Physician's Retaliation Suit under EMTALA Whistleblower Provisions Advances

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On October 26, 2011, the U.S. District Court for the Southern District of Texas denied a hospital's motion to dismiss a physician's retaliation claims alleging that his hospital privileges were terminated for reporting EMTALA violations (Zawislak v. Memorial Hermann Hospital System, S.D. Tex., No. 4:11cv01335, 10/26/11).

The Facts

On or about February 18, 2010, Memorial Hermann Hospital System suspended Walter Zawislak's medical staff privileges to treat patients at Memorial Hermann. Zawislak describes that "on two occasions unstable emergency room patients were transferred from Memorial Hermann to another trauma center because Memorial Hermann's oncall trauma surgeon was either unavailable or unqualified to address the patient's injuries." Zawislak reported the oncall trauma surgeon's conduct to the hospital's emergency department medical director and to the Root Cause Analysis Committee. He asserts that in a countermove, Memorial Hermann conducted a peer review of him which resulted in allegations of substandard care. Also according to Zawislak, "as a result of Memorial Hermann's peer review, his medical staff privileges were suspended and his employer, Team Health, terminated his employment."

Memorial Hermann took further action on April 8, 2010, by publishing to "the National Practitioner's Data Bank (NPDB) that it had taken an adverse action against Dr. Zawislak for substandard care." Zawislak disputed the publication and requested its removal by posting on January 14, 2011, by certified mail, a letter of complaint to the U.S. Secretary of Health & Human Services.

Further, Zawislak filed suit, arguing that his privileges were suspended "in retaliation for disclosing and objecting to Memorial Hermann's alleged Emergency Medical Treatment and Active Labor Act (EMTALA) violations." Zawislak also asserted a state law claim of defamation against Memorial Hermann for publishing in the NPDB that it took an adverse action against his clinical privileges for purported substandard care. Defendant Memorial Hermann moved to dismiss, contending that Zawislak 1) failed to exhaust his administrative remedies; 2) failed to allege facts sufficient to overcome the statutory presumption that the hospital is immune from liability pursuant to the Health Care Quality Improvement Act (HCQIA); and 3) failed to state a claim for relief under EMTALA's antiretaliation provision.

The Ruling

1. Federal Rule Exhausting Administrative Remedies

Memorial Hermann argued that plaintiff's claim of defamation arising from the NPDB report is subject to dismissal for failure to exhaust administrative remedies and that Zawislak did not allege "any facts demonstrating that before filing suit he followed the procedures set out in the applicable federal regulation to dispute the accuracy of Memorial Hermann's report." A physician may dispute the accuracy of the NPDB report by filing a written dispute with the Secretary of Health within sixty days of receiving the report. The district court affirmed that "more than sixty days lapsed between plaintiff's receipt of the NPDB report and the time he sent the Secretary of Health… Thus, Dr. Zawislak did not follow the procedures."

However, the court also found that "disputing the accuracy of the report with the Secretary of Health is not a prerequisite to filing suit…[and that] resort to administrative remedies is not required before filing suit." Zawislak did "not seek the correction of the report. Instead, he complains of harm he has suffered as a result of the already filed report. Because procedures only provide for the correction of a report, the Court does not believe that administrative exhaustion is required before Plaintiff may proceed with claims asserted in the complaint. Therefore, defendant's motion to dismiss for failure to exhaust administrative remedies must be denied."

2. Immunity Under HCQIA

In light of the immunity conferred under HCQIA, the defendant argued that it is shielded from liability advanced in the plaintiff's suit about decisions reached in the Memorial Hermann professional review process. "The HCQIA was enacted to provide for effective peer review and interstate monitoring of incompetent physicians, and also to provide qualified immunity for peer review participants. In order for immunity to apply under the HCQIA, the professional review action must be taken:

1. in the reasonable belief that the action was in furtherance of quality health care,
2. after a reasonable effort to obtain the facts of the matter,
3. after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
4. in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3) [above]."

