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## California Court Extends Whistleblower Protections

By Santosh Narayan

A recent decision by a California Court of Appeal may have important implications for hospital employers and shows that processes previously thought immune from suit may not be so. Hospitals often utilize a "peer review" process in which certain decisions related to physician employees are reviewed by that employee's peers. Typically, a hospital enjoys statutory protections for its peer review proceedings on the basis that the proceedings directly impact the quality and nature of patient care given by its employees at the hospital. But what would happen if a physician was dismissed by a hospital's governing body, only to claim it was because he or she was trying to increase patient safety and care? Would the physician be able to begin a lawsuit right away, or would the physician have to go through a potentially lengthy administrative process?

In [Fahlen v. Sutter Central Valley Hospitals](#), (2012) 208 Cal. App. 4th 557, the California Court of Appeal addressed these issues and ruled that the California whistleblower statute applicable to health care workers, Health and Safety Code 1278.5, was written to encourage individuals to speak up on matters related to public safety and would not require an individual seek a writ of review (an appeal of the final administrative ruling) if the adverse employment action was based on a claim of retaliation.

Health and Safety Code 1278.5(b)(1)(A) states that no health care facility shall discriminate or retaliate against any person who has "presented a grievance, complaint or report to the facility." In this case, Dr. Mark Fahlen was a physician practicing at a local hospital. During the time he was practicing at the hospital, Fahlen argued with nurses who failed to follow his directions pertaining to care of patients. Fahlen eventually reported to the administration what he believed to be the

nurses' substandard or insubordinate activity.

The hospital terminated Fahlen's contract and appointed an investigative committee that would review the decision and report its findings to the hospital's executive committee. The investigative committee recommended that Fahlen's contract not be renewed. Fahlen exercised his right to contest the decision, and the hospital's judicial peer review committee subsequently reversed the decision not to reappoint Fahlen. The hospital board of trustees, which had the final decision, reversed the judicial review committee, and Fahlen's contract was not renewed.

Fahlen did not seek judicial review of this decision and instead filed a complaint against the hospital in California civil court. While Fahlen alleged multiple causes of action, one of them was retaliation in violation of the whistleblower statute, Health and Safety Code 1278.5. In response, the hospital challenged the sufficiency of the pleadings through an action referred to as a "demurrer." It also sought to dismiss the case through an "anti-SLAPP motion" pursuant to Code of Civil Procedure § 425.16. (A "SLAPP" lawsuit is a term for a civil lawsuit that aims to prevent individuals from exercising their political rights or punish those who have done so, and an "anti-SLAPP" law allows for a special means by which people can seek to quickly dismiss such lawsuits.)

In its demurrer, the hospital contended that because Fahlen failed to seek judicial review of the board of trustees' decision, that decision was final, preventing Fahlen from challenging it in court. The hospital also argued that the hospital peer review proceedings are official proceedings authorized by law and therefore should be protected from Fahlen's lawsuit under the anti-SLAPP statute.

The Court found itself with opposing legal principles. On the one hand, the Health and Safety Code prevents retaliation against anyone who makes a complaint or grievance with respect to patient safety. At the same time, California's "anti-SLAPP" statute was meant to prohibit strategic lawsuits against public participation and included discussion of a "public issue," which included the discussion of hospital peer review committees. The Court found itself balancing the competing policies of administrative exhaustion with allowing a whistleblower to immediately file a lawsuit.

The Court sided with Fahlen on both issues. As to the anti-SLAPP motion, the Court acknowledged that actions for defamation and abuse of process would be covered by the anti-SLAPP statute. It also held that the hospital had made its initial burden under the anti-SLAPP statute to show that the lawsuit arose from protected conduct, *i.e.* the peer review proceedings. But the Court denied the anti-SLAPP motion as to the retaliation cause of action because Fahlen showed he could prevail on the merits.

The Court stated that while the doctrine of administrative exhaustion was important, in certain circumstances, the quasi-judicial proceeding could be part of the retaliatory action itself. The Court stated that because judicial review of an administrative action would only be overturned if the underlying decision was "arbitrary and capricious," this would narrow an individual's right to redress under the statute if required to exhaust the administrative remedy. The Court made clear that it did not want to narrowly construe the statute as to make it more difficult for a potential whistleblower to seek redress under the statute. The Court did not want to create any delays by seeking judicial review of the final administrative decision when the alleged adverse decision was based on whistleblowing.

*Fahlen* is an important case for hospital employers because the communications of peer review committees have often been protected both through traditional discovery (Evidence Code § 1157) and hospitals have also been able to file anti-SLAPP motions against individuals suing such committees for defamation. *Fahlen* shows that what occurs in peer-review committees is not necessarily immune from suit and that an aggrieved employee can file a complaint in state court without exhaustion of administrative remedies if the allegation is retaliation for trying to improve the hospital's quality of care. Hospitals should take careful note of this subtle, but important, ruling.

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