EEOC Challenges Yale New Haven’s “Late Career Practitioner Policy” in Discrimination Suit

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Introduction


United States Physicians Are Aging

Ensuring competence of senior physicians is increasingly important as United States
physicians advance in age. According to the American Medical Association’s (“AMA”) Physician Master File, physicians in the United States over age 65 account for 15% of the active workforce, and those between ages 55 and 64 make up 27% of the active workforce. This includes approximately 336,000 of 800,000 physicians in active patient care.\(^2\) One in four physicians in the United States is over the age of 65, and the number of physicians in this age group quadrupled between 1975 and 2013.\(^3\) The issue for health care providers and entities is how to discern whether a senior physician is competent to continue practicing.

Some Health Care Providers and Entities Have Implemented AgeBased Screening Requirements for Physicians

Some hospitals, like Yale Hospital, have instituted age-based screening requirements for physicians over a certain age, and there is growing interest in such policies.\(^4\) Age-based policies require physicians over a certain age to undergo periodic physical and cognitive exams as a condition of renewing clinical privileges.\(^5\)

While there are many approaches to age-based screening, these four elements are often included in screening policies:

1. a physical examination;
2. peer assessment;
3. other co-workers’ assessments; and
4. a cognitive assessment.\(^6\)

Recognizing the significance of this issue, the AMA\(^7\) and the American College of Surgeons (“ACS”)\(^8\) support age-based screenings to evaluate physicians’ mental health and review their treatment of patients. The AMA Council on Medical Education report states “formal guidelines on the timing and content of testing of competence may be appropriate and may head off a call for mandatory retirement ages or imposition of guidelines by others.”\(^9\) ACS has recommended surgeons undergo voluntary and confidential baseline physical examination and visual testing by their personal physician for overall health assessment starting at age 65 to 70.\(^10\) The ACS also recommends that surgeons voluntarily assess their neurocognitive functions using confidential online tools and selfdisclose any concerning findings.\(^11\)

Legal Considerations for Age-Based Policies

It is estimated that “only 5 to 10 percent of U.S. hospitals mandate screening of late career physicians.”\(^12\) Some hospitals cite concerns for litigation risk. The federal government and the majority of states have “enacted some form of prohibition against age discrimination in employment.”\(^13\) Senior physicians negatively affected by age-based policies could potentially sue health care facilities based on claims under Title VII, the ADEA, and the ADA.

While courts have held some hospitals liable under Title VII,\(^14\) the ADEA,\(^15\) and the ADA,\(^16\) many hospitals have successfully defended against such claims. The ADEA, for example, prohibits the arbitrary use of age in decisions that impact the employment status of an individual. If the hospital can demonstrate that the agebased testing program is reasonably necessary for public safety, the program may not violate the ADEA.

The United States Supreme Court explained: “The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a ‘bona fide occupational qualification’ defense.”\(^17\) Specifically, the ADEA provides that it does not violate the ADEA to
take an action based on age when “age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.” But this defense “has only ‘limited scope and application’ and ‘must be construed narrowly.’”

Yale Hospital’s “Late Career Practitioner Policy”

Yale Hospital developed a multistep assessment process for all clinicians age 70 and older who apply for, or seek to renew, medical staff privileges. The first step in this assessment is a screening with multiple tests to evaluate cognitive ability. Specifically, a neuropsychologist administers these tests, which include: rudimentary information processing; visual scanning and psychomotor efficiency; processing speed and accuracy under decision pressure; concentration and working memory; visual analysis and reasoning; verbal fluency; memory—visual and verbal; prefrontal self-regulation; and executive functioning. According to the Hospital, “the cognitive screening battery of tests was developed and designed to balance brevity with broad coverage of abilities relevant to clinical practice. The instrument was constructed to account for the cognitive decline and neurodegeneration commonly associated with aging.”

