⁸ set new goals and standards for healthcare workplaces to deal with those

Box 3-9

One nurse shared her personal story:

It was morning rounds in the hospital and the entire medical team stood in the patient’s room. A test result was late, and the patient, a friendly, middle-aged man, jokingly asked his doctor whom he should yell at.

Turning and pointing at the patient’s nurse, the doctor replied, “If you want to scream at anyone, scream at her.”

This vignette is not a scene from the medical drama *House*, nor did it take place 30 years ago, when nurses were considered subservient to doctors. Rather, it happened just a few months ago, at my hospital, to me.

As we walked out of the patient’s room I asked the doctor if I could quote him in an article. “Sure,” he answered. “It’s a time-honored tradition—blame the nurse whenever anything goes wrong.”

I felt stunned and insulted. But my own feelings are one thing; more important is the problem such attitudes pose to patient health. They reinforce the stereotype of nurses as little more than candy strippers, creating a hostile and even dangerous environment in a setting where close cooperation can make the difference between life and death. And while many hospitals have anti-bullying policies on the books, too few see it as a serious issue.¹¹⁰

wrongdoers who create intimidating work environments by creating a workplace that nurtures assertive communication. A continual stream of studies has documented this deleterious phenomenon where such a healthy corporate culture does not prevail.¹⁰⁹

A national survey of physician and nurse executives¹¹¹ asked how many had observed or experienced these behavior problems from doctors or nurses in their organizations. The responses are shown in Table 3-2.

Table 3-2 Noted Behavior Problems

Degrading comments and insults	84.5%
Yelling	73.3%
Cursing	49.4%
Inappropriate joking	45.5%
Refusing to work with a colleague	38.4%
Refusing to speak to a colleague	34.3%
Trying to get someone unjustly disciplined	32.3%
Throwing objects	18.9%
Trying to get someone unjustly fired	18.6%
Spreading malicious rumors	17.1%
Sexual harassment	13.4%
Physical assault	2.8%
Other	10.0%

In a 2008 study of 102 hospitals and more than 4,500 staff members,¹¹² the findings in Table 3-3 were documented. The consequences of bad conduct and organizational malaise based on this study:

- Ninety-nine percent say disruptive behaviors lead to impaired nurse–physician relationships.
- Sixty-seven percent believe there is a link between disruptive behaviors and adverse events.
- Seventy-one percent believe there is a link between disruptive behavior and medical errors.
- Eighteen percent are aware of at least one specific adverse event that occurred because of disruptive behaviors; 20% of nurses responded in the affirmative, and 21% of administrators did so as well.

The lesson is clear: Healthcare employers oversee hierarchical bureaucracies that continuously operate in fast-paced and high-pressure situations that often create the opportunity to promote and perpetuate incivility. Ignoring the potential harm to patient care and to employee morale is done at your peril.

Physical violence in the healthcare workplace is also well documented.¹¹³

Table 3-3 Observers of Disruptive Behavior

Who has seen doctors exhibit disruptive behavior?

Staff overall	77%
Nurses	88%
Doctors	51%

Who has seen nurses exhibit disruptive behavior?

Staff overall	65%
Nurses	73%
Doctors	48%

Box 3-10

The recent notorious cases of Michael Swango, M.D., and Charles Cullen, R.N., demonstrate the willingness of hospital administrators and educators to ignore clear signals of danger in the healthcare workplace to the mortal detriment of patients and coworkers.¹¹⁴ Dr. Swango’s patients had exceptionally high mortality rates and was ultimately convicted of killing patients in Ohio and New York. He was also convicted of falsifying his medical credentials, and the FBI is investigating him for up to 60 deaths. Mr. Cullen pleaded guilty to killing 29 patients and said he killed many more in New Jersey and Pennsylvania, often injecting Digoxin. He worked in hospitals and nursing homes, which often did not attempt to verify his credentials.

Healthcare employers are obligated to provide a safe workplace.¹¹⁵ Nonetheless, approximately one-third of nurses have experienced workplace violence.¹¹⁶ The Joint Commission issued a Sentinel Alert in recognition of the increase in crime and violent acts in the healthcare workplace.¹¹⁷ It provided the following guidelines:

1. Work with the security department to audit the facility's risk of violence. Evaluate environmental and administrative controls throughout the campus, review records and statistics of crime rates in the area surrounding the healthcare facility, and survey employees on their perceptions of risk.
2. Identify strengths and weaknesses and make improvements to the facility's violence-prevention program.
3. Take extra security precautions in the emergency department, especially if the facility is located in an area with a high crime rate or gang activity. These precautions can include posting uniformed security officers and limiting or screening visitors (for example, wand for weapons or conducting bag checks).
4. Work with the human resources department to make sure it thoroughly prescreens job applicants, and establishes and follows procedures for conducting background checks of prospective employees and staff. For clinical staff, the human resources department should also verify the clinician's record with appropriate boards of registration. If an organization has access to the National Practitioner Data Bank or the Healthcare Integrity and Protection Data Bank, check the clinician's information, which includes professional competence and conduct notes.
5. Confirm that the human resources department has ensured that its procedures for disciplining and firing employees minimize the chance of provoking a violent reaction.
6. Require appropriate staff members to undergo training in responding to patients' family members who are agitated and potentially violent. Include education on procedures for notifying supervisors and security staff.
7. Ensure that procedures for responding to incidents of workplace violence (e.g., notifying department managers or security, activating codes) are in place and that employees receive instruction on these procedures.
8. Encourage employees and other staff to report incidents of violent activity and any perceived threats of violence.
9. Educate supervisors that all reports of suspicious behavior or threats by another employee must be treated seriously and thoroughly investigated. Train supervisors to recognize when an employee or a patient may be experiencing behaviors related to domestic violence issues.
10. Ensure that counseling programs for employees who become victims of workplace crime or violence are in place.
Should an act of violence occur at the facility—whether assault, rape, homicide, or a lesser offense—follow up with an appropriate response that includes the following measures:
11. Report the crime to appropriate law enforcement officers.
12. Recommend counseling and other support to patients and visitors to your facility who were affected by the violent act.

13. Review the event and make changes to prevent future occurrences.

Myriad studies have shown that violence in the workplace may be predictable because the perpetrators often state aloud precisely what they intend to do and to whom they mean to do it.

[T]he killers do not just snap. An examination by *The New York Times* of 100 rampage murders found that most of the killers spiraled down a long slow slide, mentally and emotionally. Most of them left a road map of red flags, spending months plotting their attacks and accumulating weapons, talking openly of their plans for bloodshed. Many showed signs of serious mental health problems.

