

**STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM THE MICHIGAN COURT OF APPEALS  
PRESIDING JUDGE SERVITTO**

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ROBERTO LANDIN,

Plaintiff-Appellee,

-vs-

HEALTHSOURCE SAGINAW, INC.,

Defendant Appellant.

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Supreme Court No. 149663

Court of Appeals No. 309258

Trial Court No. 08-002400-NZ-3

**BRIEF OF *AMICUS CURIAE* MICHIGAN NURSES ASSOCIATION  
IN SUPPORT OF PLAINTIFF-APPELLEE**

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### **INTEREST OF AMICUS CURIAE**

The Michigan Nurses Association ("MNA") is a professional association and labor organization with a membership of approximately 10,000 registered nurses and other professional employees throughout Michigan and Wisconsin. MNA submits this brief as an *amicus curiae* in an effort to protect the interests of its members by safeguarding the protections afforded them under the Michigan Public Health Code.

Protecting nurses and other health care employees who notify their employer of suspected malpractice by a co-worker, or unsafe activities or conditions in the health care facility, is precisely what the Legislature intended in amending the Michigan Public Health Code. There is a strong public interest in bringing such matters forward. And nurses ought not to be at risk of retaliatory discharge for making such reports.

The Michigan Public Health Code sets forth clear legislative intent from which to uphold the Court of Appeals' decision in this case. Discharging nursing professionals employed at a health facility in retaliation for reporting malpractice or any other issue related to that health facility that is an unsafe practice or condition is so contrary to public policy that it must be actionable.

## **STATEMENT OF MATERIAL FACTS**

Plaintiff/Appellee Roberto Landin (“Landin”), a licensed practical nurse (“LPN”), was an at-will employee of Defendant/Appellant Healthsource Saginaw, Inc. (“Healthsource” or “Hospital”), a long-term health facility.

During the last two years of his employment, Landin provided professional nursing services to patients needing long-term care. One of those patients, named Jack, was under Landin’s care for approximately 18 months. At the jury trial, Landin described Jack as a “brittle diabetic” who suffered from numerous medical conditions. (Trial Transcript, Attachment 1, pp 81-85.)

On February, 25, 2006, when Landin arrived to work the day shift, he was informed by Gayle Johnson (an LPN assigned to care for Jack during the night shift), that Jack had died while under her care.

Believing that Jack’s death could have been avoided, Landin submitted a form “Variance/Concern Report” to his supervisor on February 25, describing his concerns about the unsafe and dangerous nursing care Ms. Johnson provided to Jack. Landin alleged that Ms. Johnson failed to adequately care for Jack and administered an inaccurate dosage of insulin. At the bottom of the Hospital form it states:

This confidential document is prepared solely for the Safety Risk Management Committee, a committee established pursuant to MCL 333.20175, 333.21513, 333.21515, and 331.531, and its peer review function, including the reduction of morbidity and mortality within the Hospital. It is not to be duplicated or made available to anyone without authority of the Committee Chairperson or Risk Manager.

**\*FORWARD DIRECTLY TO RISK MANAGEMENT\***

(Variance / Concern Report, Attachment 2.)

On April 28, 2006, Healthsource terminated Landin.

On or about August 13, 2008, Landin filed a one-count Complaint against Healthsource claiming that he was wrongfully terminated from his employment in violation of the public policy of the State of Michigan.

The trial court denied several motions for summary disposition filed by Healthsource and the case proceeded to a jury trial.

At the trial, the court instructed the jury that “Michigan law recognizes a cause of action for wrongful termination in violation of the public policy exhibited by MCL 333.20176a(1)(a).” (Trial Court Opinion and Order #3, Attachment 3.)

The jury concluded that Healthsource wrongfully terminated Landin in violation of the public policy exhibited by MCL 333.20176a(1)(a), and rendered a verdict against Healthsource and in favor of Landin.

### **MICHIGAN COURT OF APPEALS DECISION**

Healthsource appealed the trial court’s decisions denying each of its motions for summary disposition, arguing that the court failed to apply the proper legal analysis.

In its review, the Court of Appeals aptly noted the underlying purpose “of the statutes regulating health care professionals, including those set forth in the Public Health Code (under which MCL 333.20176a falls) is to safeguard the public health and protect the public from incompetence, deception and fraud.” *Landin v Healthsource*, 305 Mich App 519, 530; 854 NW2d 152 (2014), citing *Michigan Ass’n of Psychotherapy Clinics v Blue Cross & Blue Shield of Michigan*, 118 Mich App 505, 522; 325 NW2d 471 (1982). Applying the plain language of the statute, the Court recognized that, “[i]n enacting MCL

333.20176a, the Legislature clearly expressed a desire to further that policy by prohibiting retaliation against an employee who reports malpractice.” *Id.*

The Court of Appeals, in its de novo review of the trial court’s decisions in this case, applied the public policy exception to the at-will employment doctrine recognized in *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-697; 316 NW2d 710 (1982), “based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.” Those proscriptions are as follows: (1) where there are explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty; (2) where the alleged reason for the discharge was the employee’s failure or refusal to violate a law in the course of employment; and, (3) where the reason for the discharge was the employee’s exercise of a right conferred by well-established legislative enactment. *Landin*, 305 Mich App at 524.

The Court of Appeals found that the trial court “set forth an objective basis for plaintiff’s public policy claim,” namely, MCL 333.20176a(1)(a). *Id.* at 528. While not clearly articulated in the trial court’s opinion, the Court of Appeals held that the public policy exhibited by MCL 333.20176a(1)(a) of the Public Health Code “fell within exception (1) and/or (3)” cited in *Suchodolski*. *Id.* “As to exception (1), MCL 333.20176a(1)(a) contains an explicit legislative statement prohibiting discharge or discipline of an employee for specified conduct. It could also be argued that the specified conduct was that of acting in accordance with a statutory right or duty.” *Id.* at 529.

The Court reasoned that exception (3) in *Suchodolski* could apply to MCL 333.20176a for the same reason. *Id.* at 530. “[I]t could be argued that reporting

malpractice in the context of a medical workplace would have even more of a direct impact on the health and welfare of our citizens [than the underlying purpose of the workers' compensation statutes] and that the right to report alleged malpractice in one's workplace without fear of repercussion is of at least equal if not of greater significance than benefitting and protecting victims of work-related injuries." *Id.* at 531.

The Court of Appeals went on to hold that Landin's claim did not originate under the Public Health Code and, therefore, the exclusive remedy provision of the Whistleblowers' Protection Act ("WPA") was inapplicable. *Id.* at 532-533. The Hospital was prohibited from discharging Landin in retaliation for accusing a co-worker of malpractice pursuant to Section 20180 of the Public Health Code. The WPA did not apply in this case.

The Court of Appeals analysis was thorough, in accordance with the law of the land, and appropriately applied to the facts of the case.

### **ISSUES ON APPEAL**

The primary purpose of this Court granting the Hospital's application for leave to appeal is to determine "whether the plaintiff may maintain a wrongful discharge claim for violation of public policy under MCL 333.20176a(1)(a)," in consideration of *Suchodolski v Michigan Consolidated Gas Co, supra*. Further, to "address whether the Whistleblowers' Protection Act, MCL 15.361, *et seq.*, provides the exclusive remedy for a claim of wrongful discharge under MCL 333.20176a(1)(a)" in view of MCL 333.20180(1). (Michigan Supreme Court Order, Attachment 4.)

## ARGUMENT

### A. STANDARD OF REVIEW

The grant or denial of a motion for summary disposition is reviewed de novo. *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 472 Mich 353, 357; 696 NW2d 681 (2005). Resolution of the issues presented requires statutory interpretation which involves questions of law that are also reviewed de novo. *Madugula v Taub*, 496 Mich 685, 695; 853 NW2d 75 (2014).

### B. THE MICHIGAN PUBLIC HEALTH CODE

The stated purpose of the Michigan Public Health Code (“PHC”) is “to protect and promote the public health. . . .” The Legislature’s enactment of the PHC, and each of its numerous parts, is in accordance with the State’s constitutional mandate.

