WAS THIS PERIOPERATIVE NURSE EDUCATOR'S FIRING A RETALIATORY ACTION BY HER EMPLOYER?

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Retaliation by an employer occurs when the employer takes an adverse action against an employee because the employee reports to the employer –or to an outside entity–an employment situation that is inconsistent with legal or ethical duties the employer and fellow employees are required to meet.

Retaliation can include a reduction in salary, a denial of a promotion or a termination of employment.

An example of an employee report to an employer that may result in retaliatory action by an employer is voicing concerns about special treatment (e.g., promotions, increase in salary) of an employee inconsistent with workplace policies governing promotions and salary increases.

If an employee reports his or her concerns outside of the workplace to a governmental body that enforces workplace laws—such overtime pay to the state or US Department of Labor—the employee's action is termed whistleblowing. Such reporting can also result in retaliation by the employer.

Employees who work for the federal government are protected against retaliation when reporting inside or outside the workplace. Federal employees' protections against whistleblowing and retaliation can be accessed here.

State laws also protect employees and those laws vary from state to state. You can search your state's protections for whistleblowing here.

In the following unpublished case (Tamblyn Johnson v. Pasadena Hospital Association, Ltd., B321794, Court of Appeal of the State of California, Second Appellate District, Division One, December 12, 2023), an employer's actions against a nurse employee voicing concerns to her employer (and presumably to an outside entity) required a judicial determination of the employer's subsequent actions.

Details Leading Up to the Case

The hospital hired the RN to fulfill the role of "Perioperative Nurse Educator." The position required the RN to "identifying problems and learning needs for perioperative nurses, bringing those issues to the attention of decision-makers, and participating in developing changes to resolve the identified problems and needs."

The position required the RN to possess CNOR certification.

The RN did not have the certification at the time of her hiring so the hospital conditioned her employment on obtaining the CNOR certification within 90 days of her hiring. The RN signed a document containing this, and other, requirements of her hiring.

The RN was also required to complete a 90-day probationary period consistent with the hospital's policy for new hires. The hospital reserved the right to extend that time period for an additional 45 days.

Both parties were provided the right to terminate the employment relationship at any time during or after the probationary period without prior notice.

Employee Concerns Shared with RN

About two months into her position, two hospital employees shared their concerns that orthopedic techs were performing tasks during surgeries that were beyond the scope of their certifications.

The RN shared her concerns with her supervisor who asked for more details about techs conduct. The RN did an internal investigation which supported the concerns voiced to her.

The hospital decided to require the techs to obtain further credentials so they could perform certain surgical tasks. The RN was complimented on her report.

An email was sent to the orthopedic surgeons that the techs could no longer perform tasks beyond their certification. The orthopedic techs were also informed of the policy change.

Joint Commission Complaint

A complaint from The Joint Commission was received by the hospital the day after the emails were sent out. It detailed the ortho techs conduct and alleged that nothing had been done to rectify the situation despite the situation being shared with the OR director and CNE. It further stated that staff was fearful of saying anything due fear of retaliation by administration.

The hospital replied to the complaint in writing describing steps to eliminate this issue.

RN and the CNOR Exam

The RN attempted to apply for the required exam the month she was hired but computer problems prevented her from doing so. She informed her supervisor that she was finally able to apply for the exam and paid for it and would take it in February.

Despite this success, the RN did not hear from the exam provider about the status of her application. She attempted to contact the provider numerous times during February and March to no avail.

In March, on the same day she reported the concerns about the ortho techs, the RN received an email from administration that the CNOR was due to be in place by a date in April. If that is not possible, the email continued, something in her file will need to be placed explaining the delay.

The RN shared her attempts via email. When she finally got a date, which was two days before the expiration of the 90-day deadline, she shared the date with her supervisor via phone. The supervisor responded that she understood and it should not be a problem.

An office mate of the RN overheard the conversation.

Despite the reassurances given the RN, she was terminated. The termination was based on her not obtaining the CNOR certification within 90 days of hiring and that she had "not demonstrated the required performance standards."

RN Files Lawsuit

The RN filed a lawsuit in state court alleging retaliation and wrongful discharge and stating that her termination was due to reporting the ortho techs were practicing outside their certification scope.

She also asked for punitive damages.

The hospital maintained that the RN was fired due to her failure to pass the CROR exam within the agreed to period which was a condition of employment. A Summary Judgment Motion was filed.

The trial court granted the hospital's Summary Judgment Motion.

The RN appealed that decision.

Appellate Court Decision

The Court carefully considered all of the evidence from the trial court and held that the RN's submitted evidence was adequate in raising a triable issue of key facts as to whether the hospital's reason for firing her was pretextual.

As a result, the Summary Judgment Motion should not have been granted. The issue of punitive damages was allowed to survive the motion as well.

The case was reversed and this allowed the case to be heard before the trial court.

What This Case Reveals for Your Nursing Practice

Despite the fact that the case is not one that can be used as an authority for future cases with similar facts, and the ultimate court determination at the trial level is unknown, it can still guide you and your nursing practice. Some of those guidelines include:

- If you accept a position with conditions, every attempt to meet those conditions is essential in order to demonstrate to a court (should you need to) that you in good faith attempted to meet them. Keep a log of all attempts, including dates, times, names of persons you spoke with, and any written documents or emails
- Employment probationary periods are common when newly hired and they help you leave a position without legal repercussions if the position is not what you expected
- State and federal laws exist to protect you if you determine a need to report illegal or unethical workplace happenings. Most often, such reports can be done confidentially and your identity is not revealed to the employer
- You have a legal and ethical obligation to report illegal work conditions but only do so after consulting with a nurse attorney or attorney who can guide you in how best to voice those concerns
- Fellow colleagues can be occurrence witnesses (someone who sees or hears an event, as here with the office mate who overheard the RN's conversation with her supervisor) that may help you in a case against your employer
- When reporting a practice concern within your workplace, keep a diary of the date(s) you reported, names of individuals you spoke with, responses of individuals with whom you spoke, and other pertinent information. Keep any written documentation as well.
- Employer conduct that is questionable prior to a termination of employment after a report of a workplace concern raises the issue of whether the termination was truly based on the reason given by the employer.

This information is for educational purposes only and is not to be taken as specific legal or other advice by the reader. Nor does it create an attorney-client relationship. If legal or other advice is needed, the reader is encouraged to seek such information from a nurse attorney, attorney or other professional.