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New York Court Limits Scope of Health Care Whistleblower Law

In a decision of interest to employers in the health care industry, the New York Court of Appeals, in the case of *Reddington v. Staten Island University Hospital and North Shore Long Island Jewish Health System*, issued a ruling, on July 1, 2008, that sharply limits the class of employees protected by New York's health care whistleblower law (Labor Law section 741).

New York's Whistleblower Laws

New York's whistleblower laws provide minimal protection to employees. Labor Law section 740, enacted in 1984, prohibits retaliatory action only against employees who disclose an employer action "that is in violation of a law, rule or regulation which violation creates and presents a substantial and specific danger" to the health or safety of the public at large. Section 740 requires an actual violation of a law, rule or regulation. An employee's reasonable and good faith belief of such a violation is not sufficient to establish a claim under section 740.

The law was amended in 2002 for the benefit of employees in the health care industry after lobbying by nurses' organizations. This new law, Labor Law section 741, protects persons who "perform[] health care services" and who disclose violations of "improper quality of patient care" from retaliatory discharge. "Improper quality of patient care" is "any practice, procedure, action or failure to act . . . which violates any law, rule, regulation" where such violation may present a substantial and specific danger to public health or safety, or unlike section 740, a significant threat to the health of a specific patient. Also, unlike section 740, an employee may prevail on a section 741 claim if the employee reasonably believes, in good faith, that the employer's action constitutes improper quality of patient care; this belief does not need to prove correct.

A problem with section 741 is that it does not identify the class of health care employees protected by the statute. Persons who "perform[] health care services" is a broad term, subject to interpretation. The Court of Appeals clarified this issue in the *Reddington* case.

The Facts in Reddington

Carmel Reddington was employed with Staten Island University

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Hospital, first as Coordinator and then as Manager of Volunteer Services, and later as the Director of the International Patient Program, a position she held at the time of her termination on October 30, 2002. Her basic job duties involved coordinating services for foreign patients and their families, making travel and lodging arrangements, coordinating marketing efforts internationally, developing a calendar of social activities, and providing translation services for international patients. Reddington alleged that the hospital terminated her employment in retaliation for translating and relaying alleged complaints of the international patients of allegedly “inadequate and non-treatment” for cancer and similar illnesses. The hospital asserted that Reddington did not “perform health care services” and, therefore, could not maintain her section 741 claim.

The Decision

In a unanimous decision, the Court found that section 741 affords protection to only those persons who “actually supply health care services.” The Court explained: “[S]ection 741, which offers exceptional and specialized whistleblower protection over and above the generalized protection afforded by section 740, is meant to safeguard only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments.” Persons who do not render medical treatment are not protected. As a result of this decision, employees who work in the health care field who do not personally render medical treatment or use professional judgment must rely on the more stringent whistleblower statute, section 740, which, as noted, requires that an employee’s belief of a violation prove correct, that the health and safety of the public at large be endangered, and that an employee bring his claim in court within one year of the alleged retaliatory action.

The Court also found that an employee who is uncertain whether section 741 provides protection, may seek relief pursuant to both sections 740 and 741. The Court found that even though section 740 provides that institution of an action pursuant to section 740 waives other claims the employee may have against his employer, this waiver does not apply to a section 741 claim. Importantly, an employee who seeks relief under both Labor Law sections may only recover damages for either a section 740 or section 741 violation, but not for both. As a result of this decision, health care employees seeking whistleblower protection who do not clearly render medical treatment will likely seek relief pursuant to both sections of the Labor Law.

* * *

If you have any questions about how this decision might impact you and your company, please contact Kenneth J. Kelly in the New York Office of EBG at 212 351-4606, or kkelly@ebglaw.com. Mr. Kelly argued this case before the Court of Appeals. Jennifer Horowitz, an Associate in the Litigation and the Labor and Employment practices in New York, assisted in the preparation of this Client Alert.

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