The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

Mich Const 1963, art 4, § 51.

The Michigan Legislature made clear that the PHC is to “be liberally construed for the protection of the health, safety, and welfare of the people of this state.” MCL 333.1111(2). A liberal construction of the provisions of the PHC makes clear that the Legislature intended to give all hospital employees protection when reporting complaints of alleged malpractice concerning their co-workers.

#### 1. Section 20176a(1) of the Public Health Code

The PHC is divided into 19 articles. Article 17 sets forth the requirements placed on health facilities and agencies.

- (1) A health facility or agency shall not discharge or discipline, threaten to discharge or discipline, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee or an individual acting on behalf of the employee does either or both of the following:
  - (a) In good faith reports or intends to report, verbally or in writing, the malpractice of a health professional. . . .

MCL 333.20176a(1)(a).

The Legislature also pronounced the penalties for violating this section.

- (2) In addition to the sanctions set forth in section 20165, a health facility or agency that violates subsection (1) is subject to an administrative fine of not more than \$10,000.00 for each violation.<sup>1</sup>

MCL 333.20176a(2).

**2. Section 20180 of the Public Health Code**

The Michigan Legislature introduced House Bill 5829 to address the inadequacy of the “after-the-fact” remedies afforded to workers who report unsafe activities and conditions in a health care setting which may threaten patients’ lives or their own.

The MNA actively supported HB 5829 because it believed it would increase the quality of care to patients while protecting nurses and other hospital workers from being sued, fired, or demoted when making such reports. The Michigan Health and Hospital Association also supported HB 5829. However, it contended that employees should first report unsafe conditions or practices to their employer before making any

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<sup>1</sup> Section 20165 of the PHC provides for the suspension or revocation of a license or certification, including sanctions against the health facility.

report to regulatory officials “so that the hospital has a chance to address the worker’s concern before bringing regulatory officials into the discussion.” HB 5829. (Attachment 5, pp 2-3.)

HB 5829 became law effective December 30, 2002, thereby amending Section 20180 of the PHC. (Attachment 5.)

Section 20180 of the PHC provides, in pertinent part, as follows:

(1) **A person employed by or under contract to a health facility** or agency or any other person acting in good faith **who makes a report or complaint** including, but not limited to, a report or complaint of a violation of this article or a rule promulgated under this article; who assists in originating, investigating, or preparing a report or complaint; or who assists the department in carrying out its duties under this article is immune from civil or criminal liability that might otherwise be incurred and **is protected under the whistleblowers’ protection act, 1980 PA 469, MCL 15.361 to 15.369.** A person described in this subsection who makes or assists in making a report or complaint, or who assists the department as described in this subsection, is presumed to have acted in good faith. The immunity from civil or criminal liability granted under this subsection extends only to acts done pursuant to this article.

\* \* \*

(3) **Subject to subsection (4), a person employed by or under contract to a hospital** is immune from civil or criminal liability that might otherwise be incurred and **shall not be discharged**, threatened, or otherwise discriminated against **by the hospital** regarding that person’s compensation or the terms, conditions, location, or privileges of that person’s employment **if that person reports to the department**, verbally or in writing, an issue related to the hospital that is an unsafe practice or condition that is not a violation of this article or a rule promulgated under this article. The protections afforded under this subsection do not limit, restrict, or diminish, in any way, the protections afforded under the whistleblowers’ protection act, 1980 PA 469, MCL 15.361 to 15.369.

(4) **Except as otherwise provided in subsection (5), a person employed by or under contract to a hospital is eligible for the immunity and protection provided under**

**subsection (3) only if the person meets all of the following conditions before reporting to the department the issue related to the hospital that is an unsafe practice or condition that is not a violation of this article or a rule promulgated under this article:**

(a) **The person gave the hospital 60 days' written notice of the issue related to the hospital that is an unsafe practice or condition that is not a violation of this article or a rule promulgated under this article. A person who provides a hospital written notice as provided under this subdivision shall not be discharged, threatened, or otherwise discriminated against by the hospital** regarding that person's compensation or the terms, conditions, location, or privileges of that person's employment. Within 60 days after receiving a written notice of an issue related to the hospital that is an unsafe practice or condition, the hospital shall provide a written response to the person who provided that written notice.

(b) The person had no reasonable expectation that the hospital had taken or would take timely action to address the issue related to the hospital that is an unsafe practice or condition that is not a violation of this article or a rule promulgated under this article.

MCL 333.20180 (emphasis added).

**3. Section 21513 of the Public Health Code -- Peer Review Committees**

Landin reported his concerns about the unsafe and dangerous nursing care provided by his co-worker to the Hospital's Safety or Risk Management Committee, which was established pursuant to the mandates of the PHC.

Section 21513 of the PHC provides that a licensed hospital bears responsibility "for all phases of the operation of the hospital, selection of the medical staff, and quality of care rendered in the hospital." MCL 333.21513(a). To that end, hospitals are statutorily obligated to create peer review committees "to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients. The review shall

include the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital.” MCL 333.21513(d).

This Court has consistently recognized the functions and role of peer review committees in protecting public health. “Hospitals are required [by MCL 333.21513(d)] to establish peer review committees whose purposes are to reduce morbidity and mortality and to ensure quality care.” *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 41; 594 NW2d 455 (1999). “Peer review is ‘essential to the continued improvement in the care and treatment of patients[.]’” *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 680; 719 NW2d 1 (2006), quoting *Dorris*, 460 Mich at 42; 594 NW2d 455 (additional quotation marks and citations omitted).

### **C. NO PRIVATE RIGHT OF ACTION UNDER THE PUBLIC HEALTH CODE**

Under Michigan law, a private right of action can be inferred only where the Legislature intended to create such an action. *Lash v Traverse City*, 479 Mich 180, 193-194; 735 NW2d 628 (2007). Significantly, where a statute provides for remedies, those remedies are exclusive unless “plainly inadequate.” *Pompey v General Motors Corp*, 385 Mich 537, 552, n 14; 189 NW2d 243 (1971).

In 2003, a hospital lab technician sued a hospital on a public policy theory when she was fired for refusing to perform a procedure she believed violated the standard of care. The Michigan Court of Appeals, in an unpublished opinion, held that “the Legislature has granted employees protection from retaliatory discharge by incorporating the WPA as a remedy” under the PHC. Therefore, plaintiff’s sole and exclusive claim for her wrongful discharge from the hospital must be brought under the WPA. Justice White dissented, stating, “The WPA only applies where the employee reports the alleged

violation to a public body.” *Parent v Mount Clemens General Hosp*, 2003 WL 21871745, \*3 (Mich App, Aug 7, 2003) (Attachment 6.)

In 2004, the Court of Appeals, in accordance with well-established principles of law, held that the PHC does not create a private right of action. *Fisher v WA Foote Memorial Hosp*, 261 Mich App 727, 730-731; 683 NW2d 248 (2004), review denied 473 Mich 888; 703 NW2d 434 (2005), citing *Mack v Detroit*, 254 Mich App 499, 501-512; 658 NW2d 492 (2002).

The issue in *Fisher* was whether the prohibitions against discrimination set forth in Article 17 of the PHC created a private right of action for discrimination. Section 21513(e) provides that a hospital “[s]hall not discriminate because of race, religion, color, national origin, age, or sex in the operation of the hospital including employment, . . . .” The Court held that the PHC includes a number of adequate remedies to enforce its provisions, including actions initiated by the State and misdemeanor fines, and those remedies are exclusive. *Fisher*, supra at 730-731. See also, *Pompey*, supra at 552.