The district court wrote that "[w]hile it is true that Memorial Hermann enjoys a presumption that its professional review action met the fairness and due process requirements, the Court is persuaded that Dr. Zawislak has alleged sufficient facts to suggest he may be able to rebut the presumption by a preponderance of the evidence." Zawislak pled facts asserting that the hospital terminated his privileges in retaliation against his EMTALA protected report that oncall physicians transferred individuals before providing stabilizing treatment. The court determined that "[i]f Memorial Hermann acted on this basis, a trier of fact could find that such a decision was not grounded in considerations of quality health care, and was instead intended to protect Memorial Hermann's oncall physicians and other medical personnel." Zawislak's complaint also claims that the review committee did not consider the actions of the oncall physicians or Zawislak's treatment of the patients at issue. "If Memorial Hermann did not consider this evidence," the court stated, "a trier of fact could conclude that the reviewing committee did not make a reasonable effort to obtain the facts." Thus with a plausible claim that defendant failed to meet the fourth requirement for HCQIA immunity, the court decided that Memorial Hermann's motion to dismiss on HCQIA immunity grounds must be denied.

3. EMTALA Claim

Memorial Hermann maintained that plaintiff was not a whistleblower under EMTALA and, therefore, failed to allege a cause of action, and his claims should be dismissed. Outlining the civil enforcement provisions of EMTALA, the court noted that the law created "a private right of action for any individual who suffers personal

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harm as a direct result of a participating hospital's violation of a requirement of the statute. EMTALA also contains a section entitled 'Whistleblower protections' which prohibits hospitals from taking adverse action against two classes of individuals: 1) physicians and other personnel who refuse to authorize the transfer of an individual with an emergency medical condition that has not been stabilized and 2) hospital employees who report a violation of EMTALA."

The court concurred with Memorial Hermann that Zawislak did not fall within the first class of whistleblowers because he failed to allege a situation in which he refused to authorize the transfer of an unstable patient. However, where the hospital reasoned that Zawislak was not a hospital employee, the court was not able "to identify any decisions construing the meaning of 'employee' in the whistleblower provision." Thus the court found that "[w]hether a physician with hospital privileges is considered an 'employee' for the purposes of the whistleblower provision appears to be a case of first impression." The court reasoned that because EMTALA "affirmatively prohibits hospitals from taking adverse action against 'any hospital employee,'" it cannot be implied that the statute "permits hospitals to take adverse action against physicians with hospital privileges who have observed and reported EMTALA violations. Such a result would seem to contradict the very purpose of EMTALA. The legislative purpose of the statute is best served by construing it to prohibit participating hospitals from penalizing physicians with medical privileges…Accordingly, the whistleblower provision must be construed to include physicians with medical privileges within the definition of 'hospital employee.'" Therefore, the court denied the defendant's motion to dismiss.

To examine the court's full opinion, go to: http://ia600703.us.archive.org/32/items/gov.uscourts.txsd.879218/gov.uscourts.txsd.879218.13.0.pdf

State Peer Review Privilege Only Protects Materials Not Relevant to EMTALA Claim

On November 2, 2011, a federal magistrate judge of the U.S. District Court for the District of Colorado held that the plaintiffs may discover hospital peer-review documents relevant only to the plaintiffs' federal law claim that a hospital violated EMTALA by discharging their daughter absent stabilizing her emergency medical condition. Other peer review materials sought by the plaintiffs were not directly relevant to the EMTALA claim, to the extent they were protected under the state peer review privilege law (Etter v. Bibby, D. Colo., No. 1:10 cv 557, 11/2/11).

The Facts

In the early morning of March 22, 2008, Johanna Etter took her daughter Gabrielle Etter to the Delta County Memorial Hospital's (DCMH) emergency department. Gabrielle was discharged later the same day. The next day, Gabrielle returned to DCMH, was transferred to Children's Hospital, and died shortly after arrival as a result of pneumonia and infection.

Gabrielle's parents filed suit in federal court asserting violation of EMTALA by DCMH, alleging that "when Gabrielle was discharged from the emergency department on March 22, 2008, she had an emergency medical condition that the Hospital was required to screen for and stabilize before it discharged her." Plaintiffs also asserted under Colorado law three negligence claims against DCMH and two physicians, Charles King Bibby, Jr., MD, and Timothy Carter Meilner, MD. The federal district court had subject matter jurisdiction over the EMTALA claim, under which federal law creates a cause of action, and supplemental jurisdiction over the other three claims.

This particular court decision is on Plaintiffs' Motion to Compel Documents from Defendant Delta County Memorial Hospital. Specifically in the Etters' discovery request, they asked DCMH to produce "the following documents:

3. Produce any reports, files or reviews that refer or relate to Gabrielle Etter's care on March 22, 2008, including, but not limited to, any quality assurance reports, peer review reports and morbidity/mortality reports…

7. Produce any and all reports or files relating to Dr. Bibby, including, but not limited to, credentialing files, peer review files, quality assurance reports, morbidity/mortality reports, hospital privileges, and any reports relating to the deaths of patients under his care."

