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Welcome to Speaking of Health Law

Hi, I'm Norm Tabler, host of *The Lighter Side of Health Law* AHLA podcast sponsored by Coker Group. I hope you enjoy this month's edition.

Can a Person's Opinion Be False?

An NLRB judge recently addressed the question whether a person's opinion can be false—not can it be right or wrong, but can it be *false*?

It came up because Karen-Jo Long wrote a letter to the editor about morale at the hospital where she worked. She wrote in response to newspaper articles on hospital morale, including a report that 60 or so nurses had signed a petition calling attention to the, quote, “lack of adequate ... staffing ... that puts our patients at risk.”

Karen-Jo's letter said she applauded the nurses for going public with their concerns about unsafe staffing levels.

The day her letter appeared in the paper, the hospital fired Karen-Jo on the grounds that her letter was, quote, “maliciously untrue.” Why? Because in the view of hospital administration, staffing levels were *not* unsafe.

Karen-Jo filed a complaint with the NLRB. In a 25-page opinion the judge found in her favor and ordered the hospital to rehire her with back pay and benefits.

The decision pointed out that what Karen-Jo wrote was *not* false, let alone maliciously untrue. She didn't say staffing levels were unsafe. She simply applauded the nurses for expressing their *concerns* about staffing levels.

That's her *opinion*. And an opinion can't be false.

The case is *Maine Coast Regional Health v. Young*, NLRB.

No Good Deed Goes Unpunished

Mission Hospital, in Asheville NC, has learned the truth of Oscar Wilde's observation that no good deed goes unpunished. It was because of the hospital's good deed that a federal court denied the hospital's motion for summary judgment in a case brought against it by the EEOC.

Hospital policy required employees to have a flu shot by December 1, with an exception for employees who requested an exemption based on religious grounds by September 1.

Three employees refused on religious grounds to have the flu shot but hadn't requested exemption by September 1. So the hospital fired them. The EEOC sued under Title VII, alleging that the firing was based on the religion of the employees.

What was the hospital's good deed? It allowed a "grace period" for employees who got the flu shot but missed the December 1 deadline.

How was the hospital *punished* for that good deed? Well, the EEOC cited the grace period as proof of religious discrimination because there was a grace period for missing the *shot* deadline but not for missing the *religious exemption* deadline. The court ruled that was a valid argument.

The case is *EEOC v. Mission Hospital*, W.D.N.C.

As Others See Us

You're walking down the street feeling pretty good, when you accidentally see your reflection in a store window. Suddenly, you don't feel so good. You've seen yourself as others do.

A post-trial motion in a federal Medicare fraud case shows us how a nonlawyer—a juror in this case—sees health lawyers and, like the store window reflection, it's a little depressing.

Executives with Health Diagnostic Lab and BlueWave Consultants were found liable for Medicare fraud.

The defendants sought a new trial because of Facebook posts by a juror. According to the posts, the government lawyer is, quote, *a guy in a not at all expensive suit*. The defense lawyer is, quote, *a guy in a really expensive suit*.

After the guilty verdict, one post said, quote, *It's funny when rich people fall down*. The defense moved for a new trial, arguing the post showed prejudice against the defendants. But the judge ruled that the posts didn't show prejudice against the *defendants*—only against their *lawyers*. And since it's okay to be prejudiced against defense lawyers, motion denied.

The case is *U.S. v. Health Diagnostic Lab*, D.S.C.

When Words Speak Louder than Actions

Sometimes words speak louder than actions. Just ask Allergy Associates of Hartford. When a patient showed up for treatment, she was turned away because she had brought an animal with her, even though she insisted it was a service animal and not just a pet.

She reported the incident to the Connecticut Disability Office, which referred it to the U.S. Attorney, who in turn opened a joint investigation with HHS. As far as we know, the disability discrimination investigation went nowhere.

So Allergy Associates was off the hook for its *action*: turning away a patient with a service animal. But what about its *words*? You see, besides reporting the matter to the disability office, the patient also did what people with a gripe do these days: she complained to a local TV station.

The TV reporter called the allergist to get his side of the story. Did the allergist say, *no comment*? Or limit his response to the service animal issue? No. He elaborated. And his elaboration included some of the patient's protected health information, or PHI.

And remember, he didn't just *divulge* it: he broadcast it on TV. That's why HHS required the practice to pay \$125,000 and enter into a two-year corrective action plan.

So if you have a chatty doctor for a client, suggest googling *Allergy Associates of Hartford* and *HHS Resolution Agreement*.

Prescribing a Bitter Pill

Has your doctor ever recommended something you hoped was the wrong medicine because you *really* didn't want to take it, but it turned out the doctor was right, after all?

Here's a case like that. Spectrum heart hospital in Grand Rapids sent a letter to Hedda Martin, saying they would *not* go ahead with her heart transplant, quote, *due to [your] needing [a] more secure financial plan for immunosuppressive medication coverage*, and, quote, *recommending a fundraising effort of \$10,000*.

Hedda posted a copy of the letter on Facebook the next day. It went viral, and the world was outraged, united in agreement that this was one *heartless* heart hospital.

Meanwhile, Hedda's daughter did what the letter suggested: she set up a go-fund-me account. In two days she raised \$29,000—about three times the goal in the hospital's letter.

Sure, the pill the hospital prescribed was bitter—after all, who wants to beg strangers to help pay a medical bill? But it *did* work, and it worked fast. Now Hedda can get her transplant, with more than enough money for the post-op medication.

So maybe the heart hospital wasn't so heartless after all.

Well, that's it for this month's edition of *The Lighter Side of Health Law*. I hope you enjoyed it. Check your *AHLA Weekly* and *Connections* magazine for the next edition.