



Reporting Rudeness is Not “Protected Activity”

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Reporting incidents of “rudeness” by nursing staff and a vague accusation another nurse might need a drug test both fail to qualify as “illegal activities” under Tennessee’s Public Protection Act. This Act protects employees who are terminated for their refusal to participate in, or remain silent about “illegal activities.”

On March 8, 2010, the Court of Appeals at Nashville affirmed a trial court decision finding that Saundra Counce, a registered nurse, failed to establish her termination by Baptist Hospital violated the Act or Tennessee’s common law claim for retaliatory discharge.

Counce signed a Registered Nurse Premium Pay Agreement with Baptist on August 15, 2004 to work on an as-needed basis. The agreement specified “work availability is not guaranteed.” A year later, she was placed on probation for unsatisfactory work performance and provided performance objectives for improvement. Two months later, she was terminated.

After her termination, Counce alleged she was wrongfully discharged for several reasons, including asserting Baptist’s action was taken in retaliation for her reporting “illegal activities.” Specifically, Counce alleged she was discharged for reporting a nurse supervisor who “raised her voice impatiently and angrily in front of the staff” and for suggesting another nurse, who Counce found to be hyperactive and agitated, be drug tested. The Court of Appeals determined none of these activities rise to the level of “protected activity” under either the Public Protection Act or a common law theory for retaliatory discharge.

In order to prevail under the Public Protection Act, the employee’s protected activity must be established as the sole reason for termination, whereas, under a common law theory, it must be a “substantial factor.”

In addition to her retaliation claims, Counce also raised several complaints concerning her employment including discrimination on the basis of sex, national origin, disability and age. All of the discrimination claims were raised for the first time after termination and were dismissed at trial, with the dismissals affirmed on appeal.

Counce v. Ascension Health, No. M2009-00741-COA-R3-CV, 2010 Tenn. App. LEXIS 178 (Mar. 8, 2010).





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