

EMPLOYER WINS ON AGE DISCRIMINATION BUT LOSES ON JUST CAUSE CONTRACT

AWARD OF ARBITRATOR

OVERVIEW

The Arbitrator finds that the Claimant has failed to carry his burden with respect to his claim of age discrimination. Specifically, the Arbitrator believes that Respondent's principals fired Claimant because **they** truly believed that Claimant was guilty of professional negligence.

The Arbitrator finds that Respondent failed to carry its burden of proof with respect to the alleged acts of professional negligence which Respondent claims constitutes just cause for termination. The proofs submitted by Respondent were not of sufficient quantity or credibility to merit a finding of just cause.

The restrictive covenant contained in the purchase and employment agreements remain in full force and effect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BREACH OF JUST CAUSE CONTRACT

The Claimant has been a physician in southeastern Michigan for over 40 years. His resume, which was entered into evidence, is impressive. He earned his bachelor degree from the University of Michigan and his medical degree from Wayne State University. The Claimant completed his ophthalmic residency at the Kresge Eye Institute in ____ and became board certified in ophthalmology in _____. He is also a diplomat of the American Board of Ophthalmology and a fellow of the American Academy of Ophthalmology. Other professional credentials include Chief of Staff at _____ Hospital on three occasions and the _____ Recognition Award for Continuing Medical Education during the years _____.

From 1960 to 1995 Claimant owned and operated a private practice in [Mars] County. In 1995 Claimant sold his practice to Respondent. The sale was memorialized in an asset purchase agreement which included a three year guaranteed employment agreement.

On September 4, 1997 Respondent fired Claimant.

Prior to his termination, Respondent's principals had never expressed any concern regarding Claimant's performance. However, on or about August 21, 1997, Respondent's nurse, [Betty Boop], R.N. reported to Respondent that she was concerned about Claimant's treatment of a patient with a yag laser. Although Nurse [Betty Boop] prepared a written statement regarding her concerns, she never testified at the hearing. Her written statement was accepted as an exhibit at the hearing.

Respondent's principals testified that they first became concerned about Claimant's performance upon receiving Ms. [Betty Boop]'s report. However, despite this concern they allowed Claimant to perform two more laser procedures, one on his last day of employment, September 4, 1997.

After Nurse [Betty Boop]'s report and before the termination on September 4, 1997 Respondent's principals directed a non-physician office manager to conduct an investigation into Claimant's competence. The results of that investigation were presented to Claimant in letter form at his termination. At no time was Claimant given an opportunity before his termination or at his termination to contest the conclusions arrived at by Respondent's principals in reliance on the office manager's investigation which formed the basis of the termination.

At the arbitration, Respondent relied on some of the reasons stated in its original letter as well as other reasons which it formulated after firing the Claimant. Finally, Respondent relied on other reasons stated in the termination letter which were modified in material ways. The Arbitrator will differentiate these reasons as they are discussed below.

A. IMPROPER USE OF YAG LASER IN AUGUST 1997

This incident precipitated Claimant's termination. However, the Arbitrator finds this incident insufficient alone or in combination with the other alleged incidents cited below to justify Claimant's termination under his contract.

As a preliminary matter, the parties should understand that a termination of employment is the work-world equivalent of capital punishment in the criminal arena. It is this Arbitrator's view that while the rules of evidence in arbitration are greatly relaxed vis-à-vis court, a termination must be supported by competent, i.e. reliable, evidence. In this regard, hearsay evidence is generally insufficient.

In this case, Respondent had the ability to present the testimony of Nurse [Betty Boop] on this very important point but chose not to do so. As a result, Defendant had to rely primarily on the hearsay report of Nurse [Betty Boop]. The Arbitrator was then left to weigh that hearsay evidence versus Claimant's testimony as well as the experts' conclusions based on Claimant's testimony and the hearsay evidence.

In addition to the explanation offered by Claimant, Respondent's failure to prevent Claimant from performing additional laser procedures after this supposed incident suggest the incident was not as serious as asserted by Respondent at the hearing.

