

MASSACHUSETTS Lawyers Weekly

Retaliation claim can proceed vs. health care organization

Judge points to timing of 'collegiality survey'

By: Eric T. Berkman December 9, 2021



The plaintiff was a physician at a hospital in the Atrius Health network.

A Superior Court judge has found that a retaliation suit can proceed against a health care organization that allegedly fired a doctor for engaging in protected whistleblowing activity and not for interpersonal issues as the employer claimed.

Defendant Atrius Health terminated plaintiff Diana Rodriguez after she failed to comply with its directive that she undergo assessment and potential counseling by Physician Health Services to address alleged interpersonal issues in the workplace. Physician Health is a subsidiary of the Massachusetts Medical Society that provides support to doctors struggling with mental health and behavioral challenges.

Rodriguez brought a retaliation complaint under the state Healthcare Whistleblower Act alleging she was really fired for raising concerns about Atrius' billing practices and the clinical competence of a colleague.

Atrius argued that Rodriguez could not rebut its non-retaliatory reasons for her termination and thus her claim failed as a matter of law.

But in denying Atrius' motion for summary judgment, Judge Michael D. Ricciuti pointed to an online "collegiality survey" that Atrius had Rodriguez's co-workers complete after she first expressed her concerns. He noted that the company had no regular practice of conducting such a survey and that some of Rodriguez's co-workers reported feeling pressured to give negative feedback about Rodriguez.

"[S]everal genuinely disputed material facts [show] there is a triable issue as to whether the PHS requirement was imposed to facilitate Rodriguez's removal as part of a retaliatory scheme," Ricciuti wrote. "[T]hese facts ... and the timing of the survey ... suggest that the Collegiality Survey was designed to provide a reason to terminate Rodriguez and was manipulated to support that result."

The 18-page decision is *Rodriguez v. Atrius Health Inc., et al.*, Lawyers Weekly No. 12-056-21.

Reconsidering methods

Plaintiff's counsel Michael V. Parras Jr. of Newton said his client raised genuine issues of disputed material facts so the case should be tried.

Opposing counsel, Westborough's Robert L. Kilroy, said his client was disappointed in the decision.

Still, he said he looked forward to presenting "in full" the evidence supporting Atrius Health's non-retaliatory actions and decision-making before a jury.

Christina L. Lewis, a management-side employment lawyer in Boston, said the ruling highlights how an employer's efforts to document the reasons for a termination, if outside its normal practices, can serve as evidence of pretext.



"Terminating someone for subjective reasons, like personality conflicts, are harder to prove, especially if there is not sufficient documentation in place before the employee engaged in protected activity."

— Christina L. Lewis, Boston

She also said the case shows how hard it can be to terminate an employee for subjective reasons.

"It was undisputed fact that the plaintiff was a skilled physician and capably performed the essential duties of her role," Lewis said. "Terminating someone for subjective reasons, like personality conflicts, are harder to prove, especially if there is not sufficient documentation in place before the employee engaged in protected activity."

Christopher S. Feudo of Boston, who also represents employers, said the case illustrates challenges employers face in winning retaliation cases on summary judgment.

"Here, there were actually no billing irregularities found and no conclusion was reached about [the plaintiff's colleague's] professional conduct," he said. "But even if those weren't meritorious, the employee still won. And that's where a lot of employers get in trouble. They take action against an employee who engaged in whistleblowing not based in fact, but they still got in trouble because of retaliation."

Given that reality, Feudo said, employers need to feel extraordinarily confident in their rationale for terminating someone who is a whistleblower.

"[The decision] advises clients to try and work out amicable departures of people to avoid the excessive costs associated with litigation," he said.

Newton Center employment attorney Matthew J. Fogelman said, in general, disposing of employment rights cases by summary judgment is rare and such disputes usually pose questions of credibility that require a trier of fact.

"This case seems to squarely fit within that standard rule," Fogelman said.

Based on the facts laid out by the court, Evan M. Fray-Witzer of Boston said it was easy to see how the attorneys on both sides were sure they had the case "in the bag."