But in case after case, the *Times* review found, the warning signs were missed: by a tattered mental healthcare system; by families unable to face the evidence of serious mental turmoil in their children or siblings; by employers, teachers and principals who failed to take the threats seriously; by the police who, when alerted to the danger by frightened relatives, neighbors or friends, were incapable of intervening before the violence erupted . . . The *Times* found that in 63 of the 100 cases (which involved 102 killers), the killers made general threats of violence to others in advance. Fifty-five of the 100 cases involved killers who regularly expressed explosive anger or frustration, and 35 killers had a history of violent behavior and assaults.¹¹⁸

Consequently, it behooves healthcare employers to take implicit threats and other disruptive behavior seriously.¹¹⁹ Courts have supported reasonable employer decisions in this vein. In

Calandriello v. Tennessee Processing Center,¹²⁰ a highly secure facility that utilized retinal identification procedures learned that the plaintiff had improperly used the Internet at work to reformulate a company poster and place Charles Manson's face in place of an employee's face. He also used the company computer to view images of serial killers, assault weaponry, and other violent images. When the employer terminated the employee eventually, he appealed, claiming he was entitled to a reasonable accommodation based on diagnosed bipolar disorder pursuant to the Americans with Disabilities Act. The court, however, stated that the act does not require an employer to retain a *potentially* violent employee.¹²¹ Along the same lines, in *Blackman v. New York Transit Authority*,¹²² the Second Circuit Court of Appeals held that a transit worker's termination was proper when, after two supervisors had been shot to death by an ex-employee in whose termination they had participated, he stated that they got what they deserved. The Court noted, "It is clear . . . that a government official may, in certain circumstances, fire an employee for speaking—even on a matter of public concern—where that speech has the potential to disrupt the work environment."¹²³

DEFAMATION

It is not news that employers are challenged when prospective employers of their staff members call seeking references. The dilemma is clear: Do you tell the truth and open yourself to a claim of defamation,¹²⁴ or do you sugarcoat the responses so as to shield yourself from liability? Equally clear is the principled response—to share all the gory details that you can support through documentation—although

most employers choose instead to offer name, rank, and serial number as a matter of course to avoid this quandary. That reply, however, does not resolve the matter. Particularly in health care, when an employer has knowledge of predictions of employees that put patients at risk, neglecting or choosing to withhold that information opens an entirely new source of legal accountability. In *Davis v. Board of County Commissioners*,¹²⁵ the duty of former employers to prospective employers to disclose unfavorable information about an applicant was at issue. In *Davis*, supervisors at a detention center provided positive feedback about an ex-employee who had a history of sexual harassment. At the hospital that hired him, he was accused of sexual assault and sexual harassment. The *Davis* court held that when physical harm is foreseeable and the employer reveals the negative background, the previous employer can rely on a qualified privilege to shield it from liability.¹²⁶

The best guidance an employer can follow is to limit disseminated information to facts that have been documented and have been subject to a signed release by the employee agreeing that the employer may share information, a signed settlement¹²⁷ with the employee, an empowering statute that shields an employer in defined circumstances often involving statements regarding patient care concerns in peer review,¹²⁸ or an arbitration decision; mere charges without more protection would likely not confer the qualified privilege to share information. One must factor in the notion that deliberate malice is often required for a finding of defamation. Opinions are often not held actionable, and while truth is always an absolute defense in defamation, this axiom relies on the ability to prove the veracity of a statement by clear and convincing

evidence.¹²⁹ There is no bar to a claim for defamation under a qualified privilege, so the risk for the employer will necessarily endure.

MICROINEQUITIES

Respect in the healthcare workplace is sometimes an elusive commodity. Surveys of disruptive physician conduct have revealed that nearly one-third of all nurses who left a hospital did so because of a disruptive physician.¹³⁰ More than 90% of the 1,200 individuals surveyed in one study had witnessed disruptive physician behavior, including yelling or raising the voice, disrespect, condescension, berating colleagues, berating patients, and use of abusive language. A survey of more than 2,000 pharmacists and nurses even more graphically demonstrates how physician behavior can stifle healthy communication and result in safety concerns.¹³¹ Nearly half (49%) of the respondents said a history of physician intimidation altered the way they asked for clarifications about medication orders. Almost 70% said that at least once in the past year a physician had snapped, “Just give what I ordered,” when asked for clarifications or questioned about a script.¹³²

These microinequities are subtle—or not-so-subtle—statements and behaviors that have been characterized as “death by a thousand cuts.” They have the effect of making others feel devalued or excluded, but fall short generally of legally cognizable discrimination.¹³³ The Joint Commission has recognized this communication threat and issued a Sentinel Event Alert on the subject.¹³⁴ Nurturing employees voice,¹³⁵ thereby transforming the workplace into one where all employees may articulate their concerns without fear of retribution, is a salutary method by which to reduce employer risk.

Box 3-11

Seventy-five percent of all employees believe that it is the responsibility of their employers to treat them fairly, even if being unfair in some ways is not illegal.¹³⁶

Healthcare administrators who fail to implement meaningful measures to alleviate fear and silence in the workplace do so at their own peril, as well as their patients'.¹³⁷

OTHER HIGHLY RECOMMENDED RISK MANAGEMENT STRATEGIES

As reflected in the discussion on microinequities, healthcare employers must hone their twenty-first-century leadership skills and tools. It is not sufficient to be reactive when risks rear their ugly heads; proactive tools are accessible and inexpensive. As the saying goes, "An ounce of prevention . . ."

Healthcare employers should create a workplace culture that promotes genuine discussion and straightforwardness; it also nurtures employee engagement.¹³⁸ Engaged employees speak up and rarely file formal complaints; by definition, they are advocates for the organization and recommend it to friends and family.¹³⁹

Box 3-12

Blessing White, a research and consulting management firm, concluded that engaged employees stay on the job for what they can give; disengaged workers remain for what they can get. It is your organization's culture that largely drives engagement as well as litigiousness. Litigation also creates a vicious circle, creating resentment and hostility in managers and supervisors who may then demonstrate enhanced bias toward others who share the former plaintiff's classifications.¹⁴⁰

Conversely, those who work in a hostile environment often withdraw and engage in counterproductive behaviors.¹⁴¹ In healthcare workplaces, bullying and other perceived inequities are often facts of life,¹⁴² and their perpetuation largely negate employee dissatisfaction and amplify the potential for litigation.¹⁴³

Box 3-13

Whereas 75% of all employees believe that their employers treat them fairly, that statistic changes significantly when race is factored in. Fully 42% of black employees and 35% of Hispanic employees regard their organizations as doing a "fair" or "poor" job of treating them fairly, compared to 24% of whites.¹⁴⁴ This discrepancy should give healthcare employers pause.