In any event, the Arbitrator credits Claimant's explanation of this event and finds that this event, either alone or in combination with other alleged instances, does not constitute just cause for termination.

B. FIFTY-THREE SHOTS WITH THE YAG LASER

Respondent articulated this reason for Claimant's termination well after the termination. For this reason it is suspect. Additionally, Claimant and the experts testified that the laser setting is different for each patient. The experts also disagreed as to whether fifty-three shots with respect

to an individual patient is inappropriate. Dr. [Flintstone] testified that it was not necessarily unusual, while Dr. [Rubble] believed that it was.

Because the incident was raised so far after the fact, Claimant was unable to recall the specifics of the incident. Further, Respondent produced no eye witnesses to the incident. Further, there is some question as to the reliability of the document offered by Respondent in support of its claim that Claimant inappropriately took fifty-three shots. See Exhibit 22 (MD 51). It appears that the log sheet entered into evidence was altered to delete the records of laser procedures by doctors other than Dr. Claimant. Accordingly, no comparison was possible. See MD 522.

C. CLAIMANT'S 1997 LOG OF LASER USE

Respondent claims that its records indicate that Claimant was inappropriately using the laser and that this justifies termination. This articulated reason was also formulated after Claimant's termination and is therefore suspect for that reason. Further, as indicated above, the document submitted by Respondent in support of its claim appears to have been altered to exclude the settings of the other physicians, thereby precluding comparison with Claimant.

For the above reasons, the Arbitrator finds that this articulated reason, alone or in combination with others cited, does not constitute just cause for termination.

D. INACCURATE CHARTING

The reason was also asserted well after Claimant's termination.

Respondent also claims that Claimant was appropriately discharged because he inaccurately charted infection and inflammation. However, close review of the charts as well as the testimony of Dr. [Rubble], Respondent's expert, demonstrate that Claimant was in fact appropriately charting redness and swelling, not infection or inflammation. Further, it seems odd that Respondent's principals would not have expressed concern about this issue during the two plus years before they fired Claimant.

The presence of redness and slight swelling, as indicated by injection or edema respectively, would not require treatment. See deposition of Dr. [Rubble]. Accordingly, the Arbitrator finds that this articulated reason, alone or in combination with others cited, does not constitute just cause for termination.

E. IMPROPER GUARANTEES

Respondent also asserts that Claimant improperly made guarantees to patients.

It is undisputed that Dr. [Jetson] questioned Claimant about this issue in July of 1996. However, this is nowhere stated in the termination letter. Thus, the Arbitrator concludes that the alleged improper guarantee was not a bona fide reason for Claimant's termination.

Further, review of the charts submitted by Respondent in support of this claim show that the notations by Respondent's "writers" are ambiguous. They indicate that the "risks" were explained but also indicate that treatment will "increase vision." Dr. Claimant cleared up any

ambiguity by testifying that he never made such guarantees. The Arbitrator credits Dr. Claimant's testimony as it is consistent with the Arbitrator's experience in dealing with physicians both personally and professionally. Respondent produced no witnesses on this point.

In any event, the Arbitrator finds that this alleged incident, alone or together with the other incidents cited by Respondent, are insufficient to justify Claimant's discharge.

F. CLAIMANT'S TREATMENT OF A PATIENT AT EMERGENCY ROOM IN AUGUST 1996

Respondent claims that it properly fired the Claimant because he inappropriately treated a patient at the Emergency Room in August 1996. This alleged incident was uncovered by a review of Respondent's charts conducted by Respondent's non-physician office manager. However, the charge originally was said to have occurred in 1997, not 1996. Consequently Respondent amended its reasons for termination.

The Arbitrator notes with respect to this articulated reason for termination that Dr. [Jetson] was aware of this alleged incident in 1996 but testified that he had no concerns about Claimant's performance until August 1997.

The expert testimony on this point was not helpful as Dr. [Rubble]'s testimony appears to be the product of his briefing by his friend of 30 years, Dr. [Jetson]. This is not to say that Dr. [Rubble] was testifying untruthfully. Rather, it is to say that the basis for his testimony appears to be questionable. He himself testified that he could not understand the charts until Dr. [Jetson] came over and explained the situation to him.

