



## Whistleblower Protection May Apply Before the Whistle Gets Blown

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A hospice provider in Maryland failed to avoid liability under the state's whistleblower protection laws by asserting the law did not apply to their termination of a nurse who made internal complaints about public safety and health before she reported those complaints to government authorities.

On May 13, 2010, a Maryland Court of Appeals rejected arguments that Maryland's Health Care Worker Whistleblower Protection Act ("the Act") accorded whistleblower protection only if complaints raised internally had been reported to external authorities before adverse action was taken against the employee. The court noted to do otherwise would allow employers to "evade the Act's mandate by terminating a complaining employee who has not yet been able to notify the appropriate board."

Susan Lark, a former nurse for Montgomery Hospice, Inc. ("Hospice") in Rockville, Maryland, filed a wrongful discharge action claiming she was fired for actions, reports and disclosures involving safety and health conditions which she reported to Hospice. Lark defended her actions claiming a legal duty required her as a registered nurse to disclose, to her supervisors, violations of state and federal narcotic laws and the rules and regulations of Maryland's Board of Nursing.

While working for Hospice from September 2006 to April 2007, Lark sent e-mail complaints to Hospice about several alleged safety and health concerns including: narcotics being sent to persons who were not hospice patients; improper documentation of narcotics; improper documentation for treatment of patients; and failure to initiate safety precautions with a patient who had a high risk of hemorrhage.

Although Hospice contends Lark was terminated in April 2007 for not meeting acceptable and safe standards for nursing, Lark claims those charges were unfounded and a pretext. She contends the actual reason Hospice terminated her was because of the safety and health violations she reported to Hospice management.

Under Maryland law, protection under the Health Care Worker Whistleblower Protection Act applies only if:

- (1) The employee has a reasonable good faith belief that the employer has, or still is, engaged in an activity, policy, or practice that is in violation of a law, rule or regulation;
- (2) The employer's activity, policy, or practice that is the subject of the employee's disclosure poses a substantial and specific danger to the public health or safety; and
- (3) Before reporting to the Board:



- (i) The employee has reported the activity, policy, or practice to a supervisor or administrator of the employer in writing and afforded the employer a reasonable opportunity to correct the activity, policy, or practice; or
- (ii) If the employer has a corporate compliance plan specifying who to notify of an alleged violation of a rule, law, or regulation, the employee has followed the plan.

Since the Act requires a whistleblower complainant to raise their concerns to their employer “before reporting to the board,” Hospice argued Lark did not qualify for whistleblower protection because she was fired before making any complaint to the nursing board. The Court of Appeals found this position untenable given the legislative intent of the Act is to encourage and protect legitimate whistleblower action and allow for alleged violations to be resolved informally where possible. To hold otherwise, would encourage employees to “do nothing at all” when confronted with a dangerous condition affecting public safety and health.

The prerequisites for whistleblower protection in the Maryland statute, which are similar to those in other states, serve an important public purpose by allowing the employer an opportunity to investigate and correct the alleged violative condition. This informal resolution process also saves time and resources and allows the employer to potentially avoid harm to its reputation. Further, employees who are loyal in raising concerns internally so they can be first addressed and resolved by their employer are not to be accorded less protection than those who immediately direct their complaints to outside entities.

Providers who have policies to encourage and effectively address safety and health complaints may be more effective in preventing safety and health hazards and violations, as well as addressing disciplinary matters involving employees who make frivolous complaints. Since state and federal laws and working environments vary, providers should consult with counsel in developing such policies.

Lark v. Montgomery Hospice, Inc., No. 140, 2010 Md. LEXIS 192 (Md. App. May 13, 2010)

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