A climate of bullying and intimidation has also been documented to contribute to patient safety errors.¹⁴⁵ Just as patients are reluctant to sue physicians who display empathy and communicate well,¹⁴⁶ so, too, employees feel an affinity to leaders and organizations that treat them with respect and value their contributions; those employees find salutary methods to express their concerns in lieu of litigation.¹⁴⁷

Managers and supervisors should engage in candid performance discussions, whether in the context of counseling sessions¹⁴⁸ or performance appraisals,¹⁴⁹ on both regular and as-needed bases. Employers that give prompt, evenhanded feedback are regarded as fair by employees and juries and courts,¹⁵⁰ and they set an organizational climate that is conducive to openness and transparency.¹⁵¹

Supervisory training and enhanced supervisory performance expectations can increase the utilization of these vital tools.

Box 3-14

In 2006, the Novations Group found that while nearly two-thirds of all employees believe that their companies' policies are equitable, only 47% of minority workers agree. Lack of confidence in the recruitment and selection processes created cynicism in minority employees; overall, 20% of all employees expressed this distrust.¹⁵²

Fairness is part of the psychological contract that is shared by employees and employers. A significant breach in this unwritten agreement will often trigger latent litigiousness.¹⁵³ Employers should not be complacent if few complaints are made; healthcare employers face numerous litigation and nonlitigation perils as well, including compromised patient safety, disengagement, poor morale, and grievances.¹⁵⁴ In a 2005 poll, Gallup found that, despite the relative dearth of discrimination complaints, informal and undocumented perceptions of discrimination are much more common than employers might think; "unfiled" but nonetheless active and festering grievances are not statistically apparent but have their detrimental impact.¹⁵⁵ Nationwide, one in three African American employees perceives himself or herself to be the victim of racial discrimination.¹⁵⁶

Box 3-15

In one 2001 study conducted in Cincinnati, 80% of minority workers believed that they had fewer opportunities for promotions than whites; whites disagreed, by a margin of 90% to 10%. One African American respondent stated, "blacks often don't have the relationships with bosses to get an equal shot at promotions. . . . You'll find people getting jobs that weren't even posted. . . . Sometimes, it almost seems like someone went looking for them to give them a promotion."¹⁵⁷

Most of the unfiled complaints¹⁵⁸ focused on perceived discrimination in promotion decisions and pay.¹⁵⁹ Numbers of complaints alone do not fully communicate the depth of feeling or possible hostility that an employee or a group of employees may be experiencing.¹⁶⁰ It therefore behooves employers in health care to reward employees who speak their minds.

REFERENCES

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2. Commins, J. (2011, January). "EEOC healthcare bias complaints on the rise." *Health Leaders Media*. Retrieved from http://www.google.com/search?ie=utf-8&oe=utf-8&q=AIDS+discrimination+%22healthcare+workplace%22&rlz=1V4IPYX_enUS459US459
3. *Ahdaoui v. Ivy Hall Assisted Living* (Case No.: 1:08-CV-3067-BBM-SSC) (N.D.Ga.).
4. <http://abcnews.go.com/Technology/secretly-recorded-work/story?id=13409126&page=1>; *Roberts v. Texaco, Inc.*, 979 F.Supp. 2d 185 (S.D.N.Y. 1996).
5. <http://www.nytimes.com/1996/11/17/us/size-of-texaco-discrimination-settlement-could-encourage-more-lawsuits.html?pagewanted=2>; see also *Ingram v. Coca-Cola*, 200 F.R.D. 685 (Ga. 2001), wherein the company settled for \$192.5 million for race discrimination. See the report of the task force monitoring this settlement at http://www.thecoca-colacompany.com/ourcompany/task_force_report_2005.pdf
6. See Greenhouse, S. (2004, November 17). *Abercrombie & Fitch bias case is settled*; CBS

- News. (2009, February). The look of Abercrombie and Fitch. *60 minutes*. Retrieved from http://www.cbsnews.com/2100-18560_162-587099.html
7. *Saffos v. Avaya, Inc.*, <http://law.justia.com/cases/new-jersey/appellate-division-published/2011/a3189-08-opn.html>, 16 A.3d 1076 (N.J. Super. A.D. 2011). It is not insignificant for employers gauging risk exposure to note that the ultimate award of \$2.5 million reflects a *reduction* from the original jury award of more than 75%. Juries are inclined to sympathize with worker-plaintiffs who are treated inequitably.
 8. *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010). An agency that certified and assigned certified nursing assistants paid \$150,000 to settle charges that it used race in its assignment of personnel. *EEOC v. HiCare, Inc., dba Home Instead Senior Care*, No. 1:10-CV-02692 (D. Md. Dec. 10, 2010). In 2005, a chain of assisted living and senior centers paid \$720,000 to settle charges that it screened out non-Caucasian applicants as potential employees because its general manager believed residents did not want them to enter their homes. *EEOC v. Merrill Gardens, LLC*, No. 1:05-CV-004 (N.D. Ind. Oct. 6, 2005). See <http://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm#customer>. In 2003, Abington Memorial Hospital in Philadelphia also allegedly instructed black personnel not to play a role in one patient's care delivery. See <http://www.freerepublic.com/focus/f-news/994789/posts>
 9. *Roby v. McKesson*, 219 P.3d 749 (Cal. Sup. Ct. 2009). See *Niami v. Federal Exp. Print Services, Inc.*, 2010 WL 958045, *4+, 93 Empl. Prac. Dec. P 43,849+ (N.D.Cal. March 12, 2010) (adopting the *Roby* court's reasoning that management's personnel decisions that continue to send the hostile messages of the supervisor may be regarded as evidence of discrimination [here, based on a woman's sexual orientation]).
 10. Sack, K. (2010, August 10). "Texas nurses fired for alleging misconduct settle their suit," *The New York Times*. See also the trial transcript at <http://texas-nurses.org/displaycommon.cfm?an=1&subarticle=538>
 11. *Stagg v. Vintage Place Inc.*, A-09-949 (Minn. Ct. App. 2010).
 12. *Id.*
 13. Despite the dubious proposition that someone can do something for no reason at all, the now famous (or infamous) iteration of employment at will encapsulates the power of employers to govern the workplace. Although employment at will expressly addresses employers' "absolute" right to terminate employees, it is about much more. Someone who has the power to terminate also has the power to do as he or she pleases with respect to all terms and conditions of employment. At its core, employment at will is about employer power and prerogative. Corbett, W. R. (2003). The need for a revitalized common law of the workplace. *Brooklyn Law Review*, 69, 91, 125–127. However, healthcare employers should not be led down the proverbial garden path: "[E]mployment at will provides employers far less freedom to discharge employees than appears at first blush, and it is vastly overrated in its value to employers. There are numerous exceptions to employment at will contained in federal and state statutes, tort theories such as wrongful discharge in violation of public policy, and contract concepts, among others." *Catholic University Law Review*, 60(615), 657 (2011), citing Sprang, K. A. (1994). Beware the toothless tiger: A critique of the Model Employment Termination Act. *American University Law Review*, 43, 849, 862–871.
 14. For example, New York Labor Law § 740(2), the "whistleblowers' statute," provides, in relevant part, that an employer shall not take any retaliatory personnel action against an employee because such employee:
 - (a) discloses, threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety . . .
 15. *Crawford v. Metropolitan Government of Nashville*, 129 S.Ct. 846 (2009). In *State University of New York v. David Young*, 566 N.Y.S.2d 79 (1991), the employer contested the employee's reinstatement as a violation of public policy and prevailed (the termination of an employee who placed patients in jeopardy was upheld, and an arbitrator's decision was struck down as in violation of public policy).
 16. *Wooley v. Hoffman-LaRoche*, 491 A.2d 1257 (N.J. 1985). However, it may arise in other circumstances that do not require such a document, as in unfair

