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CITATION: VAOPGCPREC 48-91
Vet. Aff. Op. Gen. Couns. Prec. 48-91

TEXT:

SUBJECT: Legal Liability in Providing References for Staff Appointments

(This opinion, previously issued as Opinion of the General Counsel 3-87, dated December 2, 1986, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Director, Southeastern Region

QUESTION PRESENTED:

To what extent is the Director, VAMC or other VAMC personnel legally liable for statements made when responding to reference inquiries about VAMC staff members presented by local community hospitals?

COMMENTS:

A part-time VA physician at the VAMC Amarillo, Texas applied for clinical privileges at three local community hospitals. Each local hospital, when requesting reference information from the VAMC, enclosed a consent form executed by the physician which read:

I hereby release from any liability any and all individual and organizations who provide information to the hospital or its Medical Staff, in good faith and without malice concerning my professional competence, ethics, character and other qualifications for medical staff reappointment and clinical privileges, and I hereby consent to release of such information.

The Office of District Counsel, Waco, Texas provided an opinion to the Director dated June 20, 1986, which stated that such a release would not prevent the physician from suing an individual or organization for libel, slander or any other tort. The opinion advises that no protection is provided to the employee by the Federal Tort Claims Act. Further, in the opinion of the Office of District Counsel, immunity as set forth in Barr v. Matteo, 360 U.S. 564 (1950) is not available to the individual who releases the information because such a release is not for a governmental purpose. This office was asked to review the opinion. For the following reasons, we believe that under the proper circumstances, providing information to local hospitals pursuant to a request for an employment reference on a VA physician will not pose a

liability risk to the individual providing the information. But first, we will discuss the privacy law issues involved, which were not addressed in the opinion dated June 20, 1986.

Two important points should be made at the outset about the requirements of the Privacy Act, codified at 5 U.S.C. § 552a. First, a disclosure of information about anyone from a system of records such as appears to be contemplated in this case, may be made only either with that individual's consent, or within one of the statutory substitutes for consent. Second, before disclosing the information, the Agency must take reasonable steps to ensure the accuracy, completeness, timeliness and relevance of the information to be released. 5 U.S.C. § 522a(b), (e)(6).

It appears that the physician's consent is legally sufficient to provide authority under the Privacy Act for the release to the local community hospital. However, as the June 20, 1986 opinion from the Office of District Counsel implicitly notes in suggesting the modified consent procedure, there may be some concerns about the accuracy, relevance, timeliness and completeness of the information involved in the contemplated disclosure. One way to address these concerns is going back to the physician for execution of the modified consent form suggested by the District Counsel; however, the physician does not have to be recontacted. The VAMC, if it wishes, in this or any other similar case, may pursue any alternative which also would ensure that the Agency has taken reasonable care to ensure the accuracy, completeness, timeliness and relevance of any information to be released about the physician.

There are two additional points involving the privacy issue which should be raised. First, any disclosure made concerning the physician cannot reveal the names or other identifying data concerning VA patients. Second, the release cannot contain any information contained in, or extracted from, a SERP visit report or investigation, 38 U.S.C. § 3305, but the VA is free to release data from the original underlying records used in the SERP investigation, as long as the privacy of individuals other than the physician is protected. Having fully addressed the privacy law implications, we not turn to the issues of liability and immunity.

Immunity is a subject largely of judicial making. There are generally two types of immunity discussed in the case law: (1) absolute immunity, which defeats a lawsuit at the outset, and (2) qualified immunity which must be asserted by the defendant as an affirmative defense.

As general rule, federal officials are absolutely immune from common law tort actions, such as libel or slander. Barr v. Matteo, supra; Butz v. Economou, 438 U.S. 478 (1978). The policy behind the absolute immunity rule is to allow government officials to carry out their duties freely, objectively, and without

fear or harassment. The basic test for deciding whether absolute immunity applies in a given case is whether the action of the employee is within even the "outer perimeter" of the employee's line of duty. Barr v. Matteo, supra. This test has been broadened by the federal courts of appeal which hold that "it is only necessary that the action of the federal official bear some reasonable relation to and connection with his duties and responsibilities to be within the scope of his authority." Currie v. Guthrie, 749 F.2d 185 (5th cir. 1984); Scherer v. Brennan, 379 F2d 609 (7th cir. 1967), cert. denied, 389 U.S. 1021 (1967). An additional requirement for absolute immunity that courts have imposed is that the actions of the public official must be connected with a "discretionary function." Norton v. McShane, 332 F.2d 855 (5th Cir.1964), cert. denied 380 U.S. 981 (1965); Currie v. Guthrie, supra. A public official's action is considered to be discretionary if it is the result of a judgment or decision which it is necessary that the government official be free to make without fear or threat of lawsuits and personal liability. William v. Collins, 728 F.2d 721 (5th cir. 1984); Norton McShane, supra.

We believe that responding to requests for employment information about former or current VA employees falls within the "outer perimeter" of the appropriate employee's duties, notwithstanding the fact that the fact the requests are generated from private sources. Keeping an open line of communication between public and private hospitals in exchanging information about health care professionals promotes a high standard of health care. Therefore, we believe the VA should cooperate when asked for information about VA employees. In addition, we believe that providing such information falls within the definition of "discretionary function" as set out in Norton v. McShane, supra. Upon review of the case law, we find no language which requires the activity to be for a governmental purpose. Therefore, we conclude that a VA employee releasing information concerning a physician's competence, ethics, character and other qualifications would be absolutely immune from a lawsuit alleging libel or slander.