G. PATIENT REFERRED TO DR. CLAIMANT AS A FENCE POST

Respondent claims that a patient in July 1997 informed Respondent's desk personnel that "talking to Dr. Claimant is like talking to a fence post." and requested another doctor. Respondent and its employees should be offended that a patient would refer to one of its physicians in such a derogatory manner. Needless to say, this hardly demonstrates just cause for termination, either alone or in combination with the other articulated reasons for discharge.

More important, there was no competent evidence to demonstrate that this patient was actually referring to Dr. Claimant. The patient records seem to indicate that the patient was to see Dr. [Jetson] on July 29, not Claimant and that he came in on August 1 and wanted to see Dr. [Spacely] for the next visit. The Arbitrator could find no evidence in the chart that this patient ever saw Claimant.

Accordingly, the Arbitrator finds that this articulated reason, either alone or in combination with the other articulated reasons for termination, do not justify termination.

H. DEROGATORY REMARK REGARDING PATIENT PERCEIVED AS GAY

Although highly inappropriate if made, the comment hardly justifies termination. More important, Respondent failed to produce any witnesses to this incident.

I. FAILURE TO ORDER A VISUAL FIELD EXAM OR CONDUCT DILATED FUNDUS EXAM ON PATIENT RECOVERING FROM OPEN HEART SURGERY

In reviewing the documents in connection with this allegation it appears that the Claimant did in fact order a visual field exam. Claimant testified that he did not conduct a dilated fundus exam because he was concerned about the impact on dilation of the patient's condition known as CNAG.

The Arbitrator notes that the patient chart was incomplete and, as a result, the Claimant was unable to specifically recall the circumstances surrounding this allegation. Respondent produced no witnesses on this incident.

Respondent, as with all the other articulated reasons for Claimant's termination, have the burden of proof. The quantum of proof with respect to this incident is insufficient and therefore the Arbitrator finds that Respondent did not have just cause to terminate the Claimant based on this incident alone or in combination with the other articulated reasons for termination.

J. PATIENT UNHAPPY THAT SHE HAD TO WAIT

The patient referenced by the Respondent in connection with this articulated reason is not the first nor will she be the last patient to be dissatisfied with having to wait in a doctor's office. More important, Respondent produced neither the patient nor the witness to the incident.

Dr. Claimant explained why the patient had to wait so long and the Arbitrator finds the explanation credible. Accordingly, the Arbitrator finds this "incident," alone or in combination with other incidents, does not constitute just cause for termination.

K. INAPPROPRIATE FOLLOW-UP AFTER PUFF TEST

Respondent claims that Claimant was negligent by failing to follow-up a puff test utilized to detect the presence of glaucoma with another test known as an applanation tonometer.

This allegation was amended after Claimant's firing. Originally Respondent claimed that Claimant was negligent for failing to check the pressure in the left eye. It was later pointed out that in fact Claimant did check the pressure in the left eye after which Respondent alleged that Claimant should have rechecked the pressure in the left eye with an applanation tonometer.

Dr. Claimant testified that he usually relies on the lowest puff test reading because in his experience it is most likely the accurate one. He testified that further testing with the applanation tonometer was not called for because the patient did not have any risk factors for glaucoma and that the appropriate treatment was simply to monitor the patient. Dr. Claimant did check the patient one week later.

Respondent claims, based on a treatise, that Claimant should have averaged the air puff results which would have triggered more aggressive treatment. However, Dr. [Flintstone] testified that he would not average the results. Rather, he would take the reading that he thought was the most accurate pressure of the eye and then look at whether there were other symptoms of glaucoma.

Accordingly, the Arbitrator finds this “incident,” alone or in combination with other incidents, does not constitute just cause for termination.

L. FAILURE TO PROPERLY TREAT PATIENT WITH REDUCED VISUAL ACUITY, FLOATERS AND FLASHES

Respondent claims that Claimant failed to warn this patient about retinal detachment symptoms. The chart contains no notation regarding a warning. The chart was written by Respondent’s writers, not Dr. Claimant.