- dismissal (wrongful discharge) or intentional infliction of emotional distress.
17. *Thomas v. MasterCard Advisors, LLC*, 901 N.Y.S.2d 638, 639 (1st. Dept. 2010).
 18. *Woolley v. Hoffmann La Roche*, 491 A.2s 1257 (N.J. 1985).
 19. *Bailey v. City of Wilmington*, 766 A.2d 477, 480 (Del. 2001) (describing situations in which this limit applies). But see *Kerrigan v. Britches of Georgetowne, Inc.*, 705 A.2d 624, 627 (D.D.C. 1997), affirming a trial court decision that a plaintiff employee was not protected by an implied covenant of good faith and fair dealing because “by definition [plaintiff]—as an employee at will, not under contract—had no basis for claiming breach of a “covenant.”
 20. For example, if a woman refuses to take part in a bawdy ritual while at an office party, and is disciplined or discharged, or if a disciplinary investigation commences and a witness requests the opportunity speak with an attorney and is discharged.
 21. See *Madison Services Co. v. Gordon*, 2010 WL 3529588 (D. Colo.), citing *Rocky Mountain Hospital and Medical Service v. Mariani*, 916 P.2d 519 (Colo. 1996).
 22. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
 23. *Burlington Industries v. Ellerth*, 524 U.S. 742, 753–54 (1998).
 24. *Id.*
 25. *EEOC v. Cromer Food Services*, 2011 LEXIS 4279 (4th Cir. 2011).
 26. *Indiana Civil Rights Commission v. Fireside Brewhouse*, <http://www.in.gov/icrc/files/EMse10060256%281%29.pdf> (2011); *Sandoval v. Amer. Bldg. Indus., Inc.*, 578 F.3d 787, 801 (8th Cir. 2009); see *Bennett v. Nucor*, 656 F.3d 802, 811 (2011) (racial discrimination).
 27. See <http://www.eeoc.gov/eeoc/newsroom/release/4-9-03.cfm>; <http://www.nytimes.com/2003/04/10/nyregion/brooklyn-sex-harassment-suit-is-settled-for-5.4-million.html>; <http://archive.eeoc.gov/litigation/settlements/settlement04-03.html>
 28. *Bianco v. Flushing Hosp. Medical Center*, 54 A.D.3d 304 (N.Y.A.D. 2 Dept. 2008). On remand to *Bianco v. Flushing Hosp. Med. Ctr.*, 2009 WL 2984842 (Trial Order) (N.Y. Sup. 2009); affirmed by *Bianco v. Flushing Hosp. Medical Center*, 79 A.D.3d 777 (N.Y.A.D. 2 Dept. Dec 14, 2010).
 29. 656 F.3d 33 (1st Cir. 2011).
 30. <http://www.eeoc.gov/eeoc/newsroom/release/9-8-11b.cfm>
 31. <http://www.eeoc.gov/eeoc/newsroom/release/9-8-11b.cfm>
 32. See *Becker's Hospital Review* at <http://www.beckershospitalreview.com/hospital-management-administration/garfield-medical-center-in-california-settles-harassment-lawsuit-for-530k.html> and <http://www.eeoc.gov/eeoc/newsroom/release/11-16-11b.cfm>
 33. See, for example, *Doe v. Kaweah Delta Hosp.*, 2010 WL 5399228 (E.D. Cal.); the patient disclosed his AIDS diagnosis in the course of a hospital stay to a discharge planner who was also an acquaintance, and she allegedly spread the information to others; the plaintiff claimed he lost his beauty salon as a result.
 34. See Conyers, L., et al. (2005). Workplace discrimination and HIV/AIDS: The National EEOC ADA Research Project. *Work*, 25, 37.
 35. *Bragdon v. Abbott*, 524 U.S. 624 (1998). In *Abbott*, a dentist refused to treat an HIV-positive patient. Many courts nonetheless still apply an individualized approach to HIV/AIDS to determine whether the employee is, in fact, disabled under the statute. See Ravencraft, D. (2010). Why the “New ADA” requires an individualized inquiry as to what qualifies as a major life activity. *Northern Kentucky Law Review*, 37, 441. See 1973 Rehabilitation Act Section 504, 29 U.S.C. Section 794.
 36. 566 N.Y.S.2d 79 (1991).
 37. 151 Fed. Appx. 684 (10th Cir. 2005).
 38. See, for example, *Silver v. North Shore University Hospital*, 490 F.Supp.2d 1346 (S.D.N.Y. 2007) (age discrimination based on a discriminatory mindset that outside funding sources would not favor persons older than 50 years of age); *CACI Premier Tech. v. Faraci*, 464 F.Supp.2d 527 (E.D.Va. 2007); *EEOC v. Hi 40 Corp.*, 953 F.Supp. 301 (E.D. Mo. 1996) (weight loss centers could not hire female counselors exclusively based on customer preferences); *Veleanu v. Beth Israel Medical Center*, 2000 WL 1400965 (S.D.N.Y.) (gender of the physician may be rationally related to patient preferences in obstetrics-gynecology and, therefore, is not discriminatory).
 39. Iheukwumere, E. (2002). Doctor, are you experienced? The relevance of disclosure of physician

