
HOSPITAL WORKS MEDIATION

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You are a senior associate in a large law firm in Cincinnati. You were assigned the defense of the Good Neighbor Hospital in this case by a senior partner in the firm. Your practice is in defense litigation. Lately, you've been recognized for a sub-specialty in employment defense. While you bill at normal rates for the hospital, you know that the hospital is not-for-profit. You will be under some pressure from the hospital and the senior partner not to rack up a large bill, even if you take the case to trial. You will have to be conservative when planning your allocation of time and resources on discovery and motions.

You understood from the senior partner that the Good Neighbor Hospital has been threatened with suit by P.D. Terrell, its former director of development and community relations, hired approximately a year ago and terminated within the last three or four months. You spoke with the hospital's CEO, Brian Watson, who explained that the Good Neighbor Hospital is a reasonably large not-for-profit hospital that borders a low-income neighborhood on one side and a more upscale neighborhood on the other side.

P.D. was hired approximately a year ago by Watson's predecessor, the hospital's former CEO, and board of directors, after an exhaustive and expensive search. At the time of his hire, P.D. was the development director for a smaller hospital in Memphis, Tennessee. However, he was born and raised in Cincinnati, where his mother still lives. P.D. is 50 and unmarried.

The predecessor CEO who hired P.D. was forced out by the Good Neighbor Hospital's board within 6 months after P.D. arrived. The CEO had strongly urged the hospital to establish a luxury service wing for maternity, cosmetic, and other elective surgery. The hospital had hoped to attract higher-paying patients (who could afford to pay over and above insurance reimbursements) for high-profit procedures, to increase its budget for the walk-in Emergency room, clinic, and other neighborhood services. Unfortunately, the presence of the luxury service wing rankled the lower-income neighborhood adjacent to the hospital, which claimed that the new wing had increased traffic congestion and late-night ambulance noise. (The original ambulance path had been rerouted to accommodate the new wing.) Activists objected in the neighborhood paper to being "second class patients" not good enough for the new, well-decorated facility. Community relations suffered, as did the hospital's bottom line (at least in the short term), as many people opted to go to a different hospital for non-emergency procedures and wealthier patients hesitated to come to a facility in what was perceived as a rough neighborhood.

When Brian Watson came in a few months ago, it only took him a few weeks to see that P.D. Terrell was not and never would be up to the job. "What has he been doing for the past six months?" he fumed. Here is the way Watson explained the story:

It was absolutely essential that the new community relations director be proactive and inform and involve the neighborhood in the project and its goals. Terrell should have been filling the



local paper with articles and setting up community meetings to present the new wing as intended to benefit the hospital for the neighborhood. Instead, according to the staff, he spent months setting up his office, attending seminars, and coming up with a strategic fundraising plan.

We didn't need a strategy document, we needed a go-getter who would get out there, meet people in the community, and talk to the local ministers and parent groups about the financial pressures on hospitals under managed care. We are a not-for-profit hospital and proud of it. But, if we can't make ends meet, we'll fold or be taken over by a healthcare company that only cares about the bottom line, not the community at all. I don't think I've ever heard of P.D. attending a night meeting. He lives on the other side of town, next to Mommy (who's at least 75). He drags around the office all afternoon, and then at 5:01, he bolts out the door. I'm told he was "Mr. Energy" during his interview with the board. I don't know what happened between Memphis and Cincinnati, but I'd call him "Mr. Iron-Poor-Tired-Blood."

The day after I met him, I told the board that P.D. isn't right for this job. They asked me to work with him for a while because they had spent so much on the executive search process. Over the next few weeks, I started learning more, confirming my intuition. He has simply done no outreach to the local neighborhood groups. He hasn't responded to the negative editorials against the hospital in the local paper. I took him to a lunch meeting with the district police chief (who's also a leader in some school reform efforts and an influential member of the community). He has done nothing to follow up. As far as I can tell, his only visible move has been to set up tours of the new facility, but he's had them during the workday only. That means the working folks can't come. Only the affluent (non-working) women or retirees on the fancy side of the tracks have come through. I need someone sensitive to the needs of the entire community and will demonstrate that sensitivity. At least two of our board members began calling and writing to me complaining about P.D.'s attitude and performance.

