

## Third Circuit Provides Guidance on Handling of EMTALA Whistleblower Claims

Last week, the Third Circuit Court of Appeals affirmed a District Court's grant of summary judgment in favor of a health care employer, holding that an employee failed to establish that she was retaliated against in violation of the whistleblower protection provision of the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. *Marie Gillispie v. Regionalcare Hospital Partners, Inc.*, No. 16-4307 (June 12, 2018). In the same case, the Third Circuit also upheld the dismissal of Gillispie's wrongful discharge in violation of Pennsylvania public policy claims. Noteworthy about this decision is that it provides guidance regarding how EMTALA whistleblower claims will be analyzed. Specifically, the Third Circuit announced that absent direct evidence of retaliation, courts should apply the *McDonnell Douglas* burden-shifting analysis to EMTALA whistleblower claims. In addition, this case clarified that EMTALA's whistleblower provision protects employees who inform personnel in a covered facility of an alleged EMTALA violation, even though the employee does not also inform any governmental or regulatory agency.

### EMTALA Whistleblower Protection

EMTALA seeks to prevent hospital emergency rooms from "patient dumping," which is the practice of refusing to offer emergency room treatment to indigent patients who lack medical insurance or transferring them to other medical facilities before their emergency medical condition is stabilized. EMTALA contains a whistleblower provision that states in relevant part, "[a] participating hospital may not penalize or take adverse action ... against any hospital employee because the employee reports a violation of a requirement of this section." 42 U.S.C. § 1395dd(i).

### Gillispie's Whistleblower and Wrongful Discharge Claims

Gillispie, a registered nurse who worked for the medical center as quality project coordinator, claimed that the medical center terminated her employment in retaliation for her reporting an EMTALA violation, thus violating the EMTALA whistleblower protections, and that to the extent her employment termination was motivated by her participation in the Department of Health's investigation of an unrelated patient complaint, it violated Pennsylvania public policy.

Gillispie's EMTALA claim was based on the decision of the medical center's emergency department (ER), to discharge a pregnant patient who presented with discomfort, pain, and bleeding and to instruct the patient to go to another hospital to see a gynecologist. Following the patient's discharge, the medical center conducted an investigation to determine whether or not the ER's actions violated EMTALA and whether or not the incident triggered any reporting requirements under EMTALA. In her role as quality project coordinator, Gillispie was involved in the investigation. Based on the investigation, the medical center determined that the ER's actions constituted a potential EMTALA violation, but that the medical center did not have a duty to report the violation. According to Gillispie's deposition testimony, all individuals involved in the investigation agreed that the conduct was an EMTALA violation and were aware that the medical center was not going to self-report the violation. Gillispie alleged that in conversations with management, she insisted that EMTALA required self-reporting.

Regarding Gillispie's wrongful discharge claims, while the medical center's EMTALA investigation was underway, the Pennsylvania Department of Health showed up at the medical center to investigate an unrelated complaint by a patient's family, alleging that the medical center failed to discipline nurses for patient care issues. The Department of Health interviewed Gillispie, who told the state investigators that only one of the two nurses involved in the patient's care had been disciplined. That same day, the medical center learned that Gillispie prepared a letter to assist the



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Department of Health with its investigation. Gillispie claimed that she had drafted the letter months earlier, but the medical center's information technology technicians determined that the letter had actually just been drafted that day. The medical center suspended Gillispie, and then a few days later terminated Gillispie's employment. Gillispie subsequently reported the EMTALA violation to a state agency and then filed suit.

## Case Holding

Even applying a broader definition than the District Court used for what constitutes a "report" under EMTALA, the Third Circuit affirmed that Gillispie did not make a report and, thus, there was no EMTALA violation. The Third Circuit's holding was based on its finding that even if Gillispie urged the medical center to self-report the EMTALA violation, she did not inform or notify the medical center's management of anything regarding the patient's discharge that was not already known. Therefore, Gillispie failed to demonstrate that she made a report and, thus, failed to establish that she engaged in activity protected by EMTALA's whistleblower provision.

Also affirming summary judgment as to Gillispie's wrongful discharge in violation of public policy claims, the Third Circuit explained that Pennsylvania law does not recognize a common law cause of action for violating public policy if a statutory remedy exists. The court found that Gillispie could have brought her claims under the Pennsylvania Medical Care Availability and Reduction of Error (MCARE) Act, a state law that prohibits retaliation against a health care worker for reporting a serious event or incident concerning patient safety. 40 Pa. Cons. Stat. § 1303.101 *et seq.* The court held that because she had a statutory remedy, Gillispie's wrongful discharge claims were properly dismissed.

## Decision Takeaways

As mentioned, this decision is instructive with regard to how Third Circuit courts will analyze EMTALA whistleblower claims. Where there is no direct evidence of retaliation, courts will apply the *McDonnell Douglas* burden-shifting analysis. In addition, the court made clear that an EMTALA report does not require that the report is made to a governmental or regulatory agency. Rather, the Third Circuit stated that Congress intended to include the transmission of information under the protective umbrella of a report. The court held, therefore, that EMTALA's whistleblower provision protects employees who inform personnel in a covered medical facility of a possible EMTALA violation, even though the employee does not also inform any governmental or regulatory agency. Also noteworthy, although the Third Circuit applied a broader definition of report than applicable in Title VII claims, the court concluded that EMTALA's whistleblower protection is narrower than the analogous provision of Title VII, which prohibits retaliation of employees who "oppose" an alleged Title VII violation, or "participate" in an investigation into a violation. Employers should be mindful of these differences when considering disciplinary action for employees who may have also engaged in whistleblower activities.

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