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What is an Employment Statute Doing in My Public Health Code?
Defending Claims under the Patient Safety Act

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The West Virginia Patient Safety Act (the "PSA") occupies a strange place within the West Virginia Code, although at first glance one might not realize it. It is cleverly disguised as a healthcare statute, when in fact it is an employment statute. In fact, its purpose says it all: "[T]he Legislature intends by enacting this article to protect patients by *providing protections for those health care workers* with whom the patient has the most direct contact."[2] By providing protections for those health care workers with whom patients have the most direct contact, the Legislature has essentially created a particularized whistleblower statute for the healthcare industry.[3] And, with little litigation regarding the statute itself, this article will serve as a roadmap to defending claims brought under the PSA.

Simply, the PSA provides that no employer may retaliate or discriminate against any health care worker—or anyone acting on behalf of the worker—if the health care worker:

(1) Makes a good faith report, or is about to report, verbally or in writing, to the health care entity or appropriate authority an instance of wrongdoing or waste[;]

(2) Advocated on behalf of a patient or patients with respect to the care services or conditions of a health care entity;

(3) Initiated, cooperated or otherwise participated in any investigation or proceeding of any governmental entity relating to the care, services or conditions of a health care entity.[4]

Importantly, a "health care worker" is one who "provides *direct patient care* to patients of a health care entity" and who is either an employee, subcontractor, or independent contractor of the entity.[5] "Direct patient care" means care that "provides for the physical, diagnostic, emotional or rehabilitational needs of a patient," or care that "involves examination, treatment or preparation for diagnostic tests and procedures."

The legislative history of the PSA in critical in illustrating the limited application of the act to only those health care workers providing direct patient contact. The original bill introduced on February 23, 2001 takes a broader view of the individuals covered by the PSA:

> The term "health care worker" includes a worker directly employed by a health care entity as well as an employee of a subcontractor or independent contractor that provides supplies or services to a health

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[2] W. Va. Code § 16-39-2(b) (emphasis added).

[3] *Compare* W. Va. Code § 16-39-1, *et seq.*, *with* W. Va. Code § 6C-1-1, *et seq.*

[4] *Id.* at § 16-39-4.

[5] *Id.* at § 16-39-3(7) (emphasis added).

> care entity. The term also includes a nurse, nurse's aide, laboratory technician, physician, intern, resident, clerical employee, laundry staff, kitchen staff, maintenance worker and a current or former worker or contractor[.][6]

The final language of the PSA defined "health care worker" as:

> "Health care worker" means a person who provides direct patient care to patients of a health care entity and who is an employee of the health care entity, a subcontractor or independent contractor for the health care entity, or an employee of such subcontractor or independent contractor. The term includes, but is not limited to, a nurse, nurse's aide, laboratory technician, physician, intern, resident, physician assistant, physical therapist or other such person who provides direct patient care.[7]

As indicated above, this language is dramatically different from the final definition of "health care worker" in the PSA. As such, the legislative intent is clear that the PSA only protects those individuals involved in direct patient care and does not contemplate creating protections for workers that work in the periphery of direct patient care, like a janitor or medical records clerk.

Plaintiffs often attempt to stretch the definition of "health care worker" in an attempt to fall under the ambit of the PSA. In *Lieving v. Pleasant Valley Hospital, Inc.*, Judge Chambers dismissed the claim of a Chief Executive Officer brought under the PSA. The court held that because "Plaintiff never provided direct patient care" and "only a 'health care worker' can bring a civil action under the Act[,]" the claim was subject to dismissal.[8] As such, there is support for the argument that there is no public policy in West Virginia that serves to protect individuals from reporting waste, fraud, and abuse when the individual **does not** provide direct patient care.