On the same day that the decision in *Fisher* was issued, the Court of Appeals issued another published opinion holding that a hospital employee had no cause of action under the WPA when submitting a report under the PHC. In *Manzo v Petrella*, 261 Mich App 705; 683 NW2d 699 (2004), the plaintiff argued that he had a viable claim under MCL 333.20180 because the protections of the WPA are made applicable to reports made to the hospital’s peer review committee. The Court of Appeals disagreed. “Contrary to plaintiff’s argument, a plain reading of M.C.L. §333.20180 demonstrates that no private right of action exists under the section. . . . After reviewing the language of the

statute, and the framework set out within the statute, it is clear that the statute does not create a private right of action.” *Id.* at 718.

Similarly, in the *Feyz* case, this Court held that the peer-review provisions of the PHC do not create a private right of action. *Feyz*, 475 Mich at 678-679.

Likewise, Section 20176a(1)a of the PHC does not expressly create a private cause of action. The Legislature provided that health facilities that discharge an employee for reporting malpractice of a health professional are subject to the sanctions set forth in Section 20165 and an administrative fine. See MCL 333.20176a(2).

Healthsource relies extensively on the unpublished opinion in the *Parent* case, and makes no reference whatsoever to either the *Fisher* or *Manzo* published opinions or this Court’s decision in *Feyz*. Appellant’s reliance is misplaced. The *Parent* case is contrary to judicial precedent and not binding. See MCR 7.215(C)(1).

Landin’s report concerning the poor quality of care rendered by another health care professional to a patient, which Landin believed ultimately led to the death of the patient, was made to the Hospital’s peer review committee. Based upon clear and binding precedent, Landin had no private right of action under any applicable provision of the PHC, including MCL 333.20176a(1)(a).

#### **D. THE WPA DOES NOT APPLY IN THIS CASE**

The WPA provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body,

unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

MCL 15.362.

In order to have a cause of action under the WPA in this case, Landin had to report the unsafe condition to the Michigan Department of Community Health ("Department"). See MCL 333.20180(3).<sup>2</sup> However, Healthsource terminated Landin before he could report anything to the Department.

Under the PHC, the protections afforded to a hospital employee who reports an unsafe practice or condition are conditioned on the employee satisfying two conditions. First, the employee must give the hospital 60 days' written notice. Second, the employee must have "no reasonable expectation that the hospital had taken or would take timely action to address the issue." MCL 333.20180(4)(a) and (b).

Upon receiving notice of an unsafe practice or condition, the hospital is required to provide a written response. "Within 60 days after receiving a written notice of an issue related to the hospital that is an unsafe practice or condition, the hospital shall provide a written response to the person who provided that written notice." MCL 333.20180(4)(a).

The legislative analysis of Section 20180 demonstrates that the 60-day period was for the benefit of the hospitals and patients. "Hospitals want *all of their employees* to contribute to their mission of providing the best possible care to patients," but not by going to the Department. (Attachment 5, p 2.) Instead, they asserted that

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<sup>2</sup> Section 20180(3) provides protection under the WPA "if that person reports to the department."

unsafe conditions and practices “should first be reported to the hospital, so that the hospital has a chance to address the worker’s concern before bringing regulatory officials into the discussion”. *Id.*, pp 2-3.

In this case, Landin gave Healthsource notice of the unsafe practices on February 25, 2006. Landin complied with Section 20180 and did not report the unsafe condition to the Department during the 60-day waiting period. Healthsource, however, failed to provide a written response to the unsafe practices reported and terminated Landin prior to the expiration of the 60-day waiting period. In short, Healthsource thwarted the purpose of the 60-day waiting period, terminated Landin before he could report anything to the Department, and thereby prevented Landin from the benefit of the statutory protections under the WPA. The WPA simply doesn’t apply in this case.

**E. THE COURT OF APPEALS CORRECTLY HELD THAT LANDIN HAS A VIABLE PUBLIC POLICY CLAIM**

In the absence of a private right of action under the PHC or a claim under the WPA because Healthsource took advantage of the 60-day waiting period, Landin has a viable public policy claim for wrongful termination.

Even when employment is at-will, “an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state.” *Sventko v Kroger Co*, 69 Mich App 644; 245 NW2d 151 (1976). “A cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment.” *Suchodolski*, 412 Mich at 695. In *Trombetta v Detroit, T & I R Co*, 81 Mich App 489, 495; 265 NW2d 385 (1978), the Court of Appeals

held, "It is without question that the public policy of this state does not condone attempts to violate its duly enacted laws."

The Court of Appeals rightfully found that the public policy of this State is well established.

Those employed in the health and medical fields would be best situated to report alleged acts of malpractice to the benefit of the public as a whole. And, if employers in those fields are permitted to terminate employees who report the malpractice of co-workers or others, they, like employers in workers' compensation cases, would be given free rein to use the most powerful tool at their disposal to attempt to deflect their potential liability, but to the detriment of the public and in direct violation of the purpose of the Public Health Code and regulatory statutes governing the medical profession. Thus, where the statutory basis for plaintiff's public policy claim could support a public policy wrongful discharge claim, the trial court did not err in denying defendant's motions for summary disposition.

*Landin, supra* at 532-533.

Both sections 20176a(1)(a) and 20180 of the PHC support a public policy claim in this case. Both sections provide an explicit legislative statement prohibiting discharge or other adverse treatment of a hospital employee who acts in accordance with a statutory right or duty. The jury found that Landin was terminated because he exercised a right conferred by well-established legislative enactment -- reporting the malpractice of a co-worker which he believed led to the death of a patient. That decision and resulting verdict ought not to be disturbed.

When interpreting a statute, the goal is to ascertain and give effect to the intent of the Legislature by applying the plain language of the statute. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003).

The clear intent of the Legislature in enacting Section 20180 of the PHC was to protect health care workers who report unsafe practices or conditions of a health facility. The language of the statute is crystal clear. A person employed by a hospital shall not be discharged if the person reports to the Department an unsafe practice or condition. See MCL 333.20176a(a) and 333.20180. However, the Legislature also made it clear that the employee must give the hospital at least 60 days' notice before reporting to the Department. Surely, the Legislature did not intend to leave those employees who are within that 60-day waiting period vulnerable to the employer's "powerful tool at their disposal" of termination. Yet, under the current state of the law, those employees have no private cause of action under the PHC. And, they have no viable claim under the WPA.

Landin acted in accordance with what the Legislature prescribed: wait 60 days for a written response from the Hospital. That response never came. Instead, Healthsource terminated Landin during the 60-day waiting period. The explicit legislative statements prohibiting termination under the facts of this case unquestionably provide a clear basis to find the Hospital's actions so contrary to public policy that it must be actionable.

### **CONCLUSION**

*Amicus Curiae* Michigan Nurses Association urges this Court to hold that nursing professionals employed at a health facility or agency who are terminated from their employment in retaliation for reporting an unsafe practice or condition to a peer review committee in accordance with the Public Health Code is so contrary to public policy as to be actionable.

Respectfully submitted,

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Dated: August 19, 2015

STATE OF MICHIGAN  
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PRESIDING JUDGE SERVITTO

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ROBERTO LANDIN,

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-vs-

Supreme Court No. 149663

HEALTHSOURCE SAGINAW, INC.,

Court of Appeals No. 309258

Defendant Appellant.