"This is a case that just as easily could have been decided for the defense — and still might be at trial," he said. "This case is a great reminder that we, as lawyers, need to get out of our own heads, our own mindsets, when evaluating the strengths and weaknesses of our arguments. It's a case that's ripe for mediation because, if it does go to trial, the outcome is as close to a roll of the dice as I've seen."

Survey says ...

Rodriguez began working for Atrius as a maternal fetal medicine — or MFM — doctor in 2016.

The plaintiff worked with two other MFM doctors: Mary Vadnais and defendant Deborah Platek, the latter who acted as Rodriguez's immediate supervisor.

The three doctors were supervised by defendant Kevin Fitzpatrick, chief of obstetrics and gynecology.

As of March 2017, Rodriguez apparently showed high productivity but delays occurred at the sites where she worked, an issue Vadnais and Platek expressed concerns about in email exchanges that also described co-workers as becoming frustrated.

Over the next couple of months, exchanges ensued between Platek and Laurel Martino, director of organizational development and learning, about Rodriguez's alleged unwillingness to accept feedback, interpersonal difficulties with sonographers and medical assistants, and the apparent reluctance of certain staff to work with Rodriguez.

Platek also apparently told Martino — after Rodriguez requested flexible time on Fridays after accepting the job with the understanding that she would work those days — that the job might not be a "good fit" for Rodriguez.

At one point, Martino told HR that Platek wanted to "move forward" with termination.

In October, Rodriguez made verbal complaints to Fitzpatrick about Platek's clinical performance that were later referred to a peer review committee.

On Dec. 1, 2017, Platek gave Rodriguez a performance review that acknowledged the plaintiff's "exemplary" patient care but described her allegedly disdainful interactions with staff and unwillingness to engage in constructive discussion.

Then, in February 2018, Atrius initiated an online "collegiality survey" that revealed complaints from several staff members that Rodriguez was "belittling, rude, rigid and condescending."

Some employees later claimed that Platek and others pressured them to say negative things and at least one employee testified that she did not complete a survey, though one existed in her name.

Around that time, Rodriguez raised concerns that Atrius was conducting incomplete sonograms while billing for complete ones.

On April 25, 2018, Rodriguez received a review stating that she would benefit from coaching by PHS.

Ultimately, the compliance department determined that no fraudulent billing had been found. Meanwhile, Rodriguez was told to undergo assessment by PHS by October. When she failed to do so, she was terminated, effective Dec. 31, 2018.

Rodriguez subsequently filed suit in Superior Court alleging that the defendants illegally retaliated against her. The defendants moved for summary judgment.

Rodriguez v. Atrius Health Inc., et al.

THE ISSUE: Could a retaliation suit proceed against a health care organization that allegedly fired a doctor for engaging in protected whistleblowing activity and not for interpersonal issues as the employer claimed?

DECISION: Yes (Suffolk Superior Court)

LAWYERS: Charles F. Rodman and Michael V. Parras Jr., of Rodman LLP, Newton (plaintiff)

Robert L. Kilroy of Mirick, O'Connell, DeMallie & Lougee, Westborough (defense)

Issue of fact

Ricciuti denied the defendants' motion, finding a genuine issue of material fact as to the motivation behind the plaintiff's firing.

"At its core, Atrius' defense turns on Fitzgerald's claim that Rodriguez's failure to comply with the PHS directive was the reason for her termination," the judge said. "But Fitzgerald was one of the supervisors to whom Rodriguez voiced her complaints about Platek. There is thus no dispute that the person who made the termination decision was well aware of Rodriguez's protected activity, regardless of whether Platek was aware of it."

Additionally, Ricciuti noted that evidence in the record, including the timing and circumstances surrounding the collegiality survey, cast significant doubt as to the basis for the termination decision.

Finally, the judge emphasized that Rodriguez's medical skill was never called into doubt.

"This is not a case where a hospital was taking remedial action to protect patients," he said, denying summary judgment. "Indeed, the fact that Rodriguez was an excellent doctor calls into question Atrius' motives for terminating her as it did."

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