The final step in this assessment is reviewing the cognitive test results by the Hospital’s Medical Staff Review Committee (the “Committee”) that provides its recommendations to the medical staff credentialing panel. The Committee does not, however, provide pass or fail determinations to the medical staff credentialing panel. Instead, the Committee provides a range of decisions based on the cognitive functioning level of the clinician in review.

Based on a study issued by the Hospital in relation to this Policy, this assessment process has been performed on 145 clinicians since October 2016. The majority of those assessed were physicians; however, dentists, psychologists, physician assistants, midwives, podiatrists, and Advanced Practice Registered Nurses were also assessed because of the Policy’s implementation. Of those assessed, 57.4% scored within normal limits and received their medical staff credentials—these clinicians will continue to be re-assessed every two years; 24.1% scored below the normal limits but had no deficit—these clinicians received their medical staff credentials but were recommended for annual cognitive re-screening; and 12.7% had inadequate scores resulting in a protected practice environment or the clinician opting to discontinue his or her medical practice.

The EEOC’s Claims against Yale Hospital’s Policy

The EEOC contends that the additional medical examinations are solely due to the provider’s age with no particularized suspicion that the provider’s eyesight or neuropsychological ability may have declined. The EEOC believes the Policy violates the ADEA because it “subjects employees to the stigma of being singled out due to their age,” which ultimately has the “effect of depriving medical providers age 70 and older from equal employment opportunities.” The EEOC also alleges that the ophthalmologic and neuropsychological exams are medical examinations that violate the ADA’s prohibition against subjecting employees to medical examinations that are not job-related and consistent with business necessity. Last, the EEOC claims that the medical examination interferes with the clinician’s right to enjoy their employment free from unlawful medical examinations.

The EEOC is seeking a permanent injunction enjoining the Hospital from engaging in any employment practice that discriminates based on age, an injunction against the Hospital’s Policy, instatement, reinstatement, front pay, back wages, liquidated damages, punitive damages, and costs. It is unclear if the Hospital employs physicians or merely credentials
them as independent contractors.

**Yale Hospital’s Response**

On May 13, 2020, the Hospital filed its answer and affirmative defenses in response to the EEOC’s allegations. The Hospital’s answer largely focuses on two issues: (1) the employment status of the complainant medical providers, and (2) the medical staff’s role in developing and implementing the Policy. As to the first issue, the Hospital denied the existence of any employment relationship between the Hospital and any physician whose association with the Hospital is merely by virtue of holding or exercising medical staff privileges. The Hospital asserts that without proving an employment relationship between the parties, the provisions of the ADEA and ADA at issue would not apply.

As to the second issue, the Hospital contends that even if an employment relationship exists between the Hospital and any of the aggrieved parties, it was not the Hospital that developed and implemented the Policy, but rather the Hospital’s medical staff. As such, the provisions of the ADEA and ADA would not apply.

**Conclusion**

Age-based assessment of physician competence has long been controversial. As the medical field continues to develop its own stance on the practical aspects of age-based screenings, the legal structure surrounding this topic will also materialize. The EEOC litigation is in the initial pleadings phase. While the EEOC has implied it will continue to scrutinize the adoption and implementation of policies that utilize age-based assumptions, it is not clear how the district court will rule on the age discrimination claims.


4 Id.

5 Id.


7 See Staff Writer, supra note 3.


9 Id.

10 American College of Surgeons Board of Governors Physician Competency and Health
11 Id.


14 Michael R. Lowe, Stirring Muddled Waters: Are Physicians with Hospital Medical Staff Privileges Considered Employees under Title VII or the ADA Act When Alleging an Employment Discrimination Claim?, 1 DePaul J. Health Care L. 119, 121 (1996), https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1295&context=jhcl.

15 See California, supra note 6 at 14.

16 Id.


21 Id.

22 Id.

23 Id.

24 Id.

25 Id.

26 See EEOC, supra note 1 at 7.

27 Id.

28 Id.

29 See EEOC, supra note 1.

30 Id.

31 Id.

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