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Trial Court No. 08-002400-NZ-3

**LIST OF ATTACHMENTS**

1. Trial transcript (pp 81-85)
2. Variance / Concern Report
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# ATTACHMENT 1

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TRIAL – VOLUME II of VII  BEFORE THE HONORABLE JANET M. BOES, CIRCUIT JUDGE  Saginaw, Michigan - October 19, 2011			
APPEARANCES:			
For Plaintiff: MANDEL I. ALLWEIL (P34115) Hurlburt Tsiros & Allweil, P.C. 821 S. Michigan Avenue P.O. Box 3237 Saginaw, MI 48605 (989) 790-3222			
For Defendant: RICHARD WILLIAM WARREN, JR. (P63123) 150 W. Jefferson Avenue, Suite 2500 Detroit, MI 48226 (313) 496-7932			
Also Present: Mr. M. Misbah Shahid			
Reported: TRACY M. STEMLER, CSR-4023 Official Court Reporter			

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1 Q What about 102?  
 2 A 102 is an evaluation. It's one of the pers, per one of  
 3 2003.  
 4 Q 103?  
 5 A Yeah, of 2003.  
 6 Q Okay. Is that 103?  
 7 A Yes -- 102, sir.  
 8 Q What's 105?  
 9 A 103 is that same year but the second per.  
 10 Q And what's 104?  
 11 A 104 is the annual of 2003.  
 12 Q And is that the last annual review that we had?  
 13 A Yes, sir.  
 14 MR. ALLWEIL: I'd ask that Exhibits 96  
 15 through 104 be admitted.  
 16 MR. WARREN: I have no objection, your Honor.  
 17 THE COURT: All right. 96 through 104 will  
 18 be admitted.  
 19 BY MR. ALLWEIL:  
 20 Q Now, Mr. Landin, when you work in a long-term facility  
 21 like HealthSource, is that different than working in a  
 22 hospital like St. Luke's, for instance, or Covenant as  
 23 it's now called?  
 24 A It is.  
 25 Q And how is it different?

1 A It's different. It's kind of like more relaxed, kind  
 2 of like low-keyed as far as activities or emergencies  
 3 occurring.  
 4 Q In terms of getting to know the patients, how, if at  
 5 all, is a long-term care facility different than  
 6 working at Covenant?  
 7 A It's a lot different. You have more time to know the  
 8 patient.  
 9 Q And during your time at HealthSource when you were an  
 10 LPN, what wings did you work on, what departments, or  
 11 however you want to describe it?  
 12 A Yes, sir. I worked in the psych unit, I worked on 5B  
 13 and 5A, I worked --  
 14 Q Now, is -- 5A is not part of the psych unit?  
 15 A No, sir.  
 16 Q Okay.  
 17 A I also worked 4 South, 3 South, and worked Unit 4B.  
 18 Q What is the psych unit?  
 19 A Psych unit is a --  
 20 Q Is there a number, or it's just called the psych unit?  
 21 A Just the psych unit.  
 22 Q All right. Now, as the LPN on 5A, that's where you  
 23 were during these events that we've -- that we're here  
 24 about today. Correct?  
 25 A That's right.

1 Q How many years were you on the psych unit?  
 2 A I was there almost four years. I'm going to say three,  
 3 three and a half years, sir.  
 4 Q So most of your earlier time was on the psych unit?  
 5 A That's correct.  
 6 Q Now, when you have 34 patients to care for, what  
 7 assistance, if any, as the LPN on the floor do you  
 8 have?  
 9 A We have CNAs to help us, nursing assistants.  
 10 Q And are you the supervisory nurse over those CNAs?  
 11 A Yes, sir.  
 12 Q And then if you have a problem, you would report to  
 13 who?  
 14 A To Amber.  
 15 Q Amber Boyk was the supervisory nurse?  
 16 A That's correct.  
 17 Q And she is an RN?  
 18 A Yes, she is.  
 19 Q Now, in February of 2006, Mr. Landin, how long had you  
 20 known and treated the patient we have been referring to  
 21 as Jack?  
 22 A Jack? About 18 months.  
 23 Q And what type of relationship did you have with Jack?  
 24 A Jack was my friend.  
 25 Q And how old was Jack?

1 A He was in his early 70s.  
 2 Q And his wife about the same age?  
 3 A Yes.  
 4 Q And was Jack there longer than most of your patients?  
 5 A Yes, he was.  
 6 Q And as a nurse, do you have access to the charts of  
 7 these long-term patients?  
 8 A Yes, sir.  
 9 Q And as part of good nursing practice, what are you  
 10 supposed to do to familiarize yourself with the  
 11 patients who are under your care?  
 12 A A part of it -- a big part of it is going through the  
 13 chart, history and physical, progress notes.  
 14 Q And in February of 2006, what type of familiarity did  
 15 you have with Jack's history?  
 16 A Good history. I know his history.  
 17 Q What was his history, sir?  
 18 A Jack was a brittle diabetic.  
 19 Q And what does that mean?  
 20 A That means that his sugar can fluctuate very easy. It  
 21 can go up high or low.  
 22 Q What things would cause his sugar to go up?  
 23 A Fruits or sugars or sandwiches, things like that, just  
 24 normally what we eat.  
 25 Q And then what things would make his sugar go down?

1 A Well, the absence of it, being hungry, nothing to drink  
 2 or given medication.  
 3 Q Such as insulin?  
 4 A Correct.  
 5 Q What other history did Jack have?  
 6 A Jack had PVD, peripheral vascular disease, diabetic, he  
 7 also had neuropathy.  
 8 Q What is neuropathy?  
 9 A Neuropathy is a condition that happens with diabetics.  
 10 What it is, you have decreased circulation, sensation.  
 11 It's more of a nerve problem, and so Jack, he had  
 12 paralysis from the waist down. He doesn't move,  
 13 doesn't get around. He's in a wheelchair.  
 14 Q He was not ambulatory by himself?  
 15 A That's correct. He also had an eye problem, and I  
 16 can't remember exactly what that was, but he wore real  
 17 thick lens glasses, and then he also had stasis ulcers.  
 18 Q And what are those?  
 19 A That's ulcers you develop in the distal extremities  
 20 when you have decreased circulation. The skin starts  
 21 to rot and sluff.  
 22 Q So he'd have like ulcers on his feet?  
 23 A Yes, sir. Yes.  
 24 Q And is that common with diabetics?  
 25 A It can be.

1 (Proceedings commenced at 1:35.)  
 2 THE COURT: Ready to proceed, counsel?  
 3 MR. ALLWEIL: Yes, your Honor.  
 4 MR. WARREN: Yes, your Honor.  
 5 THE COURT: All right. We will bring the  
 6 jury in.  
 7 THE BAILIFF: All rise, please.  
 8 (Jury brought into the courtroom.)  
 9 THE COURT: Please be seated. Good  
 10 afternoon, ladies and gentlemen. I believe Mr. Landin  
 11 was on the stand when we left. Sir, you can resume the  
 12 stand and you are still under oath.  
 13 (Witness resumed the witness stand.)  
 14 BY MR. ALLWEIL:  
 15 Q Mr. Landin, could you describe to the jury what  
 16 happened when you showed up to work on February 25th  
 17 2006?  
 18 A Yes, sir. I arrived at the unit early, about quarter  
 19 to 7:00, went to the nurses station, asked Gayle how  
 20 her night was. She notified me at that time that Jack  
 21 had fell in the night, said that she thought he hit his  
 22 head, that he passed this morning -- or that morning.  
 23 Q Now, had you worked with Miss Johnson as equals, as  
 24 nurses before?  
 25 A Yes.

1 MR. ALLWEIL: Your Honor, I don't know if --  
 2 you mentioned earlier you wanted to stop a little  
 3 before noon. This might be a good place to break if we  
 4 are going to stop.  
 5 THE COURT: This would be as far I'm  
 6 concerned, so since it is as far as you're concerned,  
 7 we will break for lunch. So, ladies and gentlemen, we  
 8 are going to break for lunch, and we are not going to  
 9 resume until 1:30, so you'll be able to leave, go back  
 10 to the jury room, and then you can leave the building,  
 11 of course.  
 12 Just report back to the jury room by 1:30,  
 13 and then we will resume at that time. Again, all of  
 14 those admonitions I gave about not talking about the  
 15 case, listening to anything about the case, or doing  
 16 any investigation or computer searches or anything else  
 17 about the case or anybody involved apply, and we will  
 18 see you at 1:30. Have a good lunch.  
 19 (Jury dismissed from the courtroom.)  
 20 THE COURT: All right. Court will be in  
 21 recess.  
 22 (Recess taken at 11:48 a.m.)  
 23 THE BAILIFF: All rise, please. Court is  
 24 again in session.  
 25 THE COURT: Please be seated.

