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EMPLOYER RETALIATION

Nurse unable to resuscitate retaliation and defamation claims

by Michael Futterman and Jaime Touchstone
Futterman Dupree Dodd Croley Maier LLP

A registered nurse complained to hospital management about patient safety practices. The hospital fired her shortly afterward, allegedly for improper and dangerous patient care. The nurse sued for retaliation and defamation. In upholding the trial court's dismissal of her claims, the court of appeal found that her termination was based on legitimate nonretaliatory reasons. The court also rejected the nurse's defamation claims because the hospital's comments about her to the California Board of Registered Nursing (BRN) were absolutely privileged.

Nurse challenges termination

Diana Lemke worked as a registered nurse at Sutter Roseville Medical Center. In March and April 2011, she observed and reported alleged patient safety issues to her supervisor, Debbie Madding, and to HR. She claimed that Madding ignored the issues and responded with "unethical and illegal" directives.

On April 23, 2011, an elderly patient was admitted to Sutter Roseville with a possible hip fracture. Lemke allegedly improperly administered pain medication to the patient and instructed the patient's family to "watch for signs of the patient's oxygen saturation levels dropping." She then left to see other patients and took her lunch break without placing the elderly patient on high-flow oxygen, properly monitoring the situation, or documenting the patient's condition. The patient nearly died and had to be resuscitated by another nurse.

Madding investigated the April 23 incident by (1) reviewing the patient's chart, (2) interviewing the nurse who revived the patient and made the report, and (3) meeting with Lemke to provide her an opportunity to explain her actions. Following the investigation, Sutter Roseville asked Lemke to resign. When she refused, the hospital fired her. The BRN later notified Lemke that it would investigate her role in the April 23 incident to determine if disciplinary or licensing action was appropriate.

Lemke sued Sutter Roseville, asserting claims for whistleblowing, defamation, retaliation, and failure to prevent retaliation. She claimed that she had been terminated for reporting patient safety concerns and that Sutter Roseville's "managing agents and employees" defamed her "profession, trade, business and qualifications." Sutter Roseville moved for summary judgment, asking that the case be dismissed without a trial because Lemke's dereliction of patient care justified her termination and defeated her retaliation claims. As to her defamation claim, Sutter Roseville argued that any statements about her performance were privileged.

The trial court granted the hospital's motion for summary judgment. Lemke appealed, and the court of appeal affirmed the trial court's decision.

Hospital terminated nurse for legitimate nonretaliatory reasons

Summary judgment will be granted when the evidence reflects that there is no triable issue on any significant fact and the moving party is entitled to judgment under the law. California's Health and Safety Code protects whistleblowers by prohibiting healthcare facilities from retaliating against employees who complain about or report wrongdoing.

To succeed on a retaliation claim, an employee must show that (1) she engaged in protected activity, (2) the employer subjected her to an adverse employment action, and (3) there is a causal link between the protected activity and the adverse action. Once an employee establishes a *prima facie*, or basic, case, the employer must provide a legitimate nonretaliatory reason for the adverse employment action. At that point, the burden of proof shifts back to the employee to prove intentional retaliation.

On appeal, Lemke focused on the chronology of events, arguing that she was fired shortly after she raised patient safety concerns with her supervisor and that a reasonable juror could conclude that her termination was retaliatory. She relied on a declaration from another registered nurse, Dorajane Apuna-Grummer, who opined that poor documentation was pervasive at Sutter Roseville and that Lemke's termination for documentation errors was excessive and deviated from the usual practice. Lemke contended that deviation from standard procedures established that the reasons Sutter Roseville offered for her termination were pretextual, or an excuse for retaliation. She also claimed that Madding failed to conduct a proper investigation.

The court of appeal sided with Sutter Roseville. Even though the timing of Lemke's termination helped her establish a *prima facie* showing of retaliation, timing alone is insufficient. Sutter Roseville terminated her because she failed to (1) properly administer narcotics to a patient, (2) monitor and document the patient's condition, and (3) assist in the patient's emergency care. Apuna-Grummer's declaration addressed the documentation issue but not the other serious problems with Lemke's performance, and it therefore did not create a triable issue of fact on those issues.

The court of appeal similarly rejected Lemke's claim that Madding failed to conduct a proper investigation.

She did not meet her burden to show Sutter Roseville's stated reasons for terminating her were merely a pretext for retaliating against her. Moreover, the lack of a viable retaliation claim required the dismissal of her claim for failure to prevent retaliation.

Hospital's statements to BRN were absolutely privileged

Defamation involves a publication of information that (1) is false, (2) is defamatory, (3) is unprivileged, and (4) has a natural tendency to injure or cause special damage.

Communications made in a legislative, judicial, or any other official proceeding or investigation authorized by law are absolutely privileged, with certain statutory exceptions that are not applicable here. That absolute privilege bars all civil tort (personal injury) claims except claims for malicious prosecution.

On appeal, Lemke argued that the trial court should not have dismissed her defamation claim because she provided evidence demonstrating that Sutter Roseville's statements to the BRN were false, based on inadequate investigation, and made in bad faith. The court of appeal disagreed.

The BRN is a regulatory agency charged with protecting the public via its licensing, regulatory, and disciplinary functions, including its responsibility to discipline licensed registered nurses.

Lemke's dereliction of patient care justified her termination and defeated her retaliation claims.

California Civil Code Section 47(b) bars claims of defamation based on reports of misconduct to "an appropriate regulatory agency, even if the report is made in bad faith." Sutter Roseville's statements were made in

connection with its internal investigation and in an official proceeding before the BRN to report nursing misconduct. Consequently, its statements to the board were absolutely privileged, and Lemke's defamation claim would be barred even if she could prove the statements were not made in good faith or were based on an inadequate investigation. *Lemke v. Sutter Roseville Medical Center, et al.* (California Court of Appeal, 3rd Appellate District, 2/9/17).

Bottom line

The key to beating a retaliation claim is being able to demonstrate that you took the adverse employment action for legitimate nonretaliatory business reasons. To lay the foundation for that defense, you must conduct a proper workplace investigation or, in cases involving reductions in force, document the legitimate business reasons for your decisions. In this case, Sutter Roseville avoided legal liability by performing and documenting a thorough workplace investigation into Lemke's alleged performance deficiencies before terminating her.

The authors can be reached at Futterman Dupree Dodd Croley Maier LLP in San Francisco, mfutterman@fddcm.com and jtouchstone@fddcm.com.