- experience to a valid informed consent. *Journal of Contemporary Health and Policy*, 18, 373.
40. See, for example, Workers compensation program description and legislative history. *Social Security Administration Annual Statistical Supplement 2010*. Retrieved from <http://www.ssa.gov/policy/docs/statcomps/supplement/2010/workerscomp.html>
 41. See, for example, Leamon, T.B. (2009, September). Reducing occupational injury: The value and the challenge of determining the burden. Proceedings from *Use of Workers' Compensation Data for Occupational and Illness Prevention*. Retrieved from <http://www.cdc.gov/niosh/docs/2010-152/pdfs/2010-152.pdf>
 42. See, for example, NYSIF announces 154 arrests, \$16.6 million in fraud savings in 2009. Retrieved from <http://ww3.nysif.com/AboutNYSIF/NYSIFNews/2010/NYSIF%20Announces%202009%20Anti%20Fraud%20Results.aspx>. For the same period, according to the Department of Insurance, California's anti-fraud effort netted 682 arrests based on chargeable fraud of more than \$370,000,000; <http://www.insurance.ca.gov/0300-fraud/0100-fraud-division-overview/0500-fraud-division-programs/workers-comp-fraud/index.cfm>
 43. Four faces of insurance fraud. (2008). Retrieved from <http://www.insurancefraud.org/four-faces.htm>
 44. Accenture, 2003.
 45. Rose, R. (2009). Insurance fraud and workers compensation. *PLI/Literature*, 796, 317, 342.
 46. See, for example, *Mtr. of Retz v. Surpass Chemical Co.*, 834 N.Y.S.2d 389 (3rd Dept. 2007); despite false claims of disability that were graphically disproved by surreptitious video surveillance, the claimant suffered only deprivation of benefits. In *Mtr. of Harabedian v. New York Hospital Medical Center*, 825 N.Y.S.2d 569 (3rd Dept. 2006), the plaintiff pleaded guilty to misdemeanor petty larceny in satisfaction of felony fraud charges for allegedly repeatedly obtaining reimbursements for medical-related expenses from her employer's carrier while also receiving payments for such expenses through her spouse's health insurance; she was declared ineligible for further benefits. To the same effect is *Robbins v. Mesivta Tifereth Jerusalem*, 874 N.Y.S.2d 638 (3rd Dept. 2009). Paying restitution often serves as the ultimate penalty. See *Mtr. of Dieter v. Trigen-Cinergy Solutions of Rochester*, 787 N.Y.S.2d 499 (3rd Dept. 2005). Courts that impose sentences of probation and restitution for employees who work multiple jobs while collecting worker's compensation benefits do not ameliorate this atmosphere of leniency. See "New York Letter Carrier Who Lived Double Life Sentenced to Three Years' Probation" at http://www.uspsoidg.gov/inv_healthcare.htm
 47. See Fulmer, S. Top 40 red flags which may indicate worker's compensation fraud. Retrieved from <http://pursuitmag.com/top-40-red-flags-which-may-indicate-workers-compensation-fraud/>
 48. See the report of the Post Office Inspector General on anti-worker's compensation fraud efforts at http://www.uspsoidg.gov/inv_healthcare.htm. The New York State Insurance Fund estimates that deterrence efforts present a return on investment of between 700% and 100%. See "Detecting Fraud" at <http://ww3.nysif.com/SafetyRiskManagement/RiskManagement/LimitingLiability/DetectingFraud.aspx>
 49. See George, B.G. (2008). Revenge. *Law Review*, 83, 439, 467. ("The success of retaliation claims, as compared to the underlying complaint of discrimination, may be due in part to the more relaxed standard of 'discrimination.'") Id. at 445.
 50. *Houston v. Texas Southern Univ.* 2011 WL 31796 (S.D. Tex.).
 51. Punitive damages are available where evil intent or motive or reckless or callous disregard for the protected rights of the employee is found. *Mendez v. Starwood Hotels and Resorts Worldwide*, 764 F.Supp.2d 575 (S.D.N.Y. 2010); the jury empathized with the plaintiff and awarded punitive damages of \$3 million for installing a hidden camera above the employee's workstation, but the award was reduced by the court to a nominal amount because the ratio of compensatory to punitive damages was 300:1; *Matusick v. Erie County Water Authority*, 774 F.Supp.2d 514 (W.D.N.Y. 2011).
 52. The case results and details are at <http://www.bloomberg.com/news/2011-05-04/ubs-unit-loses-10-6-million-sexual-harassment-jury-verdict-lawyer-says.html>. *Ingraham v. UBS Financial Services Inc.*, 0916-CV-36471, Circuit Court, Jackson County, Missouri.
 53. See supra, the *Tuli* and *Garfield Medical Center* cases cited under "Sexual Harassment."

54. 116 P.3d 1123 (Calif. 2005).
55. Many cases have since upheld opponents of discrimination under similar theories. See *Murphy v. Kirkland*, 930 N.Y.S.2d 285 (2nd Dept. 2011) (plaintiff opposed sexual harassment of another employee); *Sherrer v. Hamilton County Bd. of Health*, 747 F.Supp.2d 924 (S.D. Ohio 2010) (disability discrimination); *Mugavero v. Arms Acres*, 680 F.Supp.2d 544 (S.D.N.Y. 2010) (same as *Murphy*, supra).
56. 548 U.S. 53 (2006).
57. 129 S.Ct. 846 (2009).
58. 131 S.Ct. 1325 (2011).
59. *Murphy v. Kirkland*, 930 N.Y.S.2d 285 (2nd Dept. 2011).
60. *Mugavero v. Arms Acres*, 2009 WL 890063 (S.D.N.Y. 2009).
61. 131 S.Ct. 863 (2011).
62. Id. at 868.
63. Id. at 870.
64. 2011 WL 818662, 1 (N.D.Fla.).
65. Id. at 868.
66. See, for example, *Fogleman v. Mercy Hospital*, 283 F.3d 561 (3rd Cir. 2002) (the claim that the hospital terminated the employee because his father had filed a discrimination suit was cognizable under the Americans with Disabilities Act and the Age Discrimination in Employment Act); *Jackson v. Birmingham Bd. of Educ.*, 125 S.Ct. 1497 (2005) (permitting a man to make a claim for Title IX retaliation); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400 (1969) (wherein a Caucasian could sue for retaliation under 42 U.S.C. § 1982 when he spoke out against discrimination against his black tenant). Merely naming another employee as a potential witness in an EEOC filing can confer protection. *EEOC v. Creative Networks*, 2008 U.S. Dist. LEXIS 103381 (D. Ariz. Dec. 12, 2008).
67. Pub. L. No. 111-148, 124 Stat. 119 (2010).
68. 31 U.S.C. sec. 3729-3733.
69. 42 U.S.C. § 1320a-7a.
70. Photopolos T.P., & Askew, G.W. (2008). Having your cake and eating it too: The (un)enforceability of releases on future qui tam claims. *Journal of Health and Life Sciences*, 1, 145.
71. In 2000, the Office of the Inspector General's (OIG's) \$486 million settlement with Fresenius Medical Care Holdings, the nation's largest provider of kidney dialysis products and services, included the most comprehensive corporate integrity agreement ever imposed by the OIG. Other sizable 2000 settlements included \$175 million with Beverly Enterprises, a nursing home chain, and \$74.3 million with Anthem Blue Cross and Blue Shield of Connecticut. A current month-by-month listing of pending actions can be found at <http://oig.hhs.gov/fraud/enforcement/criminal/index.asp> and http://oig.hhs.gov/fraud/enforcement/cmp/false_claims.asp, and the majority of the charges are grounded in healthcare fraud. Many of the settlements were driven by self-reports, which reflects the real and potent authority of the OIG under the statute. One outcome was back pay and reinstatement for a victim of retaliation after reporting fraud. *U.S. ex rel. Nowak v. Medtronic, Inc.*, — F.Supp.2d—, 2011 WL 3208007 (Mass.). Such an outcome may not be anomalous in the future.
72. Patient Protection and Affordable Care Act (Pub. L. 111-148) (PPACA) and its companion, the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152) (HERA).
73. Office of Public Affairs, U.S. Department of Justice. (2009, November 19). Justice Department recovers \$2.4 billion in false claims cases in fiscal year 2009; more than \$24 billion since 1986 [Press release.] Retrieved from <http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html>. A total of \$2.4 billion was received altogether in that year; www.justice.gov/opa/pr/2009/November/09-civ-1253.html. The Department of Justice statistics include civil FCA settlements only; they do not include substantial criminal penalties or amounts awarded to the states under their false claims laws.
74. Id.
75. See <http://www.stopmedicarefraud.gov/heatsuccess/index.html>; <http://www.hhs.gov/news/press/2011pres/01/20110124a.html>
76. Department of Health and Human Services. (2009, May). Attorney General Holder and HHS Secretary Sibelius announce new interagency health care fraud and enforcement action team. Retrieved from <http://www.hhs.gov/57news/press/2009pres/05/20090520a.html>
77. Department of Health and Human Services & Department of Justice. (2010, May). Health care fraud and abuse control program annual report for

