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A Massachusetts appellate court holds that an employee's objection to a mere proposal is not enough to trigger the protection of the state medical provider whistleblower statute.

Massachusetts Court of Appeals Finds Objections to "Mere Proposals" not Protected Activity for Whistleblower Statute

By Gregory C. Keating and Amy E. Mendenhall

The Massachusetts Court of Appeals found that an employee's objection to a "mere proposal," rather than an existing policy, did not constitute protected activity for purposes of the Massachusetts medical provider whistleblower statute.

In *Romero v. UHS of Westwood Pembroke Inc.*, 72 Mass. App. Ct. 539 (2008), the appeals court also found that the plaintiff had failed to provide any evidence that the proposal at issue violated a law, rule, regulation, or professional standard and, therefore, could not demonstrate that she held an objectively reasonable belief in the impropriety of the policy at issue.

The medical provider whistleblower statute, Massachusetts General Laws, chapter 149, section 187, protects health care providers from retaliatory action for disclosing or objecting to an activity, policy, or practice of a health care facility that the provider reasonably believes to be a violation of a law, rule, regulation, policy, or professional standard. For purposes of the statute, a "health care facility" includes individuals, partnerships, associations, corporations, or other persons that employ health care providers, including hospitals, clinics, and nursing homes. Massachusetts courts have also interpreted the statute as creating a non-delegable duty for the licensees of health care facilities. *Commodore v. Genesis Health Ventures, Inc.*, 63 Mass. App. Ct. 57, 67 (2005).

Factual Background

The plaintiff in *Romero v. UHS* worked as the director of one of the employer's partial hospitalization programs. In March 2002, the employer's CEO announced a proposal to increase the number of patients that could be admitted to the facility's pediatric unit. The facility ultimately decided not to implement the proposed increase — a decision based, in part, upon the objections of the plaintiff and other employees.

The plaintiff first voiced her objections to the proposal in a memorandum sent in May 2002. In the memorandum, the plaintiff objected not to the increase itself, but rather

to implementing such an increase "without a formal plan in place and/or with realistic patient to staff ratio under agreement." She later alleged her employer retaliated against her by subjecting her to an administrative staff reorganization in April 2002, which resulted in her reporting to a new supervisor, and, ultimately, by terminating her as part of a reduction in force in July 2002.

The Court's Analysis

In order to state a valid claim under the Massachusetts medical provider whistleblower statute, the plaintiff must show that: (1) she objected to or refused to participate in an activity, policy or practice; (2) that she reasonably believed to be in violation of a law, rule, regulation or professional standard of practice; (3) which she reasonably believed posed a risk to public health; and (4) she was retaliated against as a result. A plaintiff's belief regarding the violation must be objectively reasonable, and the plaintiff's objection must be a substantial or motivating part of the adverse employment action.

The appeals court interpreted the statute to require that a plaintiff object to an *existing* activity, policy or practice. In light of this, the court upheld the lower court's entry of summary judgment in favor of the employer, because the plaintiff had objected to a proposal, which the employer never ultimately adopted. The court reasoned that extending the statute to cover objections to "mere proposals" and, in particular, proposals that were never adopted or enacted, would undermine an important purpose of the statute by depriving health care providers of a reasonable opportunity to correct an unfair or improper policy, practice, or activity. A finding of liability against the employer, the court concluded, would effectively punish the employer for having a "salutary internal debate among health care professionals regarding how best to handle their medical practice."

The appeals court also upheld summary judgment for the employer because there was no evidence that the proposal, if enacted, would have violated any law, rule, regulation, professional standard or practice. Without any evidence of a regulation, law, or practice that would govern the patient census or the patient-to-caregiver ratio, the court found that the plaintiff could not have had an objectively reasonable belief in the proposal's illegality. That is, the plaintiff's personal view that the proposal was ill-advised did not warrant the protections of the statute.

Implications of the Decision

Protection for whistleblowers in the workplace remains a dynamic area of the law and one that varies widely from state to state. In addition to whistleblower statutes, such as the one at issue in *Romero*, common law claims regarding retaliation in violation of public policy also differ from state to state. The Romero decision illustrates that, while whistleblower and retaliation claims in the healthcare industry may be defensible, the best defense to such claims in any industry is still a great offense. Documenting, communicating and seeking legal advice *before* taking precipitous action that will result in termination or other adverse action is critical to avoiding liability in this area. Employers should tread carefully when taking adverse action against employees who have opposed any practice and should consult with experienced employment counsel in advance of implementing the adverse action.

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