Dr. Claimant testified that it is always his practice to warn of retinal detachment in such circumstances.

It is the Arbitrator’s experience that not all interactions with patients get noted in a chart. In fact, some communications that were never had with the patient make their way into charts. These are the grist of medical malpractice claims. However, the Arbitrator credits Dr. Claimant’s testimony with respect to the warning in this case even though it was not noted in the chart. The Arbitrator notes in this regard that Dr. [Jetson] testified that he took action which failed to make the charts prepared by Respondent’s writers.

Respondent was also critical of Dr. Claimant for failing to perform an indirect ophthalmoscopy. It is undisputed that Claimant did check for a detached retina with a procedure known as a direct ophthalmoscopy. Dr. Claimant testified that he felt no need to perform an indirect ophthalmoscopy because the patient’s complaints were cleared up by a change in her eye prescription and that therefore no further procedures were required at that time. However, two weeks later he did follow-up with an indirect ophthalmoscopy which confirmed that his initial conclusion was correct, that there was no detached retina. Accordingly, the Arbitrator finds this “incident,” alone or in combination with other incidents, does not constitute just cause for termination.

M. PATIENT SEEN BY CLAIMANT DURING JANUARY-MARCH 1997 EXPRESSED DISSATISFACTION WITH THE LENGTH OF TREATMENT

Respondent failed to produce any testimony on this point, leaving Dr. Claimant’s explanation of the event undisputed. Dr. Claimant testified that the lens was difficult to fit because of the client’s medical condition and not because of his malfeasance. Accordingly, the Arbitrator finds that this alleged incident, alone or in combination with the other claimed incidents, does not constitute just cause for termination.

N. PATIENT WAITED FOR 2 ½ HOURS WHILE CLAIMANT AWAITED FAXED CONTACT PRESCRIPTION FROM DOCTOR IN ILLINOIS

The patient was unhappy because she waited 2 ½ hours while Dr. Claimant waited for the patient’s doctor in Illinois to fax a contact prescription.

Respondent failed to present the patient or the technician at the hearing to support this claim. The only evidence on the matter was Dr. Claimant’s testimony. He testified that he gave the

patient the choice of paying a fitting fee or waiting for her physician in Illinois to fax the prescription and that the patient chose to wait for the doctor in Illinois to fax the prescription.

The Arbitrator hardly finds this just cause, alone or in combination with the other factors cited above, for Claimant's discharge.

O. RESPONDENT'S CLAIM THAT CLAIMANT MISINFORMED PATIENTS WITH RESPECT TO THE SIDE-EFFECTS OF MEDICATIONS

Respondent presented a witness, chart writer [Daisy Duck], to testify on this point. She testified that she heard Dr. Claimant inform patients of the wrong side-effects, but never brought this to Dr. Claimant's attention. She did testify that she informed her supervisor of this. However, Respondent failed to produce any charts evidencing the wrong recitation of side-effects.

The Arbitrator considers Ms. [Daisy Duck]'s testimony as totally lacking in credibility because she never said anything to Dr. Claimant about it and Respondent failed to present any documentation to support this allegation. Further, Ms. [Daisy Duck] could not identify a particular patient, date or surrounding facts which would allow Dr. Claimant to respond to her allegations.

P. CLAIMANT ALLEGEDLY TOLD GLAUCOMA PATIENTS ON SEVERAL OCCASIONS TO RETURN FOR FOLLOW-UP WHENEVER THEY WANTED RATHER THAN SCHEDULING A FOLLOW-UP VISIT

Two witnesses testified on Respondent's behalf, [Daisy Duck] and [Minnie Mouse]. Both witnesses testified that Dr. Claimant told glaucoma patients that they could return "whenever they wanted." Dr. Claimant emphatically denied this allegation. He affirmatively stated that he would never tell a glaucoma patient to report back whenever they wanted.

