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Policy Exceptions May Protect Health Care Whistleblowers

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Many employees in the health care field are raising concerns about their employers' failure to adhere to national and local recommendations for preventing the spread of COVID-19, such as guidance issued by the Centers for Disease Control and Prevention and state or local agencies. But what legal protections do these employees have against retaliation for speaking out?

OSHA Whistleblower Protections

Unfortunately, there is no federal law that specifically protects health care workers who report patient safety issues, or other workers who report concerns about medical issues in the workplace. The Occupational Safety and Health Act, Section 11(c), does have an anti-retaliation provision — about which the U.S. Department of Labor recently issued a press release[1] — that, in theory, protects employees who report or protest workplace safety issues.[2] However, there are several fundamental problems with this statute.

First, Occupational Safety and Health Administration complaints must be filed with the DOL within 30 days after the discriminatory or retaliatory event.[3] This is far shorter than the statute of limitations for most other discrimination and retaliation statutes, which generally range between 90 days to a year, or even longer. Employees are unlikely to realize immediately that their termination was retaliatory, let alone even know of this short limitations period.

Second, the OSHA statute does not create a private cause of action — only the secretary of Labor has the authority to investigate these complaints. If a violation is found, only the secretary can bring a court action to enforce any remedy that the secretary may impose.

Federal courts have consistently rejected attempts by employees to bring a private cause of action under this statute, with the U.S. Court of Appeals for the D.C. Circuit being among the most recent to do so.[4]

Third, while the DOL receives numerous OSHA complaints, only a minority result in a favorable finding. For the past six years (fiscal years 2014 through 2019), OSHA has found merit in only 108 complaints out of 11,635 (or 0.93%).

Fourth, federal sector employees (other than those at the U.S. Postal Service) are not covered by this statute, and they are only minimally protected by Executive Order 12196, issued Feb. 26, 1980, and an OSHA regulation,[5] both of which purport to require agencies to have procedures to ensure that there is no retaliation for reporting workplace safety issues. However, neither the executive order nor the regulation creates any enforcement action or any right to a remedy.

Fifth, the OSHA statute only protects employees,[6] and does not protect independent contractors or other similar workers in the gig economy who are essentially self-employed.

Finally, a minority of courts have held that the existence of the OSHA remedy — despite its

significant weaknesses — precludes an employee from bringing a common law wrongful termination in violation of public policy claim, on the grounds that the OSHA remedy preempts the state common law remedy.[7]

In contrast, a majority of courts in other states have held that OSHA does not preempt a common law claim.[8] To avoid this potential problem, the better approach is to identify other statutes and regulations, such as those relating to patient safety, disease control and public health, as a source of a public policy claim.

Wrongful Discharge in the Context of COVID-19

Wrongful termination in violation of public policy, or "wrongful discharge," is a narrow exception to the employment-at-will doctrine that recognizes public policy protections for employees who oppose or refuse to commit illegal or unethical acts in the course of their employment. While state common law varies significantly in this context, many states require that the public policy at issue be advanced through either a statute, regulation, judicial precedent or professional code of conduct.

In the context of COVID-19, courts have yet to address the question of whether recommendations issued by the CDC, or other state and local agencies set forth public policies sufficient to support a wrongful discharge claim. However, in Alterio v. Almost Family Inc., the U.S. District Court for the District of Connecticut recently held that federal agency guidance and statements on federal agency websites could not support a health care worker's wrongful discharge claim.[9]

The court emphasized, though, that the plaintiff's reports concerned violations of federal and state requirements regarding personnel records, rather than reports of patient care and safety issues.[10] By contrast, the CDC's COVID-19 recommendations for health care facilities are quite clearly aimed at protecting patients and health care personnel.[11]

In Akers v. Kindred Nursing Centers LP, the U.S. District Court for the Southern District of Indiana denied a motion to dismiss a nurse's wrongful discharge claim grounded in an Indiana statute, under which the nurse had a duty to report unprofessional conduct.[12] The nurse argued that her reports of understaffing by the employer-nursing home were protected activity, and the court agreed, reasoning that "the Indiana legislature has stated its public policy of requiring professionals to adhere to standards set by the Board regulating the profession," and that "[i]nsufficient staffing by a long term care facility may jeopardize patient safety."[13]

Not only does this case support a cause of action for health care workers who are discharged for attempting to fulfill their professional duties under state law,[14] but, in principle, it suggests that agency regulations advancing public policies related to patient safety could support a claim for wrongful discharge.

