

HEALTH CARE PROVIDER ALERT

11/27/18

Crafting Physician Separation Agreements: Protecting Doctors from Negative References and Reviews

Hospital Employer's Agreement not to say Negative Things about an Ex-Employee may not Apply to Responses to Hospital Staff Credentialing Inquiries

By [Michael Brohman](#), Shareholder

In an era where more and more physicians are becoming employed by hospitals or hospital owned groups, such physicians must take extra measures to protect themselves in the event their employment is terminated or their employer allows them to resign their employment in lieu of termination. That is because the employer in these situations is wearing two hats: one as the physician's employer, and the other as the entity that granted staff privileges to enable the physician to practice at the hospital. In these kinds of situations, a physician typically tries to negotiate a Separation Agreement with the hospital employer by which the hospital agrees not to say anything negative about the physician in response to a third party inquiry. But, will such an Agreement necessarily prevent the hospital, wearing its "staff privileges" hat, from making negative statements in response to a staff privilege credentialing inquiry? In the recent decision of *Gallo v. Mayo Clinic Health System-Franciscan Medical Center, Inc.*, No. 17-1623 (November 1, 2018), the Seventh Circuit Court of Appeals answered this question by saying no. In so ruling, the Court affirmed a trial court decision that had refused to find a breach of a Separation Agreement where the hospital in question made negative statements in response to a credentialing inquiry.

The practitioner at issue in the case was Dr. Elisa Gallo, a dermatologist who was employed by the Mayo Clinic and who also had staff privileges at the Clinic. Shortly after Dr. Gallo began working at Mayo, she began having performance issues and conflicts with her supervisor. Things deteriorated from there and Mayo ultimately placed Dr. Gallo on an unpaid leave of absence. Dr. Gallo then hired an attorney, who was able to negotiate Dr. Gallo's resignation from Mayo through a Separation Agreement. The Separation Agreement was also intended to prevent Mayo from saying anything negative about Dr. Gallo in response to employment inquiries. Thus, the parties negotiated a specific letter of reference that was attached as an exhibit to the Separation Agreement and was to be provided by Mayo to "potential employers seeking a reference." The Separation Agreement further stated, "Employer will state nothing that will be inconsistent with the letter of reference (Exhibit A) attached hereto. No reference will be made to any performance issue and nothing derogatory will be stated."

About three years after Dr. Gallo left Mayo, she applied for a job with Refuah Health Center in New York. In connection with her potential employment with Refuah, it was anticipated that Dr. Gallo would have to perform certain procedures at Mount Sinai hospital. As a result, Dr. Gallo applied for staff privileges with Mount Sinai. As part of its normal credentialing process, Mount Sinai sent credentialing forms to facilities at which Dr. Gallo previously had privileges, including Mayo. Dr. Gallo's former supervisor at Mayo filled out the form and returned it to Mount Sinai. He rated Dr. Gallo as "superior" or "good" in 11 out of 13 categories, but rated her as only "fair" in the categories of "accepting feedback" and "ability to work with others". The supervisor also sent an email recommending Gallo, but stating that he was not willing to artificially inflate his evaluation.

Apparently because Dr. Gallo kept raising issues regarding her proposed employment contract with Refuah, that entity ultimately withdrew its offer of employment to Dr. Gallo. And, since Refuah was not going to employ Dr. Gallo, Refuah's chairman never made any recommendation for Mount Sinai to approve

Dr. Gallo's staff privilege application. As a result, Dr. Gallo was neither approved nor denied credentialing by Mount Sinai.

Presuming that it was Mayo's "negative" reference that resulted in her not getting the job with Refuah or staff privileges from Mount Sinai, Dr. Gallo sued Mayo for breaching the Separation Agreement. However, the federal district court granted summary judgment in Mayo's favor, concluding as a matter of law that 1) the Separation Agreement did not apply because the credentialing form was not an employment reference, and 2) the credentialing form was not the reason Refuah declined to hire Dr. Gallo.

The Seventh Circuit affirmed the district court's ruling. In finding no breach of the Separation Agreement, the Court first looked closely at the specific language of the Separation Agreement for a letter of reference "to be provided to potential employers seeking a reference." The Court ruled that this language did not apply to Mount Sinai's credentialing form request. According to the Court, this provision applied only to a "1) potential employer 2) seeking a reference." Looking at the facts of the case, the Court stated that it was undisputed that "Mount Sinai was not a 'potential employer seeking a reference.'" Instead, according to the Court, Mount Sinai sent the credentialing form "only for purposes of determining whether Gallo could have privileges to perform procedures at Mount Sinai..." Under these circumstances, the Seventh Circuit declined "to broadly read the contract to interpret the credentialing form as a 'reference' request from a potential employer."

The message of the *Gallo* decision is simple: If you are a physician who is leaving your hospital employment under unfavorable circumstances and you are concerned that your employer might make negative comments that can negatively affect your future options, make sure that any Separation Agreement you enter into with the hospital applies to both "hats" that the hospital is wearing. In her case, Dr. Gallo likely could have avoided any issues with Mount Sinai by including language in the Separation Agreement that required Mayo to act consistently with the agreed upon letter of reference not only with regard to "potential employers seeking a reference," but also with regard to any third-party credential or staff privilege inquiries.

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