1 Q And how long had you been working with her on that  
 2 floor?  
 3 A Maybe 14 -- maybe 3 weeks, 14 days to 3 weeks.  
 4 Q Okay. And previously to that, had you worked with  
 5 Miss Johnson?  
 6 A Yes.  
 7 Q And what positions did she have then?  
 8 A She was a CNA, and she also was a unit secretary.  
 9 Q Okay. And during the course of your dealings with  
 10 Miss Johnson, did she ever ask you for help while she  
 11 was going to nursing school?  
 12 A Yes.  
 13 Q And did you help her with her work when you could?  
 14 A Yes, I did.  
 15 Q And did you gather any opinions while she was in school  
 16 and thereafter of -- regarding Miss Johnson's  
 17 capabilities as a nurse?  
 18 A Yes. Yes, I do.  
 19 Q What were those?  
 20 A Not very good, sir.  
 21 Q Why not?  
 22 A Because Gayle was -- she was not a competent  
 23 individual, she was not thorough, she was not a  
 24 responsible person, and she's an individual that cannot  
 25 be relied on to carry things out.

# **ATTACHMENT 2**

HEALTHSOURCE SAGINAW  
VARIANCE / CONCERN REPORT



TO: Safety or Risk Management Committees

DATE: 2/25/06

Method of Referral: \_\_\_\_\_ Telephone \_\_\_\_\_ Personal Contact \_\_\_\_\_ Anonymous \_\_\_\_\_

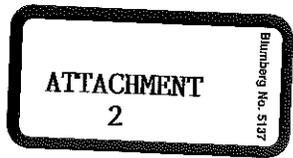
Safety / Quality Concern \_\_\_\_\_ Risk Management / Quality Concern \_\_\_\_\_ Request for Information \_\_\_\_\_

Amber I AM concerned that a resident (Jack ~~Smith~~) has died @ the neglect of a nurse (Galye LPN). Resident had a pre-existing order to adm. 100 regular insulin if Blood sugar over 400. So why did she call the Doctor for a new order? The resident was positively exhibiting the <sup>2</sup> signs and symptoms of Hypoglycemia @ 0130 in the morning, why was not the Blood Sugar checked? Again the above noted nurse documented "will cont. to Monitor" <sup>3</sup>. So why didn't she look in on the resident sooner than four hours and fifteen minutes later? By then it was too late. I believe that Jack ~~Smith~~ received a larger dose of insulin than he needed, (he was very unstable) He was not properly or safely followed up (his sugar level was not monitored post injection). That I believe his death could have been avoided and that his fall out of bed at 0130 was symptomatic to his physical reaction to the drop ↓ of his Blood Sug

Response Requested \_\_\_\_\_ Signature Roberto Jimenez LPN  
please talk with me about this, I believe the above nurse to be Dangerous

This confidential document is prepared solely for the Safety / Risk Management Committee, a committee established pursuant to MCL 333.20175, 333.21513, 333.21515, and 331.531, and its peer review function, including the reduction of morbidity and mortality within the Hospital. It is not to be duplicated or made available to anyone without authority of the Committee Chairperson or Risk Manager.

\* FORWARD DIRECTLY TO RISK MANAGEMENT \*



# ATTACHMENT 3

STATE OF MICHIGAN  
CIRCUIT COURT FOR THE COUNTY OF SAGINAW  
Civil Docket No. 08-2400-NZ-3

ROBERTO LANDIN,

Plaintiff,

v

HEALTHSOURCE SAGINAW, INC.,

Defendant.

OPINION AND ORDER #3

[PROVIDING JURY INSTRUCTIONS RE: PLAINTIFF'S  
CLAIM & BURDEN OF PROOF.]

AT A SESSION OF SAID COURT, HELD AT THE COURTHOUSE  
IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN

THIS 13<sup>th</sup> DAY OF OCTOBER, A.D. 2011.

BEFORE THE HONORABLE JANET M. BOES, CIRCUIT JUDGE.

**Court's Instruction to the Jury as to Elements of Plaintiff's Single Claim (Wrongful Termination in Violation of Public Policy):** Recent Court Rule changes require the Court to provide each juror empanelled to hear the case with a copy of the elements of the claim or claims being presented, as well as the burden of proof. After reviewing the proposals of each party<sup>1</sup> and considering relevant law, the Court will provide the jurors with the following instructions:

**Elements of Plaintiff's Claim for Wrongful Termination in Violation of Public Policy**

In this case, Plaintiff Roberto Landin makes one claim against Defendant Healthsource Saginaw, Inc. That claim is that he was wrongfully terminated from employment with Healthsource in violation of the public policy of the State of Michigan.

<sup>1</sup> Plaintiff's Amended Request to Charge, Plaintiff's Request for Modified Standard Jury Instructions and Special Instructions Regarding Public Policy; pp 5-10; Defendant's Memorandum of Law in Support of Proposed Initial and Non-Standard Jury Instructions, Sections II.A.-E at pp 4-11; Plaintiff's Objection and Brief in Opposition to the Defendant's Non-Standard Jury Instructions, pp 5-9; Defendant HealthSource Saginaw, Inc.'s Answers and Objections to Plaintiff's Amended Proposed Standard, Non-Standard and Initial Jury Instructions, pp 6-11.

I instruct you that it is a violation of public policy in Michigan for a hospital to terminate an employee for the reason that he reported, in good faith, that a co-worker was negligent or incompetent in her work, and posed a danger to Healthsource patients.

Every legal claim is made up of parts called elements. In order to prevail on his claim for wrongful termination in violation of public policy, Plaintiff has the burden of proving the following elements:

- (1) That he was employed by Defendant Healthsource;
- (2) That Plaintiff made a good faith report to his employer, Healthsource, that he believed that a co-worker acted in a negligent or incompetent manner, and posed a danger to Healthsource patients;
- (3) That the Plaintiff was terminated by Healthsource;
- (4) That his submission of the report concerning his co-worker was a significant factor in Healthsource's decision to terminate his employment.

Your verdict will be for Plaintiff Roberto Landin if you find that Plaintiff has proved each of these elements by a preponderance of the evidence, which I will define for you in a moment. Your verdict will be for Defendant Healthsource Saginaw, Inc. if you find that the Plaintiff has failed to prove any one of these elements.

#### **M Civ JI 8.01 Plaintiff's Burden of Proof**

I have just listed for you the propositions on which the plaintiff has the burden of proof. For the plaintiff to satisfy this burden, the evidence must persuade you that it is more likely than not that the proposition is true.

You must consider all the evidence regardless of which party produced it.

From the above-stated instructions, it should be clear that the Court is not submitting the question as to existence or non-existence of a public policy to the jury. The Court holds, as a question of law properly to be decided by it, that Michigan law recognizes a cause of action for wrongful termination in violation of the public policy exhibited by MCL 333.20176a(1)(a), which states in relevant portion:

- (1) A health facility or agency shall not discharge or discipline, threaten to discharge or discipline, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because

the employee or an individual acting on behalf of the employee does either or both of the following:

- (a) In good faith reports or intends to report, verbally or in writing, the malpractice of a health professional . . .

The Court incorporates by reference its prior written decisions denying Defendant's motions for summary disposition.

This Order does not resolve all pending claims and does not close this case for docketing purposes.

**IT IS SO ORDERED.**

JANET M. BOES  
(P37714)  


---

**JANET M. BOES (P37714)**  
**CIRCUIT COURT JUDGE**

A TRUE COPY OF THE FOREGOING SERVED UPON ALL PARTIES OF RECORD PURSUANT TO MCR 8.105(C), MCR 2.107(D) TO:

Mandel I. Allwell (Plaintiff);

Richard W. Warren, Jr. (Defendant)

COUNTER-SIGNED:

Dawn M. Maddox  
 DEPUTY CLERK

A TRUE COPY  
 Susan Kaltenbach, Clerk 

# ATTACHMENT 4

# Order

Michigan Supreme Court  
Lansing, Michigan

April 3, 2015

Robert P. Young, Jr.,  
Chief Justice

149663

Stephen J. Markman  
Mary Beth Kelly  
Brian K. Zahra  
Bridget M. McCormack  
David F. Viviano  
Richard H. Bernstein,  
Justices

ROBERTO LANDIN,  
Plaintiff-Appellee,

v

SC: 149663  
COA: 309258  
Saginaw CC: 08-002400-NZ

HEALTHSOURCE SAGINAW, INC.,  
Defendant-Appellant.