After the last one of those calls, I walked in and fired him. I just told P.D. that it wasn't working out, that community relations were bad, and that his fundraising development efforts had been insufficient and ineffective. When P.D. protested, referring to the situation handed to him by the predecessor CEO, I acknowledged that it may not be entirely his fault but said that he didn't seem to be equipped with the energy or temperament it takes to build community relations. I then scrambled to find a replacement and was lucky enough to learn that Mary Mullins was ready to leave her job as director of a not-for-profit housing and community development organization in the Price Hill area. I know that P.D.'s lawyer will make a big deal of the fact that Mary is only in her 30s. The fact is that I would have preferred someone with more experience, but a bet on Mary is a well-placed bet. She has a phenomenal reputation in this city, a tremendously likable presence, approachable and easy, but with more energy and common sense than most three people put together. Mary is the type who would stay up all night to help her kids on a school project and then report to work chipper the next day. It's the tireless Mom image, and I think it will work here.

Brian Watson (the new CEO) looks to be about 37, and, while he's clearly high on energy, he does sound a bit brash to you.

While you haven't done an internal investigation, Brian did acknowledge that there's been a great deal of administrative management turnover since he arrived. He said:



They were just too used to the old ways; I needed people who would share my vision. If I thought I could work with a member of the staff, I set up a private meeting and gave him or her six months to “transition.” I did the same thing with the hospital’s accountant. If I thought they simply couldn’t perform well (based both upon previous evaluations and my intuition), I gave them a modest severance based upon seniority and suggested they start looking. Frankly, I knew that P.D. couldn’t do the job, this was confirmed by the feedback I got about him within the first few weeks, and I couldn’t afford to wait to let him go. His position was just too critical to the hospital’s viability.

Like your client, you think the plaintiff’s using this case to get very high-priced unemployment insurance for the rest of his life. P.D. is a guy who failed in an admittedly difficult job and was hit with a CEO who saw that failure quickly and clearly and acted in the Good Neighbor Hospital’s best interest. Now, P.D. is claiming breach of his employment contract, age discrimination—everyone fired past the age of 40 seems to grab at that one—and gender discrimination because he was replaced by a woman. It’s just lucky for P.D. that he wasn’t replaced by a 55-year-old man. Then, he would have nothing to sue about. Much as you would like to try one of these cases before a jury someday, you know this might not be in the hospital’s best interest.

For that reason, you decided to take the bull by the horns, and you called the plaintiff’s counsel, Fran Hamilton, to discuss settling the matter. He responded that his client would be amenable to settlement, but that given his client’s salary plus benefits at \$100,000 per year, back pay, front pay to age 60 or 65, and punitive damages, his demand would be \$2 million. Though you anticipated some puffing, you were frankly shocked. You know (and the plaintiff surely knows) that type of sum would put the hospital into the red. For a moment or two, you remained silent. Then you told Hamilton you’d get back to him. You called Watson, the CEO, who was absolutely livid when he heard the demand. After he calmed down, he surprised you by saying: Okay, let’s try to mediate it. I had some very good luck with mediation of a difficult case in my last position. If we are going to mediate, I think we should do it early so that I can keep your fees down. At a minimum, the mediation will give us information about the case that would be a lot more expensive to get through discovery. Besides, I think this guy is all puff and he’ll settle for short dollars, which is all this is worth.

You immediately called the plaintiff’s counsel and said: “I don’t think we’re going to get very far negotiating. I would like to try mediation in this case. After all, if we don’t do it now, some judge will tell us to do it later. The plaintiff’s counsel responded by saying: “I’m not a big mediation fan, but I agree with you that we’re going to have to go through it sometime. He soon got back to you with the names of three mediators who had been recommended to him. You circulated these names via email and learned that one had successfully mediated with others in the firm. You called the plaintiff’s counsel and agreed upon the mediator. Together, you contacted the mediator and scheduled a date.

Frankly, you don’t know if Watson will look to you for a settlement recommendation in this case—he may be brash enough not to ask a lawyer. Of course, you have analyzed the case



and would be prepared to give Watson your assessment. You do think the hospital has some exposure on the age discrimination claim (at minimum) because of the actions taken to bring in “new blood”. It is problematic that Watson didn’t offer Terrell the same probationary period as the others. On the other hand, the complaints from board members and community people are helpful: Watson didn’t have that type of complaint about any of the other management people.

Liability aside, you strongly disagree with the plaintiff’s view of damages. Right now, his back pay is less than \$30,000 (the termination was 3 months ago), you haven’t seen any effort to mitigate, and you didn’t believe he would get front pay or compensation. The most front pay you could imagine would be a year or two—not more than \$200,000. Unless you are convinced otherwise in the mediation, you see that as your realistic exposure, but you would recommend paying much less. You have not talked about fees with Watson yet, but you did jot down a budget before the mediation, estimating \$15,000 to draft and argue on summary judgment an additional \$30,000 in discovery, and \$30,000 for initial preparation—a total of \$75,000.