- fiscal year 2009. Retrieved from <http://oig.hhs.gov/publications/docs/hcfac/hcfareport2010.pdf>
78. Department of Health and Human Services & Department of Justice. Health care fraud and abuse control program annual report for fiscal year 2010. Retrieved from <http://oig.hhs.gov/publications/docs/hcfac/hcfareport2010.pdf>. In the three and a half years since its inception, Strike Force prosecutors filed 465 cases charging 829 defendants who collectively billed the Medicare program more than \$1.9 billion; 481 defendants pleaded guilty and 48 others were convicted in jury trials, and 358 defendants were sentenced to imprisonment for an average term of nearly 44 months. <http://www.codingnetwork.com/blog/post/health-care-fraud-and-abuse-control-program-annual-report-for-fiscal-year-2/>
 79. The employee should state explicitly in such a release that he or she is not aware of any violations of the law, or should specify those he or she is aware of. Whistling while they work: Limiting exposure in the face of PPACA's invitation to employee whistleblower suits. (2010). *Health Lawyer*, 22, 19, 24.
 80. <http://www.phillipsandcohen.com/2009/Bextra-whistleblower-case-leads-to-record-setting-Pfizer-settlement.shtml>
 81. The Health Alliance of greater Cincinnati and the Christ Hospital to pay \$108 million for violating anti-kickback statute and defrauding Medicare and Medicaid. (2010, May). Retrieved from <http://www.justice.gov/opa/pr/2010/May/10-civ-602.html>
 82. <http://fraudblawg.com/2010/01/14/wheaton-community-hospital-violates-the-false-claims-act/>
 83. <http://www.longislandpress.com/2011/12/01/whistleblower-feted-in-northport-hospital-case/>
 84. <http://www.ktbs.com/news/27108735/detail.html>
 85. Seven individual hospitals' settlement amounts as of January 2010:
 - Lakeland Regional Medical Center, Lakeland, Florida: \$1,660,134
 - Seton Medical Center, Austin, Texas: \$1,232,956
 - Greenville Memorial Hospital, Greenville, South Carolina: \$1,026,764
 - Health Care Authority of Lauderdale County and City of Florence, Ala., doing business as Coffee Health Group (formerly known as Eliza Coffee Memorial Hospital): \$676,038
 - Presbyterian Orthopaedic Hospital, Charlotte, North Carolina: \$637,872
 - St. Dominic-Jackson Memorial Hospital, Jackson, Mississippi: \$555,949
 - Health Care Authority of Morgan County—City of Decatur doing business as Decatur General Hospital, Decatur, Alabama: \$537,893
- <http://www.phillipsandcohen.com/2011/Hospital-Medicare-fraud-settlements-for-kypoplasty-billing-bring-total-recovered-from-whistleblower-lawsuit-to-101-million.shtml>
86. Ongoing Department of Justice investigation that began with a settlement for \$75,000,000 with Medtronic Spine for counseling hospitals to admit patients undergoing the procedure overnight; see <http://www.fcaalert.com/tags/kypoplasty/>
 87. First Amendment/free speech concerns are not applicable to private employers.
 88. Fake friending (gaining access to social networks through misrepresentation) and coerced friending (by supervisors whose requests may be perceived as coercive); *Petryol v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J. 2009).
 89. <http://recruiting.jobvite.com/news/press-releases/pr/jobvite-social-recruiting-survey-2010.php>
 90. Under Section 7 of the National Labor Relations Act (29 U.S.C. § 151-169, NLRA), employees have the right to engage in concerted activity. Under Section 8 of the NLRA, it is an unfair labor practice for an employer to interfere with or restrain an employee in exercise of his or her rights.
 91. Case No. 34-CA-12576 before the National Labor Relations Board.
 92. See, for example, N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2002) (prohibiting discrimination, refusal to hire, or termination of employees based on “legal recreational activities outside work hours, off of the employer’s premises and without use of the employer’s equipment or other property”); CAL. LAB. CODE § 1102.5(a) (2009); COLO. REV. STAT. § 24-34-402.5(1) (2008).
 93. Simonetti, E. (2004, December 14). I was fired for blogging. *CNET*. Retrieved from http://news.cnet.com/I-was-fired-for-blogging/2010-1030_3-5490836.html. See *Simonetti v. Delta Air Line Inc.*, Case No. 1:05-CV-2321, Complaint filed (N.D. Ga. Sept. 7, 2005). The case was stayed after Delta