On order of the Court, the application for leave to appeal the June 3, 2014 judgment of the Court of Appeals is considered, and it is GRANTED, limited to the issue whether the plaintiff may maintain a wrongful discharge claim for violation of public policy under MCL 333.20176a(1)(a). See *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692 (1982). In discussing this issue, the parties shall also address whether the Whistleblowers' Protection Act, MCL 15.361 *et seq.*, provides the exclusive remedy for a claim of wrongful discharge under MCL 333.20176a(1)(a). See MCL 333.20180(1).



t0331

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 3, 2015

*Larry S. Royster*  
Clerk



# **ATTACHMENT**

# **5**



House Office Building, 9 South  
Lansing, Michigan 48909  
Phone: 517/373-6466

## HEALTH CARE WHISTLEBLOWERS

House Bill 5829 (Substitute H-2)  
First Analysis (12-4-02)

Sponsor: Rep. Barb Vander Veen  
Committee: Health Policy

### THE APPARENT PROBLEM:

The Whistleblowers' Protection Act, Public Act 469 of 1980, prohibits an employer from discharging, threatening, or otherwise discriminating against employees who report a known or suspected violation of a law, administrative regulation or rule, or a local ordinance. Whistleblowers who believe that their employer has retaliated against them for reporting such a violation may sue for an injunction and damages, but over the years, health care workers have argued that these "after-the-fact" remedies fail to adequately protect workers who want to report problems anonymously while their complaints are being investigated. Although it is arguable that all workers suffer from gaps in the protection provided by the whistleblowers' act, health care workers have been particularly active in trying to gain additional protections because unsafe activities and conditions in a health care setting threaten their patients' lives and their own lives in some cases. As a result of their efforts, various whistleblower protections for health care workers have been added to the health code. Now the health code generally prohibits health facilities and agencies from retaliating against employees who testify in a malpractice trial or who report malpractice or a violation of the code's articles dealing with controlled substances, occupations, and health facilities and agencies to the Department of Consumer and Industry Services (CIS).

With respect to Article 17, which concerns health facilities and agencies, the health code grants immunity from civil or criminal liability and protection under the whistleblowers' act to persons employed by or under contract to a health facility or agency (or to any other persons acting in good faith) who do any of the following: make a report or complaint, including a report or complaint of a violation of Article 17 or a rule promulgated under the article; assist in originating, investigating, or preparing a report or complaint; or assist CIS in carrying out its duties under the article. The code requires CIS to protect the confidentiality of complaints made by health care workers regarding violations of the article unless and until the

complainant is required to testify in disciplinary proceedings.

Representatives of the Michigan Nurses Association have observed that these protections for health care workers reports focus heavily on workers who report or make complaints about *illegal* activities and conditions in their workplaces. Although the health code states that a person is protected if he or she, acting in good faith, makes a report or complaint "including, but not limited to," a violation of Article 17 or a rule promulgated under the article, it is unclear whether someone is protected if he or she makes a report or complaint about an unsafe condition or practice that is not illegal. According to committee testimony, such conditions and practices are not uncommon. For instance, many hospitals are suffering from a shortage of nurses, and at least some require existing staff to compensate for the shortage by working overtime. In this case, a hospital may be creating a climate where nurses are more likely to misread a patient's chart or make other mistakes, but the hospital's inability to hire a sufficient number of nurses may not constitute a violation of a law or administrative rule. If the condition threatens to cause workplace injuries, CIS may be able to investigate the matter under the Michigan Occupational Safety and Health Act (MIOSHA), but for threats to patient safety, CIS has little if any authority to order a hospital to change an unsafe condition or practice unless it constitutes a violation of a law or rule.

The health code already prohibits nursing home workers and administrators from physically, mentally, or emotionally abusing, mistreating, or harmfully neglecting a patient and, as amended by Public Act 11 of 2002, sets forth a process for nursing homes to accept and respond to complaints. Legislation has been introduced to set forth conditions under which persons employed by or under contract to a hospital would be given job protection and immunity from civil and criminal liability if they made a report or complaint

concerning an unsafe, but not illegal, practice or condition in a hospital.

### *THE CONTENT OF THE BILL:*

House Bill 5829 would amend the Public Health Code to specify that immunity from civil and criminal liability and other protections would be granted to a person employed by or under contract to a hospital if the person reported to the Department of Consumer and Industry Services (CIS) unsafe practices or conditions that do not violate Article 17 of the health code or a rule promulgated under that article.

As noted above, the health code currently extends immunity from liability and other protections to health care workers who make reports and complaints. House Bill 5829 would add to these provisions specific protections for hospital workers—i.e., persons employed by or under contract to a hospital licensed under Article 17 of the health code. A hospital worker would be immune from civil or criminal liability that might otherwise be incurred and could not be discharged, threatened, or otherwise discriminated against by the hospital regarding his or her compensation or the terms, conditions, location, or privileges of his or her employment, if he or she reported to CIS, verbally or in writing, an issue related to the hospital that is an unsafe practice or condition that is neither a violation of Article 17 nor a violation of a rule promulgated under Article 17. The bill specifies that these protections would not limit, restrict, or diminish, in any way, the protections afforded under the Whistleblowers' Protection Act.

In general, a hospital worker would be eligible for the immunity and protection only if he or she met both of the following conditions before reporting to CIS the unsafe practice or condition that is not a violation of the article or rule. First, the person would have to have given the hospital 60 days' written notice of the unsafe practice or condition. A person who provided a hospital such written notice could not be discharged, threatened, or otherwise discriminated against by the hospital regarding that person's compensation or the terms, conditions, location, or privileges of his or her employment. Within 60 days after receiving such written notice, the hospital would have to provide a written response to the person who had provided the written notice. Second, the person could not have had any "reasonable expectation" that the hospital had taken or would take timely action to address the unsafe practice or condition. However, the hospital worker would be granted the immunity and protection if he or she was required by law to

report the issue related to the hospital that is an unsafe practice or condition that is not a violation of the article or rule before the expiration of the required 60 days' notice.

Hospitals would be required to post notices and use other appropriate means to keep hospital workers informed of their protections and obligations relative to reports and complaints about violations of the article or rule and other unsafe practices and conditions that do not violate the article or rule. The notices would have to be in a form approved by CIS. The notice would have to be made available on CIS' Internet web site and would have to be posted in one or more "conspicuous places" where notices to hospital workers are customarily posted.

MCL 333.20180

### *FISCAL IMPLICATIONS:*

According to the House Fiscal Agency, the bill would have no fiscal impact on the state or on local units of government. (12-4-02)

### *ARGUMENTS:*

#### *For:*

Hospital administrators, nurses, and representatives of other hospital workers agree that any unsafe condition or practice is a potential threat to patient well-being and that it should be reported and addressed without any fear that the "whistleblower" will be sued, fired, or demoted. Ensuring that hospital workers who report unsafe conditions or practices—whether or not they are illegal—receive various "whistleblowers' protections" would help Michigan's hospitals deliver the highest possible quality of care to their patients. While it is arguable that the state's health code does not limit protections to those who report illegal activities, the Department of Consumer and Industry Services has limited authority to address conditions or practices that do not violate state law, rules, or regulations. Thus, many hospital workers assume that protections under current law will apply to them only if the conditions or practices they complain about are illegal, and because many hospital workers do not know whether specific conditions or practices are illegal, they are likely to be overly cautious about making any complaints. As a result, patients' well-being is put in jeopardy.