However, most legal actions seek to elevate the action to a constitutional level in order to reduce the likelihood of a successful absolute immunity defense. Only qualified immunity is available to a federal official who has allegedly violated the constitution. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The burden of pleading qualified immunity rests upon the defendant. Gomez v. Toledo, 446 U.S. 635 (1980). Until recently there was both an objective and subject element to qualified immunity. However, in Harlow and Butterfield v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court altered the doctrine of qualified immunity when it eliminated the subject element of "good faith" which had previously been part of the test. The Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. The focus is to

be on the objective reasonableness of the official's conduct. Hewitt v. Grabicki, 794 F.2d 1973 (9th Cir.1986).

The most likely constitutional issue which would arise in the current set of circumstances involves that of the physician's liberty interest. The fifth amendment guarantee of due process applies in the employment context when an action is taken by the Federal government against an employee which deprives him or her of liberty or property. Board of Regents v. Roth, 408 U.S. 564 (1972). To establish a liberty interest, an employee must demonstrate that his governmental employer has brought false charges against him that "might seriously damage his standing and associations in his community" or that impose a "stigma or other disability" that forecloses "freedom to take advantage of other employment opportunities." Id. at 573; Paul v. Davis, 424 U.S. 693 (1976). Stigmatizing charges are those which concern an employees good name, reputation, honor and integrity, such as charges of dishonesty or other moral turpitude. Board of Regents v. Roth, supra. However, where there is no charge of dishonesty or immorality, no serious damage to an employee's standing and associations in the community can be shown. Id. Mazaleski v. Treusdell, 562 F.2d 701 (D.C.Cir.1977). Charges of substandard performance or inability to get along with others do not rise to the level necessary to infringe a liberty interest, thereby triggering constitutionally mandated procedural due process protections. Mazaleski v. Treusdell, supra; Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361 (9th Cir.1976).

However, at least one court has said that limited information as to an employee's competence does not have the same effect of every classification of employees. Giordana v. Roudebush, 448 F.Supp 899 (S.D.Iowa 1977), aff'd on other grounds, 617 F.2d 511 (8th Cir.1980). In Giordano, the Veterans Administration discharged a probationary physician, for failure to qualify and perform satisfactorily. Notification of such discharge was placed in the physician's personnel file on standard form 50. The VA explained that the policy on dissemination of information to prospective employers was then as follows: (1) If a non-federal prospective employer, only information specifically consented to by the physician would be released, except for the reason for separation shown on standard form 50, and (2) if a government prospective employer, the VA would release the physician's name, present and past position, titles, grades, salaries, and date and reason for separation shown on standard form 50. The court stated that although a prospective employer would only be told that the physician was separated for failure to qualify and perform satisfactorily during the probationary period, it was naive and unrealistic to believe that any hospital, university or practicing physician would give serious consideration to employing or associating with a highly specialized physician without a full disclosure of his past record. His refusal to consent to the full release of information would only raise a question of more serious conduct than was actually contained in the file. He would have

no choice but to consent to the release of his entire personnel file which contained unexplained stigmatizing charges which would have a substantial impact upon his employment opportunities. The Court held that because the personnel file and board action folder contained damaging information which the physician did not have an opportunity to rebut, the physician should be given a due process opportunity to reply orally or in writing to the information previously not made available to him.

Under the current set of circumstances, the information of which the Director contemplated release included a response that the physician "had demonstrated some degree of depression because of personal problems and a SERP visit noted a higher than expected complication rate in some of his surgical cases." We believe that the physician should be allowed access to this information and should be given a chance to respond orally or in writing before any information which may foreclose employment opportunities is released to the private hospital. This would afford the physician a meaningful opportunity to "clear his name," Board of Regents v. Roth, supra, as well as fulfill the Agency's obligation to ensure that the information is accurate, complete, timely, and relevant, as required by the Privacy Act. We believe that extending the physician due process at this point will facilitate a successful Harlow defense i.e., the official's conduct did not violate a clearly established statutory or constitutional right concerning a liberty interest.

A hearing required by due process is subject to waiver. Boddie v. Connecticut, 401 U.S. 371 (1971). However, we believe that the consent form which the physician executed in this case, although sufficient for Privacy Act purposes, does not serve to waive his constitutional right to due process. In a criminal proceeding, the standard for waiver is that it be voluntary, knowing, and intelligently made, Brady v. United States, 397 U.S. 742 (1970), or "an intentional reliquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458 (1938).

Even in non-criminal proceedings, the court "should indulge every reasonable presumption against waiver of an essential right." Aetna Insurance Company v. Kennedy, 301 U.S. 389 (1937). In accord with the reasoning of the court in Giordano, it is our opinion that it would be unrealistic to believe that any private hospital would consider extending clinical privileges to a physician who would not agree to execute such a consent. Therefore, we do not believe that the consent is sufficiently voluntary or intentional to rebut the presumption against waiver of the physician's due process right.

HELD:

The VA must ensure that any information released to the private hospital is accurate, complete, timely and relevant, and that no identifying data of patients or information from a SERP visit report or investigation is released.

Further, the Director of the VAMC Amarillo, Texas would be absolutely immune from a lawsuit alleging libel, thereby defeating a lawsuit at the outset. In order to ensure that the director can successfully assert the defense of qualified immunity in the event that a constitutional tort is alleged, we suggest that the physician be notified of the information to be released, and be given a meaningful opportunity to respond to the information orally or in writing before the information is released to a private hospital.

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