- entered bankruptcy. Simonetti is considered “dooced”—fired for what she wrote in a blog. See Netlingo.com at <http://www.netlingo.com/lookup.cfm?term=dooce>
94. Of course, online information becomes available universally and is difficult, if not impossible, to retract.
 95. Compare the termination of the sociology professor who was suspended for posting on her Facebook page in January, “Does anyone know where I can find a very discrete hitman? Yes, it’s been that kind of day. . .” At a later date: “had a good day today. DIDN’T want to kill even one student. :-). Now Friday was a different story.”
 96. http://www.hcca-info.org/staticcontent/2011SocialMediaSurvey_report.pdf
 97. 751 A.2d 538 (N.J. 2000).
 98. 302 S.W.3d 592 (Sup. Ct. Ark. 2009).
 99. *C.R. v. Tenet Healthcare Corp.*, 169 Cal.App.4th 1094, 87 Cal.Rptr.3d 424 Cal.App. 2 Dist. (2009) (sexual abuse of patients).
 100. See, generally, “Employee Background Checks Were on Many States’ Lawmaking Calendars,” 2003 State Legislation, Daily Labor Relations, Supp. Rep., No. 84, May 3, 2004 (S-5).
 101. For example, *Jones v. Healthsouth Treasure Valley Hosp.*, 206 P.3d 473(2009) (wherein an independent contractor who worked in the hospital, a cell-saver technician, worked under “apparent authority” of the hospital and so gave rise to a claim of negligent hiring); in *Harrison v. Binnion*, 214 P.3d 473 (2009), a hospital was held by the Idaho Supreme Court to be potentially liable for credentialing a physician who had a history of substance abuse.
 102. This baseline connotes more than merely interviewing an employee and reviewing his or her resume. It requires contacting references and former employers, for instance, if employment carries with it the authority to enter someone’s living quarters or to provide intimate physical care. *Tallahassee Furniture Co., Inc. v. Harrison*, 583 So.2d 744 (Fla. App. 1 Dist., 1991). See N.Y. Corr. Law Sect. 752 (2) (McKinney 1987), allowing limited circumstances wherein employers can determine the risks of employing an ex-offender based on the correlation between the offense and the duties of the job, the interval since the offense, the age of the offender at that time, and the gravity of the crime. See N.Y. Corr. Law Sections 750-753. All Medicare and Medicaid providers should be aware of the current focus of the Center for Medicare and Medicaid Services on vetting providers. See Dresevic, A., Romano, D. (2011, April). “The Medicare enrollment process: CMS’s most potent program integrity tool. *Health Lawyer*, 23(4), 1.
 103. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987(codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.). These guidelines have been strengthened and impose affirmative responsibilities on boards of directors, including setting a corporate climate that encourages ethical conduct and compliance with the law. Supplement to Appendix C, Amendment 673, http://www.usssc.gov/Guidelines-/2010_guidelines/Manual_PDF/Appendix_C_Supplement.pdf (starting at page 102).
 104. See Federal Sentencing Guidelines Manual § 8B2.1 (2009), for a full description of the components of such a program.
 105. See Office of the Inspector General of the Department of Health and Human Services & America Health Lawyers Association. (2003, April). Corporate responsibility and corporate compliance: A resource for healthcare boards of directors. Retrieved from <http://www.nhpco.org/files/public/040203CorpResPrsccGuide.pdf>; see Department of Health and Human Services, Office of the Inspector General’s Compliance Program Guidance for Pharmaceutical Manufacturers, 68 Fed. Reg. 23,731, 23,731 (May 5, 2003), for general guidance in healthcare.
 106. Studies that support these conclusions abound. See American Hospital Association Resource Center. (2010). Workplace intimidation in the health care setting. Retrieved from <http://www.ashrm.org/ashrm/.../WorkplaceIntimidationBibliography.pdf>
 107. The silent treatment. Retrieved from <http://www.silenttreatmentstudy.com/>. Key findings include: The 10 percent of healthcare workers who confidently raise crucial concerns observe better patient outcomes, work harder, are more satisfied, and are more committed to staying in their jobs.
 108. Behaviors that undermine a culture of safety. (2008, July 9). *Sentinel Event Alert*, 40. Retrieved from

- http://www.jointcommission.org/assets/1/18/SEA_40.PDF
109. See., for example, Halverson, D. (2010). Abuse in the medical workplace: Fact vs. myth. Retrieved from <http://www.workplacebullying.org/2010/02/20/medical-workplace/>; Felblinger, D. (2008). Incivility in the workplace and nurses' shame responses. *Journal of Obstetric, Gynecologic and Neonatal Nursing*, 37, 234–242; Hutton, S. & Gates, D. (2009). Workplace incivility and productivity losses among direct care staff. *American Journal of Nursing*, 109, 52–58 (patient and management incivility is more detrimental than coworkers); Rosenstein, A. & Naylor, B. (2011, March). Incidence and impact of physician and nurse disruptive behaviors in the emergency department. *Journal of Emergency Medicine*.
 110. See Brown, T. (2011, May 7). Physician, heel thyself. *New York Times*.
 111. Bad blood: Doctor–nurse behavior problems impact patient care. (2009, November/December). *American College of Physician Executives*.
 112. Rosenstein, A. (2008). A survey of the impact of disruptive behaviors and communication defects on patient safety. *The Joint Commission Journal on Quality and Patient Safety*, 34, 464–471. Retrieved from http://www.mc.vanderbilt.edu/root/pdfs/nursing/ppb_article_on_disruptive.pdf
 113. Gates, D. M. (2004). The epidemic of violence against healthcare workers. *Occupational and Environmental Medicine*, 649.
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 120. 2009 WL 5170193.
 121. Id. at 8 (*italics added*).
 122. 491 F.2d 95 (2nd Cir. 2007).
 123. Id. at 99.
 124. An employee alleging defamation must show that the information concerned the employee, that it was

- published or disclosed to others, that it is false, that it damages the employee's reputation, and that the employer either acted negligently or had malicious intent. If a hospital discharges an employee for incompetence, that is protected opinion if it can be substantiated with facts and documents upon challenge. *Doe v. White Plains Hospital Medical Center*, 2011 WL 2899174 (S.D.N.Y.). However, to maintain this protection from liability, the information can be published only to those with a need to know. See *Johnson v. Medisys Health Network*, 2011 WL 5222917 (E.D.N.Y. 2011).
125. 987 P.2d 1172 (N.M. 1999).
 126. See also *Theisen v. Covenant Medical Center*, 636 N.W.2d 74 (Iowa 2001), wherein the court stated: A limited privilege applies to communications made in good faith on any subject matter in which the [person communicating] has an interest, or with reference to which he has a duty . . . if made to another person having a corresponding interest or duty, on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.
 127. *Johnson v. C. White & Son, Inc.*, 2011 WL 761540 (D. Conn. 2011). See the Connecticut Supreme Court's recognition of the qualified privilege in *Miron v. University of New Haven Police Dept.*, 631 A.2d 847 (2007).
 128. *Chudacoff v. Univ. Med. Ctr. of Southern Nevada*, 11 Cal. Daily Op. Serv. 7064 (9th Cir. 2011); *Ritten v. Lapeer Regional Med. Ctr.*, 611 F.Supp.2d 696 (E.D. Mich. 2009).
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 135. See Gardezi, F. et al. (2009). Silence, power and communication in the operating room. *Journal of Advanced Nursing*, 65, 1390-1399.
 136. How opportunities in the workplace and fairness affect intergroup relations. (2003). Survey conducted by the Center for Survey Research and Analysis at the University of Connecticut for the Level Playing Field Institute. The full report is available at http://www.lpfi.org/workplace/res_howfair.shtml
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 149. See, for example, *Naik v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 2010 WL 4702453 (C.A.7 (Ill.)).
 150. In *Wayne v. Principi*, S.D.N.Y. March. 3, 2004 (Slip Opn.), the Department of Veterans Affairs prevailed in a retaliation case based largely on counseling

