

Paper It: How Documented Decision-Making Can Help an Institution Avoid the Risk of He Said/She Said Litigation

BY LYNETTE PACZKOWSKI • JANUARY 2, 2019

A recent case out of the District of Columbia underscores the importance of establishing policies and documenting performance-related issues. Stephanie Waggel is a former resident in the Psychiatry Residency Training Program of The George Washington University (GW). She alleges that through a series of actions culminating in her termination from the program, GW violated her rights under the Americans with Disabilities Act and the Family and Medical Leave Act, as well as their local analogues, the District of Columbia Human Rights Act and the District of Columbia Family and Medical Leave Act. Both parties moved for summary judgment, and GW prevailed on all counts. The Court found that Waggel failed to request reasonable accommodation of her alleged disability and failed to show that GW's Clinical Competency Committee discriminated on the basis of disability when it recommended her termination after reviewing 12 issues with her performance. Additionally, GW granted FMLA leave each time Waggel requested it. Waggel was unable to show that GW retaliated against her because of that leave, or that GW interfered with her rights under the FMLA. The Court's incredibly lengthy decision is an impressive display of how well-documented decision-making can stifle largely unsupported, self-serving assertions.

Shortly after beginning her second year in the program, Waggel underwent surgery for the removal of a cyst in her kidney. She took various kinds of leave from the program during her two years, including sick leave during the surgery and FMLA leave at other times. In the meantime, GW identified a number of problems with Waggel's performance in the program, which were documented in, among other places, four Letters of Deficiency and a Notice of Unprofessional Conduct. As a result of these deficiencies, aspects of Waggel's clinical duties were suspended multiple times, her promotion to her third year in the program was delayed, and she was ultimately dismissed from the program.

The Court found that GW could not be liable for failing to make a reasonable accommodation when Waggel never went to GW's Office of Equal Employment Opportunity to pursue the procedure GW offered to all of its residents and other employees to present a claim of disability and a request for any reasonable accommodation they might need. Nor could Waggel prove she suffered an adverse employment action because of her disability. Rather, GW established that, among other things, Waggel (1) did not show up for an Emergency Medicine shift, did not give notice that she would be

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absent, was not responsive to efforts to reach her over the course of several hours, and upon contact simply stated that she was "not feeling well and decided not to come to work as a result;" (2) failed to submit required documentation for hospital health forms despite having been granted extension of the deadline for submission; (3) was involved in an incident with an agitated patient while she was on call, which incident resulted in a root cause analysis that identified knowledge deficiencies, disorganized thought, and lack of insight; (4) failed two courses; (5) made certain misrepresentations to faculty; (6) engaged in "disruptive" behavior, including a series of emails and texts to the program director and her classmates, threatening to "bring down the program;" and (7) had patient care/safety issues raised with regard to her performance.

In her pleadings, Waggel repeatedly disputed or offered "clarification" regarding GW's assertions about her conduct and performance, but she could not dispute the material points. Nor could she dispute that at least certain of the letters of deficiency included plans for remediation, and that she failed to comply with those plans, as well.

As to the FMLA claims, neither party disputed that Waggel applied for, and was granted, FMLA leave in both October 2015 and March 2016. Nevertheless, temporal proximity between Waggel's FMLA leave and GW's decisions could, under other circumstances, have been sufficient to establish the causal element of Waggel's prima facie case. In light of the record, however, the Court was not persuaded that temporal proximity was sufficient evidence for a jury to find that GW's seemingly legitimate, non-discriminatory justifications for their decisions were instead pretextual.

Client Tip: *GW had a policy for requesting reasonable accommodations. GW had a policy for requesting FMLA leave. GW documented Waggel's performance issues and took contemporaneous action, providing Waggel with, for example, Letters of Deficiency, a Notice of Unprofessional Conduct, and remediation plans. All institutions should take note of how strongly GW was able to refute Waggel's allegations with reference to documentary evidence.*

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