Hospitals want *all of their employees* to contribute to their mission of providing the best possible care to patients, but by reporting a condition or practice that

seems unsafe but is not illegal, an employee would essentially be going behind the hospital's back. When hospitals are engaged in outright illegal activities, the state's interest in protecting health, safety, and welfare of its residents overrides the hospital's interest in solving problems in house. But unsafe conditions and practices that are not illegal should first be reported to the hospital, so that the hospital has a chance to address the worker's concern before bringing regulatory officials into the discussion. Since CIS might not be able to require a hospital to correct an allegedly unsafe condition or practice unless it is illegal anyway, it is important that the hospital and its employees approach such issues collaboratively rather than in a confrontational manner. The bill would establish a cooperative process allowing a hospital worker to make a written report or complaint to the hospital about an unsafe condition or practice that is not illegal and would require the hospital to respond to the worker within 60 days. As long as the worker did this, he or she could not be discharged, threatened, or otherwise discriminated against by the hospital regarding his or her compensation or the terms, conditions, location, or privileges of his or her employment. The bill should satisfy all involved: the employees who would be given not only job protection but also a reminder that their contributions to patients' well being are valuable, the hospitals who would be allowed to address such issues in house, and most importantly, patients, who are the ultimate beneficiaries of increased focus on ensuring the quality of health care.

**Response:**

Ultimately, it is not clear that the bill would do anything in terms of ensuring that an unsafe practice or condition that is not illegal is addressed. After making a written complaint and then following up with CIS, unless CIS believed that the hospital had violated a law, rule, or regulation, CIS would have no more authority to force a change in behavior than it does under current law. Therefore, it is unclear whether the bill would actually benefit patients.

**Reply:**

The bill would create a cooperative, collaborative process for addressing safety concerns. Hospitals are interested in addressing such concerns, whether or not government regulators are pressuring them to do so.

**Against:**

The bill would not necessarily enhance protection for hospital workers who blow the whistle and could, however unintentionally, make employees even less willing to speak up when they see problems whose legal status is not clear. Currently the state health

code does not distinguish between hospital workers who report unsafe conditions or practices that are illegal and those who report unsafe conditions or practices that are not illegal. It simply states that health care employees can make "good faith" complaints regarding perceived violations of laws and regulations covering health facilities and agencies. By creating two clearly separate tracks—one for complaints about illegal activities and another for complaints about legal activities—as well as an exception for hospital workers who report violations of other laws, such as the Michigan Occupational Safety and Health Act, the bill would put the onus on hospital workers to determine the legal status of various activities. This would increase the uncertainty and the perceived risks for an employee who believes a condition to be unsafe and yet does not know whether or not it is illegal. Hospital employees should be allowed to report all such conditions to CIS and let CIS determine which conditions or actions violate the health code or other laws, which are legal but unsafe and in need of rectification, and which are simply spurious concerns or malicious attempts to sully the hospital's image. As written, the bill seems to be focused on protecting hospitals from potential complaints that may eventually prove mistaken or misguided rather than ensuring that hospital workers feel comfortable reporting problems and erring on the side of caution.

Although the bill states that the protections afforded under the new provisions would not limit, restrict, or diminish the protections afforded under the Whistleblowers' Protection Act, a worker would be protected in the case of a report or complaint concerning an unsafe, but legal, practice or condition only in very narrow circumstances. The person would have to give the hospital 60 days' written notice of the problem. Requiring a complainant to provide written notice, which is not required under the current law, would force a complainant to give up his or her anonymity. Unless workers can make complaints anonymously, they will not truly feel protected from potential backlash. Also, many lower-level hospital workers may feel intimidated by having to write a complaint. Further, the bill would specify that a complainant could have no reasonable expectation that the hospital had taken or would take timely action to address the problem, but it is unclear what constitutes a "reasonable expectation". For instance, what would happen if the hospital responded *verbally* to the complainant within the 60-day period, saying that the hospital was still looking into the matter and would respond in writing as soon as it had completed its investigation? Would a worker who received such a response have a

“reasonable” expectation that the hospital would take timely action to address the issue?

Perhaps what hospital workers and employees of other health facilities and agencies really need is an employee education campaign to make employees aware of their rights under current law. If not, leaving the law alone is preferable to changing it in the ways that the bill proposes.

***Response:***

The bill states that the new protections would not limit, restrict, or diminish, in any way, the protections afforded under the Whistleblowers’ Protection Act. A worker who reported an unsafe condition or practice to CIS in good faith, not knowing whether or not it was illegal, could still do so anonymously, unless and until disciplinary proceedings were to be held. By this point, it would be clear that CIS regarded the matter as a violation of law or rule. If it was not a violation, CIS would probably suggest that the worker follow the new procedure by giving the hospital 60 days’ written notice. Either way, the intent of the bill is clearly to encourage cooperation between hospitals and their employees when conditions or practices are unsafe but not illegal, while continuing to protect anyone who makes a good faith report or complaint about an unsafe condition or practice to CIS.

***POSITIONS:***

The Michigan Nurses Association supports the bill. (12-3-02)

The Service Employees International Union supports the bill. (12-4-02)

A representative of the Michigan Health and Hospital Association testified in support of the bill. (12-3-02)

The Department of Consumer and Industry Services does not have an official position on the bill, but does not object to the bill in concept. (12-4-02)

A representative of the Michigan Campaign for Quality Care testified in opposition to the bill. (12-3-02)

Analyst: J. Caver

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

# ATTACHMENT 6

2003 WL 21871745

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES  
BEFORE CITING.

Court of Appeals of Michigan.

Karen A. PARENT, Plaintiff-Appellant,

v.

MOUNT CLEMENS GENERAL HOSPITAL, INC.,  
Defendant-Appellee.

No. 235235. | Aug. 7, 2003.

Before: MARKEY, P.J., and WHITE and ZAHRA, JJ.

[UNPUBLISHED]

PER CURIAM.

\*1 Plaintiff was employed as a technician in defendant's histology laboratory where her primary duty was to assist the hospital's pathologists. She was fired for insubordination after she refused to perform a laboratory procedure as instructed. She subsequently commenced this action against defendant alleging that she was wrongly discharged, contrary to public policy, because she refused to perform a procedure that allegedly was not in the best interests of defendant's patients and violated the standard of care. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff now appeals by right. We affirm.

Plaintiff objected to performing a procedure that the parties refer to as the "tray method." Defendant had used this method in the past. Technicians, like plaintiff, prepared trays of multiple gross specimens for analysis by defendant's pathologists. Multiple specimens would be set out on a single tray with identifying information so that the pathologist who was assigned to microscopically examine the specimens could work quickly.

During the course of plaintiff's employment, defendant hired a pathologist's assistant who regularly prepared her specimens for microscopic examination using a different method. The pathologist's assistant would only handle one specimen at a time and would keep the specimens in

their separate containers.

On September 30, 1998, the pathologist's assistant was not present at work, so Dr. Watkins was in charge of preparing the specimens for examination. He instructed plaintiff to prepare the specimens using the tray method. Plaintiff refused to do, allegedly because she felt there was a greater chance of the samples becoming mixed up, which could cause a misdiagnosis.

This Court reviews a trial court's decision granting summary disposition de novo. *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v. Robertson*, 212 Mich.App 45, 48; 536 NW2d 834 (1995).

Plaintiff's claim for wrongful discharge is premised upon public policy. In *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich. 692, 695; 316 NW2d 710 (1982), our Supreme Court recognized that, in some situations, the discharge of an at-will employee may be so contrary to public policy as to be actionable. The Court identified three sources as supporting recognition of an action for wrongful discharge grounded on public policy. One source is explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act pursuant to a statutory right or duty, such as the Whistleblowers' Protection Act (WPA), M.C.L. § 15.361 *et seq.* *Suchodolski, supra* at 695 & n 2. A second type of discharge protected by public policy is when an employee is fired for refusing or failing to violate a law in the course of employment. *Id.* at 695. As the third source, the Court noted that appellate courts have recognized that an employer cannot retaliate against and discharge an employee where the reason for the "discharge was the employee's exercise of a right conferred by a well-established legislative enactment." *Id.* at 696. See also *Vagts v. Perry Drug Stores, Inc.*, 204 Mich.App 481, 484-485; 516 NW2d 102 (1994).