- sessions; see also *Jack-Goods v. State Farm Mut. Auto. Ins. Co.*, Slip Opn., N.D.Ill. May 6, 2004 (counseling sessions, cited by the plaintiff-employee as evidence of racial and other discrimination, were held to be appropriate criticism of performance); *Ponniiah Das v. Our Lady of Mercy Medical Center*, 2002 WL 826877 (S.D.N.Y. 2002) (criticisms that precede the protected activity are relevant to finding there was no causal nexus in retaliation claim); *Sims v. Health Midwest Physician Services Corp.*, 196 F.3d 915, 921 (8th Cir. 1999); *Riebhoff v. Cenex/Land O'Lakes Agronomy Company*, 1998 WL 901749 (Minn. App. 1998) (unpublished) (counseling sessions were held to be valid criticism of inadequate performance and defeated claims of age discrimination, retaliation, and defamation); *Mercado v. N.Y.C. Housing Authority*, 1998 WL 15 (disability); *Gasio v. Department of Navy*, 114 F.3d 1207 (Fed. Cir. 1997) (claim of wrongful discharge based on disrespectful conduct).
151. See Oakley, J. (2005). Linking organizational characteristics to employee attitudes and behavior. Northwestern University Forum for People Management. Bullying is three to four times more prevalent than sexual harassment according to the 2010 Workplace Bullying Institute Survey (<http://www.workplacebullying.org/wbiresearch/2010-wbi-national-survey/>). According to CareerBuilder.com, approximately one out of four victims of bullying complains to the Human Resources departments, but 62% of those people claim that nothing was done in response. (<http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr632&sd=4%2f20%2f2011&ed=4%2f20%2f2099>). In *Street v. U.S. Corrugated*, 2011 WL 304568 (W.D. Ky. 2011), five employees (three women and two men) sued, contending a turnaround expert was abusive to them (yelling, cursing, throwing objects, and making physical threats). Although they lost in court because the employer prevailed on an “equal opportunity” defense (i.e., the “expert” did not discriminate based on gender but treated everyone equally miserably), the employer apparently recognized a problem, and the expert was soon removed. Nonetheless, the employees had to do battle in court—an experience that they could not have regarded as positive—and the employer won a Pyrrhic victory. For a study on verbal abuse of nurses, see Martin, A. et al. (2007). Nurses’ responses to workplace verbal abuse: A scenario study of the impact of situational and individual factors. *Research and Practice in Human Resource Management*.
 152. See Hastings, R. R. (2006, April). Minorities lack faith in promotion policies. *Society for Human Resource Management*. Retrieved from <http://www.wshrma.org/newsletters/june2006.pdf>
 153. How opportunities in the workplace and fairness affect intergroup relations. (2003). Survey conducted by the Center for Survey Research and Analysis at the University of Connecticut for the Level Playing Field Institute. The full report is available at http://www.lpfi.org/workplace/res_howfair.shtml
 154. Healthcare employers, under new pressure to meet patient satisfaction expectations, are also at risk when employees are not fully engaged. Sibson Consulting conducted its 2010 survey and found 52% of employees were engaged in 2009, compared with 47% in 2006 (<http://www.sibson.com/publications/surveysandstudies/2009ROW.pdf>). It defined “engaged” as one who know what to do and wants to do it. In December 2010, Blessing White found approximately 31% of employees engaged (http://www.blessingwhite.com/EEE_report.asp). See Fink, J. (2007). Unintended consequences: How antidiscrimination increases group bias in employer defendants. Retrieved from http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jessica_fink and http://works.bepress.com/jessica_fink/1.
 155. According to the Gallup data, 15% of all workers felt they had been subjected to some sort of discriminatory or unfair treatment. Among various racial/ethnic groups, 31% of Asians surveyed reported incidents of discrimination, the largest percentage of any ethnic group, with African Americans constituting the second largest group at 26%. Despite the incidents of discrimination experienced on the jobs, many employees chose not to file charges. Indeed, only 3% of the employees who filed charges at the EEOC were Asian/Pacific Islanders (<http://www.eeoc.gov/eeoc/newsroom/release/12-8-05.cfm>). These “unfiled” grievances have an impact that does lend itself to facile estimates.

156. See, for example, Three in ten African-American workers have experienced discrimination or unfair treatment at work. Retrieved from <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr378&sd=6%2f19%2f2007&ed=12%2f31%2f2007>; Ensher, E. et al. Effects of perceived discrimination on job satisfaction, organizational commitment, organizational citizenship behavior and grievances.
157. *Cincinnati Enquirer* poll at http://www.enquirer.com/editions/2001/09/04/loc_at_work_blacks_still.html
158. “The social costs of making attributions to discrimination may prevent stigmatized people from confronting the discrimination they face in their daily lives.” Kaiser, C.R., & Miller, C.T. (2001, February). Stop complaining! The social costs of making attributions to discrimination. *Personnel and Social Psychology Bulletin*, 27(2), 254. Middle-class African Americans anticipate backlash from confronting discrimination; Feagin, J.R., & Sikes, M.P. (1994). *Living with racism: The black middle-class experience*. Boston: Beacon. In fact, in the study contained in “Stop Complaining!”, “participants readily devalued an African-American man who attributed his failure to discrimination . . . participants thought he was a complainer . . . [I]t is stunning that this negative impression was created even when discrimination was certainly the cause of the failing grade” (pp. 261–262).
159. See Hastings, R.R. (2006, April). Minorities lack faith in promotion policies. Society for Human Resource Management.
160. Alternative dispute resolution mechanisms that carry insulation from retaliation have had notable successes: Crenshaw, W.D. (2011). Emerging applications for ADR. WL 284498; Morrison, G., & Robson, R. (2003, Spring). ADR in healthcare: The last big ADR frontier? *Conflict Resolution Quarterly*. Mandatory arbitration can also serve as a vehicle for resolution short of judicial proceedings: Stipanowich, T. (2010). Arbitration: “The new litigation.” *University of Illinois Law Review*, 201, 1. These processes, however, must be infused with fairness, or else they will be perceived as employer-created tools to perpetuate inequitable treatment. See Hickox, S. (2010). Ensuring enforceability and fairness in the arbitration of employment disputes. *Widener Law Review*, 16, 101.

