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When Titans Clash: California Whistleblower Protections Trump Law on Review of Internal Hospital Staff Privilege Procedures

Maria Greco Danaher | March 10, 2014

Health care employers face myriad challenges in complying with numerous laws—with physician hospital staff privileges and whistleblower issues not least among them. On the privileges side, a well-developed body of law provides rigid requirements on both sides of the employer-hospital relationship. On the whistleblower side, claims continue to expand and increase at a rapid rate, developing the law at a sometimes breathtaking clip, even to the point, now, that these two areas of the law have collided. Advantage, whistleblower.

California has long had very particular requirements of physicians challenging adverse staff privilege decisions. Typically, a physician may not sue over a hospital's internal decision to terminate staff privileges unless 1) he or she exhausts all internal hospital procedures in place for reviewing that decision *and* 2) he or she prevails in a proceeding to have the termination decision set aside before filing a separate lawsuit against the hospital (a mandamus proceeding).

Now, the California Supreme Court has ruled that a whistleblower-physician who reported patient treatment concerns and was fired did *not* have to seek and obtain a mandamus judgment setting aside the hospital's decision before suing the hospital in state court. *Fahlen v. Sutter Central Valley Hospitals*, Supreme Court of California, No. S205568, February 20, 2014.

In 2004, physician Mark T. Fahlen, then a kidney specialist with Gould Medical Group in Modesto, California, was granted staff privileges by a hospital owned by Sutter Central Valley Hospital. On a number of occasions Fahlen argued with hospital nurses who, he alleged, failed to follow patient treatment instructions. He also reported that the nurses had been insubordinate and had provided substandard care to nursing supervisors and to the hospital's administrators.

In 2008, the hospital's chief operating officer contacted Gould's medical director about Fahlen's "disruptive interactions" with hospital staff, admittedly hoping Gould would fire Fahlen. Gould did fire Fahlen on May 14, 2008, cancelling his medical malpractice insurance and thus precluding him from treating patients at Sutter.

When Fahlen asked the hospital about the status of his privileges, he was told that he should resign and leave town or the hospital would begin an investigation into his behavior that could result in a report to California's medical board. When Fahlen did not resign, the hospital convened an investigative committee. That committee presented a report to the medical executive committee (MEC) which, in turn, reviewed the issue and recommended against the renewal of Fahlen's hospital privileges. Fahlen was notified of the decision and of his right to contest it.

In response to Fahlen's request for further hearing, the MEC sent a letter to Fahlen with a statement of charges, including 17 incidents of "disruptive behavior" between 2004 and 2008, and one incident of "abusive and contentious" behavior with the investigating committee in 2008. The letter also informed Fahlen that a judicial review committee would conduct a review hearing under the hospital's bylaws.

After a 13-session hearing conducted between October 2009 and May 2010, the judicial review committee reversed the MEC's decision, finding that the evidence failed to show that Fahlen was professionally incompetent or that he had endangered patient care through his behavior. The judicial review committee also found that although several of Fahlen's interactions with nurses had been inappropriate, the

hospital should have intervened sooner. In addition, the judicial review committee found that the hospital should have considered "intermediate steps" short of loss of privileges.

The judicial review committee's decision was conveyed to the hospital's board of trustees, the final decision-maker regarding staff privileges. The Board reversed the judicial review committee's decision.

Fahlen did not seek judicial review of the board of trustees' decision by petition for writ of mandamus to set aside the decision, as required by California law. Instead, he filed a lawsuit against Sutter and a number of individual decision-makers, alleging that the hospital's action to terminate his privileges had been taken in retaliation for his complaints about "substandard, insubordinate and unprofessional nursing care he had observed . . . [which had] endangered patient care and patient safety." Fahlen sought reinstatement to the hospital's medical staff, along with monetary compensation.

The defendants attempted to have the case dismissed based upon Fahlen's failure to exhaust the internal procedure and the mandamus action, in accordance with California law. But the trial court determined that the case should go forward, finding that Fahlen's suit was based on "disciplinary activity," not on any activity on the part of the hospital that was protected by state law.

On appeal, the question of whether, in a whistleblower retaliation case, a physician who has lost his privileges "must first prevail in an administrative mandamus proceeding to set the decision aside" proceeded to the state's supreme court. The court determined that a successful mandamus action is *not* a necessary condition to a civil suit under California's whistleblower statute.

The *Fahlen* decision is of concern to hospitals and health care systems that rely on the state court protections accorded to internal procedures regarding peer review and credentialing decisions. What the decision means, in short, is that a physician viewed as disruptive by a hospital can circumvent certain steps of the otherwise mandated review process by claiming that the process itself was undertaken in retaliation for actions or reports that fall within the parameters of actions that are protected by the state's whistleblower statute.

Although the *Fahlen* decision is limited to health care entities in California, it is part of a trend that has continued to erode state court protections for hospital peer review and credentialing processes. Health care employers should ensure that such processes are implemented for actions or behaviors specifically affecting patient care and that any concerns or reports made by an individual under review should be investigated and acted upon aside and apart from the peer review process against that individual. As always, a culture of compliance remains essential to an employer's ability to police its practices and prevail under regulatory and enforcement scrutiny.

Ogletree Deakins' Ethics Compliance, Investigations, and Whistleblower Response Practice Group work together with our health care clients to ensure programmatic best practices, effective investigations, and comprehensive defense in investigatory and enforcement actions.

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