Along these lines, in Falcon v. Leger, the Massachusetts Court of Appeals emphasized that, where a plaintiff's wrongful discharge "claims are grounded in regulations directly bearing on public safety, we will give weight to the statement of public policy that such regulations represent."[15]

HHS Regulations as a Source of Public Policy Underlying CDC Recommendations

The Social Security Act of 1935, as amended, states that all hospitals participating in the Medicare program must meet certain requirements enumerated in that statute, and that the

Secretary of the U.S. Department of Health and Human Services may impose additional requirements deemed necessary to ensure the health and safety of hospital patients receiving Medicare benefits.

On that basis, HHS has implemented regulations governing the minimum health and safety standards for hospitals participating in Medicare.[16] Under these regulations, participating hospitals "must have active hospital-wide programs for the surveillance, prevention, and control of HAIs [health care-associated infections] and other infectious diseases," and the "programs must demonstrate adherence to nationally recognized infection prevention and control guidelines."[17]

A strong argument could be made that the CDC's COVID-19 recommendations are nationally recognized infection prevention and control guidelines that express significant public policies aimed at protecting the health and safety of patients and health care personnel, and curbing the transmission of COVID-19.

The CDC guidance sets forth, among other things, detailed recommendations to protect health care personnel, to "[i]solate symptomatic patients as soon as possible," and to "[l]imit how germs can enter the facility," including by rescheduling nonemergent appointments, using telemedicine and limiting points of entry to medical facilities.[18]

Accordingly, hospital staff who are terminated in retaliation for opposing their employers' failure to abide by these guidelines could, theoretically, allege wrongful discharge based on the HHS regulations governing hospitals that participate in Medicare, by arguing that those regulations require adherence to CDC guidelines.

State or Local Regulations as a Source of Public Policy

Most state and local governments have also implemented regulations governing the licensure of hospitals and other medical facilities in those jurisdictions.

For example, Washington, D.C., regulations state that a D.C. hospital is responsible for "[e]stablishing visitation policies which are in the best interest of patients, including, but not limited to, protection from communicable diseases;"[19] that hospital "[f]acilities shall make provisions for isolating patients with infectious diseases;"[20] and that the "hospital shall establish and implement procedures to ensure that patient care and treatment, safety and well-being are maintained during and following instances of natural disasters, disease outbreaks, or other similar situations."[21]

Additionally, many state and local governments have issued orders or other recommendations requiring medical facilities to comply with COVID-19 protocols, including by postponing elective procedures and appointments with high risk patients.

At least one state court has recognized that state regulations governing hospitals advance substantial public policies that could support a wrongful discharge claim. In Tudor v. Charleston Area Medical Center Inc., the West Virginia Supreme Court of Appeals held that it did not require an in-depth analysis to recognize the substantial public policy underlying West Virginia's regulations governing the licensure of hospitals.

On this basis the court upheld a jury verdict in favor of a registered nurse's wrongful discharge claim, under which she alleged that she was constructively terminated in retaliation for reporting patient safety concerns due to the employer-hospital's understaffing of nurses.[22]

Similarly, in Hobson v. McLean Hospital Corp., the Massachusetts Supreme Judicial Court denied a motion to dismiss a hospital employee's wrongful discharge claim, under which the plaintiff alleged that she was fired in retaliation for attempting to enforce state regulations governing food service and patient care.[23] Therefore, state or municipal regulations of hospitals may provide another source of public policy sufficient to support a health care worker's wrongful discharge claim.