The Arbitrator credits Dr. Claimant's testimony because Ms. [Daisy Duck] testified that she documented Dr. Claimant's instructions as stated above yet Respondent failed to produce any charts with such notation. Further, both writers testified that they failed to point out to Dr. Claimant the error of his ways.

The Arbitrator prefers to believe that Ms. [Daisy Duck] and Ms. [Minnie Mouse] are simply confused and not lying. This is a plausible explanation given Dr. Claimant's testimony that he would inform patients that they could return anytime that they wanted **before** their specifically scheduled follow-up visit. In any event, the Arbitrator finds that this alleged negligence, either alone or in combination with the other factors relied on by Respondent, is insufficient to justify Claimant's discharge.

Q. DR. CLAIMANT'S POST JUNE 2, 1998, PATIENT CARE

The Respondent produced deposition testimony from an "expert," Dr. [Rubble], Dr. [Jetson]'s close friend for over 25 years. One of the topics of Dr. [Rubble]'s testimony was Claimant's patient care at the [ABC] Eye Clinic after Claimant's contract with Respondent would have expired on June 2, 1998.

It appears that Dr. Claimant may have missed retinal detachment symptoms in patients that he treated at the [ABC] Eye Clinic on June 23, 1998, and in September 1998. However, the proofs were by no means conclusive. Judged on the preponderance of the evidence standard, the Arbitrator finds that the proofs do not substantiate a deviation from the standard of care for the above referenced incidents.

However, these proofs are irrelevant except to the extent that it establishes Dr. Claimant's credibility. That is because the events occurred well outside the contract term and do not relate to whether Respondent had just cause to terminate Claimant in September 1997 or at any time during his contract term.

The proofs, as mentioned above, established in the Arbitrator's mind that Dr. Claimant was testifying truthfully at the hearing. He was specifically asked whether he missed any retinal detachments while working that the [ABC] Eye Clinic. He responded "I don't know." Dr. Claimant could have clearly given himself the benefit of the doubt and answered no to the question. The arbitrator would have felt that he was within his rights in giving such an answer. However, he gave what the Arbitrator feels is a candid answer which reinforced his credibility.

R. SUMMARY

The Arbitrator finds that the reasons articulated by Respondent for termination of Claimant do not constitute just cause because Respondent failed to prove the alleged incidents under a preponderance of the evidence standard and/or because some of the allegations, even if true, do not constitute the types of things which would prompt reasonable persons to discharge Dr. Claimant.

The Arbitrator has no doubt that similar allegations could be brought against any number of physicians if their records were critically scrutinized after the fact. However, even the searching scrutiny undertaken by Respondent failed to produce the requisite cause for termination.

II. AGE DISCRIMINATION

The parties skillfully argued their positions with respect to Claimant's age discrimination claim. In addition to the shifting burden analysis, the same actor inference, and the comment by Dr. [Jetson] regarding Dr. Claimant being set in his ways, the Arbitrator must also consider the substance, tone and demeanor of each witness' testimony. Having considered all of these matters, it is the Arbitrator's firm conviction that Respondent fired Claimant because its principals firmly believe that Claimant was professionally negligent, a belief not shared by this Arbitrator. Since this is a legitimate nondiscriminatory reason, the Claimant cannot prevail on his age discrimination claim.

III. COVENANT NOT TO COMPETE

The Arbitrator finds no legal or equitable basis to overturn the non-competition provisions contained in the purchase agreement and employment agreement. Accordingly, the covenants not to compete shall remain in full force and effect for the contract period.

AWARD

I, the undersigned Arbitrator, having been designated in accordance with the Agreements entered into by the above named parties on June __, ____, and having been duly sworn, having duly heard the parties' proofs and allegations of the parties, awards Claimant:

1. \$105,698.00 in economic damages and
2. \$30,487.00 in attorney fees and costs.

Further, the Respondent is to bear the fees and costs of the American Arbitration Association and of the Arbitrator.

This award is in full settlement of claims submitted by either party against the other in this arbitration.

DATED: _____

SIGNED: _____
James K. Fett, Arbitrator