\*2 In *Dudewicz v. Norris Schmid, Inc.*, 443 Mich. 68, 78-80; 503 NW2d 645 (1993), the Court limited its decision in *Suchodolski*, stating:

As a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative. *Pompey v. General Motors*

*Corp*, 385 Mich. 537, 552-553; 189 NW2d 243 (1971). At common law, there was no right to be free from being fired for reporting an employer's violation of the law. *Covell v. Spengler*, 141 Mich.App 76, 83; 366 NW2d 76 (1985). The remedies provided by the WPA, therefore, are exclusive and not cumulative. *Shuttlesworth v. Riverside Hosp*, 191 Mich.App 25, 27; 477 NW2d 453 (1991).

In *Suchodolski v Michigan Consolidated Gas Co, supra*, this Court recognized that there was an exception to the general rule that either party to an employment at will contract could terminate the agreement at any time for any or no reason. The exception is based on the principle that "some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* at 695. We also found that these restrictions on an employer's ability to terminate an employment at will agreement are most often found in explicit legislation. *Id.* The WPA is such legislation. *Id.*

The existence of the specific prohibition against retaliatory discharge in the WPA is determinative of the viability of a public policy claim. In those cases in which Michigan courts have sustained a public policy claim, the statutes involved did not specifically proscribe retaliatory discharge. Where the statutes involved did proscribe such discharges, however, Michigan courts have consistently denied a public policy claim. Compare *Trombetta v. Detroit, T & I R Co*, 81 Mich.App 489; 265 NW2d 385 (1978) (the public policy claim was sustained where the defendant was discharged for refusing to manipulate and adjust pollution control reports), and *Sventko v. Kroger Co*, 69 Mich.App 644; 245 NW2d 151 (1976) (the claim was sustained where the defendant was discharged for filing a lawful workers' compensation claim), with *Covell v. Spengler, supra* (the public policy claim was denied where the defendant also was sued under the WPA and the statute proscribed discharge in retaliation for the employee's complaints to the labor board concerning overtime pay), and *Ohlsen v. DST Industries, Inc*, 111 Mich.App 580; 314 NW2d 699 (1981) (the claim was denied where the employee also sued under MIOSHA provisions that prohibited discharge in retaliation for the employee's exercise of statutory rights). A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. As a result, because the WPA provides relief to *Dudewicz* for reporting his fellow employee's illegal activity, his public policy claim is not sustainable. [Footnote omitted.]

\*3 Here, plaintiff argues that an action for wrongful

discharge based upon public policy is sustainable in light of M.C.L. § 333.20176a and 333.20521 of the Public Health Code, M.C.L. § 333.1101 *et seq.* We disagree. Pursuant to M.C.L. § 333.20180(1), the Legislature has granted employees protection from retaliatory discharge by incorporating the WPA as a remedy. Therefore, the rule from *Dudewicz, supra*, applies to this case. Because the Legislature has adopted an exclusive remedy for a retaliatory discharge grounded on policy based on the Public Health Code, we may not impose cumulative remedies in this situation.<sup>1</sup>

Accordingly, to the extent that the Legislature has protected health care workers under M.C.L. § 333.20176a and 333.20521, plaintiff's exclusive remedy for any alleged wrongful discharge predicated on the policies embodied in these statutes is to pursue a claim under the WPA. Plaintiff may not maintain an independent action grounded on public policy arising from the Public Health Code apart from the WPA.<sup>2</sup>

We also disagree with plaintiff's claim that the statutes governing medical malpractice, see M.C.L. § 600.2912 *et seq.*, support her action for wrongful discharge grounded on public policy.

In order to state a claim for wrongful discharge contrary to public policy, plaintiff must prove the following elements:

First, plaintiff engaged in protected activity. The activity's protection may stem either from a constitutional or statutorily granted right or from an obligation favored by statutory policy. Second, plaintiff was discharged. Third, a causal connection exists between the plaintiff's protected activity and the discharge. See *Schlei & Grossman, Employment Discrimination Law*, ch 15, p 534 (Washington, D.C.: Bureau of National Affairs, 1983). [*Clifford v. Cactus Drilling Corp*, 419 Mich. 356, 368-369; 353 NW2d 469 (1984) (Williams, C.J., dissenting).]

Even assuming that plaintiff could pursue a public policy wrongful discharge claim predicated on M.C.L. § 600.2912a(1), it was incumbent upon her to show that she had a reasonable basis for believing that the use of the tray method constituted malpractice before she refused to perform her duties. See *Dabbs v Cardiopulmonary Management Services*, 188 Cal App 3d 1437, 1444; 234

Cal Rptr 129, 133 (1987). Although plaintiff's expert offered the opinion that the tray method was more error prone than the method he used, he acknowledged that all methods have some risk of error and that he was unable to conclude that using the tray method was malpractice. Indeed, he admitted that for some the tray method might work well. Furthermore, plaintiff admitted that she had never observed any actual errors occur with the tray method. Thus, plaintiff failed to establish a genuine issue of material fact with regard to this issue.

Additionally, plaintiff failed to show that there was a genuine issue of material fact with regard to causation. The evidence plaintiff submitted failed to show that she was fired for refusing to use the tray method to do her job, rather than for insubordination. The evidence showed that other employees and doctors in the laboratory had used different methods and that plaintiff had raised concerns well before she was fired about the tray method, without any consequence. There is no evidence supporting plaintiff's claim that she was fired for pointing out the potential for malpractice with the tray method. Rather, the evidence showed that plaintiff was fired for refusing to do her job as directed. Accordingly, the trial court properly granted summary disposition for defendant.

\*4 We affirm.

WHITE, J. (dissenting).

WHITE, J.

I respectfully dissent. The WPA only applies where the employee reports the alleged violation to a public body. Such conduct was not involved here. The WPA provides no remedy, and therefore is not the exclusive remedy.

Although plaintiff's expert was unable to conclude that using the tray method constituted malpractice, it does not

#### Footnotes

- 1 Indeed, it appears that the Legislature incorporated the WPA as a remedy for a retaliatory discharge under the Public Health Code so that health care workers will report suspected abuses to the proper authorities to protect the general public.
- 2 Furthermore, even if an independent action were sustainable as a matter of law, plaintiff here failed to establish a genuine issue of fact regarding whether she reasonably believed that defendant was engaged in malpractice or that she was discharged because of her objections to the tray method.

follow that plaintiff did not have a reasonable basis for concluding that the tray method constituted malpractice when she failed to prepare the specimens in that fashion. The expert testified that standard practice was to process one specimen at a time, that he knew of no pathologists that used the tray method, that the tray method is "error prone," fails to minimize the risk of confusing or mixing up specimens, and "opens up the opportunity for substantial specimen mixup errors," that his opinion was not affected by Dr. Watkins' assertion that he used the method for twenty-seven years without error, that the method compromises the standard that requires that the identity of every specimen be maintained at all times during the processing and examination steps, and that the assertion that no errors have occurred is problematic because it assumes that all mixups would be discovered, and with the tray method an error would be hard to trace. The expert concluded that the tray method was not a safe method for processing pathology specimens from the patients' point of view.

Lastly, there was also a genuine issue of material fact regarding causation. Defendant's agents' testimony was inconsistent regarding who made the decision to terminate plaintiff's employment. Further, the alleged insubordination was the failure to prepare the specimens according to the tray method. Plaintiff contends that she told Dr. Watkins that she had a problem with this method, and that he told her to go to Human Resources. Dr. Watkins conceded that he told plaintiff it would be okay if she spoke to her supervisors since she did not know anyone in Human Resources. Plaintiff contends that she spoke to her supervisors and explained that she had a problem with the tray method, and specifically discussed with King the dangers of mixing up the specimens.

#### All Citations

Not Reported in N.W.2d, 2003 WL 21871745

Parent v. Mount Clemens General Hosp., Inc., Not Reported in N.W.2d (2003)

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