Though it remains to be seen how courts will treat wrongful discharge claims in the context of COVID-19, there is precedent to support a finding that federal and local regulations constitute public policies that protect medical workers who oppose their employers' failure to implement adequate COVID-19 protocol, including nationally recognized guidelines such as the recommendations issued by the CDC.

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[1] U.S. Department of Labor, Occupational Safety and Health Administration, U.S. Department of Labor Reminds Employers That They Cannot Retaliate Against Workers Reporting Unsafe Conditions During Coronavirus Pandemic, OSHA.gov (Apr. 8, 2020), https://www.osha.gov/news/newsreleases/national/04082020.

[2] 29 U.S.C. § 660(c).

[3] 29 U.S.C. § 660(c)(2).

[4] See Johnson v. Interstate Mgmt. Co. LLC, 849 F.3d 1093, 1097-98 (D.C. Cir. 2017).

[5] 29 C.F.R. § 1960.46.

[6] 29 U.S.C. § 652(6).

[7] See Odutola v. Branch Banking & Trust Co., 321 F. Supp. 3d 67, 75 (D.D.C. 2018); Hines v. Elf Atochem N. Am. Inc., 813 F. Supp. 550, 552 (W.D. Ky. 1993).

[8] See, e.g., Flenker v. Willamette Indus. Inc., 162 F.3d 1083, 1084 (10th Cir. 1998) (Kansas); Schweiss v. Chrysler Motors Corp., 922 F.2d 473, 475-76 (8th Cir. 1990) (Missouri); George v. D.W. Zinser Co., 762 N.W.2d 865, 872 (Iowa 2009); Berry v. Lee, 428 F. Supp. 2d 546, 560 (N.D. Tex. 2006); Kinzel v. Discovery Drilling Inc., 93 P.3d 427 (Alaska 2004); Cabesuela v. Browning–Ferris Indus. of CA Inc., 80 Cal. Rptr. 2d 60, 64 (Cal. Ct. App. 1998); Sherman v. Kraft General Foods Inc., 651 N.E.2d 708, 712-13 (Ill. App. Ct. 1995).

[9] Alterio v. Almost Family Inc., No. 3:18-cv-374, 2019 WL 7037789, at *4-9 (D. Conn. Dec. 20, 2019).

[10] Id. at *7.

[11] See U.S. Department of Health & Human Services, Centers for Disease Control and Prevention, Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings, CDC.gov, https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html (last updated Apr. 9, 2020).

[12] Akers v. Kindred Nursing Ctrs. LP, No. 2:03-CV-0327, 2004 WL 1629733, at *4-6 (S.D. Ind. May 18, 2004) (citing Ind. Cod. § 25-1-9-4).

[13] Id. at *6.

[14] But cf. Wright v. Shriners Hosp., 589 N.E.2d 1241, 1243-44 (Mass. 1992)(no public policy violation found where nurse was terminated for criticizing quality of care rendered to patients at hospital, as required by nursing ethical code).

[15] Falcon v. Leger, 816 N.E.2d 1010, 1019 (Mass. App. Ct. 2004).

[16] 42 C.F.R. § 482.

[17] 42 C.F.R. § 482.42 (emphasis added).

[18] See U.S. Department of Health & Human Services, Centers for Disease Control and Prevention, Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings, CDC.gov, https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html (last updated Apr. 9, 2020).

[19] D.C. Mun. Regs. tit. 22, § 22-B2014.2(o) (emphasis added).

[20] D.C. Mun. Regs. tit. 22, § 22-B2035.13(a).

[21] D.C. Mun. Regs. tit. 22, § 22-B2037.10 (emphasis added).

[22] Tudor v. Charleston Area Med. Ctr. Inc., 506 S.E.2d 554, 567-68 (W. Va. 1997).

[23] Hobson v. McLean Hosp. Corp., 522 N.E.2d 975, 977 (Mass. 1988).