DCMH challenged the requests, arguing that the peer-review documents are privileged pursuant to the Colorado Peer Review Act and that those peer-review materials were irrelevant to the EMTALA claim, the only federal claim in the case and, therefore, federal law requires recognition of the state law privilege.

The Ruling

In analyzing the procedure for reviewing the materials, the court noted that discovery in federal courts generally is governed by the Federal Rules of Civil Procedure and that Rule 501 provides that federal privilege law controls in cases proceeding under federal question jurisdiction. "Here, federal law provides the rule of decision for the EMTALA claim but not the state law negligence claims… The court perceives two issues regarding whether the peer review documents must be produced: 1) are they relevant to the subject matter, and 2) are they otherwise privileged?"

Failure to properly diagnose a medical condition cannot serve as the basis for a violation of EMTALA's Requirements…[nor does EMTALA] hold hospitals accountable for failing to stabilize conditions of which they are not aware, or even conditions of which they should have been aware. The court, therefore, reasoned that "[w]hether Gabrielle Etter received an appropriate screening examination and stabilizing treatment can be established from the medical records, Delta Hospital's policies and procedures, and deposition testimony."

Although all fifty states and the District of Columbia have recognized some form of medical peer review privilege, the federal court noted that Congress has declined to extend the peer review privilege to materials produced by medical peer reviews. It also affirmed other federal court precedent that "where medical peer review materials are relevant only to state law negligence claims and not to an EMTALA claim, state privilege law applies and peer review materials are privileged."

While the court considered that the Etters' request for production of the peer review records may be relevant to the EMTALA claim, the court was not persuaded that all peer review documents would be relevant to the subject matter of the plaintiffs' EMTALA claim. "The other peer review documents sought by Plaintiffs do not inform the query relevant to EMTALA liability, that is, how Delta Hospital treated other patients with similar symptoms…Any additional peer review documents are not likely to lead to admissible evidence regarding the EMTALA claim, as 'EMTALA does not guarantee that the hospital's emergency room personnel will correctly diagnose a patient's condition as a result of the emergency room screening.'"

Given the restricted relevance the peer review materials had to plaintiffs' EMTALA claim and Fed. R. Evid. 501's recognition of

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for the conversation, and asked if I could find him a cup of coffee while he waited for that ride.

I thought to share this story as part of my first assistant editor's letter as it struck a personal cord in my career as an emergency medicine physician. Amidst all of the debate about best practice, implementation of EMR's, talk about changes to insurance reimbursement, and government directed takeover of the medical establishment…the elderly gentleman reminded me of why many of us got into medicine - the people, the individuals, what makes them who they are and not just another diagnosis or disposition. It's the one and only concept that will never change in our professional practice…a concept full of rewards that we need to keep in focus throughout our career.

As the gentleman was being escorted out of the ED by the ambulance crew, he looked over and we exchanged salutes. He probably did not know that I was saluting him for more than his service to country. He essentially was the answer to the question "Do you like your job?" At this time, I salute the members of AAEM and what you do every time you step into the role of an emergency medicine physician. I look forward to serving in my new position as assistant editor for AAEM's *Common Sense* publication. Dr. David Vega, chief editor, and the many contributors continue to put forth a valuable resource for the members of AAEM and the emergency medicine community. I sincerely look forward to connecting with you amongst the pages of *Common Sense* and within the mission of AAEM.

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state law privilege when state law provides the rule of decision, the court determined that plaintiffs were entitled to production of the peer review records limited to Gabrielle Etter and other patients presenting at the emergency department with similar symptoms and conditions. After reviewing *in camera* (i.e., a private examination with the judge of confidential or sensitive information) the tendered peer review documents, the court determined that only certain pages of the hospital peer review records were relevant to plaintiffs' claim of EMTALA violations and thus were discoverable. Accordingly, the court ordered that the Etters' "Motion to Compel Documents" from DCMH was properly produced to Plaintiffs, but in all other respects, plaintiffs' motion was denied.

To read the full text of the decision, go to http://law.justia.com/cases/federal/district courts/colorado/codce/1:2010cv00557/118195/75.

EMTALA case synopses prepared by Terri L. Nally, Principal, KAR Associates, Inc.

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