Another tactic—along the same line as the expansion of "health care worker"—is the attempt to exploit the phrase "any person acting on behalf of [a health care worker]" in West Virginia Code § 16-39-4.[9] In *Lieving*, the plaintiff-CEO argued that she was such a "person acting on behalf" of a health care worker.[10] Judge Chambers held that "[t]he West Virginia legislature could easily have included people in Plaintiff's position in the statute by rewording it to say, 'No person may retaliate or discriminate in any manner against any health care worker [or any person acting on behalf of the worker] because [such person] ...'; however, the legislature did not do so[.]"[11]

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[6] H.B. 2506, 2001 Leg., Reg. Sess. (W. Va. 2001).
[7] W. Va. Code § 16-39-3(7).
[8] No. 3:13-27455, 2014 WL 1513851, at *5 (S.D.W. Va. Apr. 11, 2014)
[9] To refresh, this provision states that "[n]o person may retaliate or discriminate in any manner against any health care worker because the worker, or any person acting on behalf of the worker . . . ."
[10] 2014 WL 1513851, at *4.
[11] *Id.* at *5.

Thus, the PSA seemingly creates a separate protected class, but one unlike those found within the West Virginia Human Rights Act.[12] The protected class here is not based on innate characteristics, but instead based upon action—the reporting of wrongdoing—and actual job function, that of a direct health care worker. And again note that the PSA does not protect employees engaged in purely administrative functions.

Burden of Proof under the Patient Safety Act

There is a dearth of cases from the Supreme Court of Appeals of West Virginia interpreting the PSA,[13] leaving litigants—and courts—uncertain of how the burden of proof should be applied. The PSA itself is of little help; it merely provides that "[a]ny health care worker who believes that he or she has been retaliated or discriminated against in violation of section four of this article may file a civil action in any court of competent jurisdiction against the health care entity and the person believed to have violated section four of this article."[14]

Simply, because the PSA seemingly creates a new protected class—albeit one protected by action—courts should analyze the claim under the *McDonnell Douglas*[15] burden-shifting framework and the West Virginia standard for retaliation under the Human Rights Act.[16] In order to demonstrate a prima facie case, a plaintiff needs to establish that the (1) employee is engaged in a protected activity; (2) employer is aware of the protected activities; (3) employee suffered an adverse employment decision; and (4) employee suffered the adverse decision based on the protected activity. The protected activity is spelled out in the statute: the healthcare worker must report waste or wrongdoing, advocate on behalf of patients, or initiate or cooperate with an investigation into the healthcare facility. Once the patient has established that prima facie case, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment decision. This burden is simply one of production, not persuasion. The burden then shifts back to the plaintiff, as a burden of persuasion, to show that the articulated reason is merely pretext.

Nevertheless, it remains an open question in West Virginia regarding the proper analysis that should be applied and the burden of proof under the PSA. However, considering how claims have been litigated under the Human Rights Act and *Harless*, which will be addressed *infra*, the above framework provides the most reasonable and effective way of litigating claims under the PSA.

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[12] *See* W. Va. Code § 5-11-9 (prohibiting discrimination in employment based on race, religion, color, national origin, ancestry, sex, age, blindness, or disability).

[13] There is only one reported decision from the Supreme Court of Appeals addressing the PSA, and it does not provide any extensive, substantive interpretation of the PSA. *See Camden-Clark Mem'l Hosp. Corp. v. Tuan Nguyen*, 240 W. Va. 76, 807 S.E.2d 747 (2017).

[14] W. Va. Code § 16-39-6.

[15] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[16] *Erps v. W. Va. Human Rights Comm'n*, 224 W. Va. 126, 139, 680 S.E.2d 371, 384 (2009).

Remedies under the Patient Safety Act

As an employment statute, the PSA provides for many of the "usual" remedies, namely compensatory damages. Per the statute, a plaintiff may recover the reinstatement of employment, back pay, reinstatement of fringe benefits and seniority rights, actual damages, or any combination of those named.[17] Furthermore, the PSA provides that the plaintiff may receive "all or a portion of the costs of litigation, including reasonable attorney fees and witness fees," which are left to the court's discretion.[18] Notably absent from the proscribed remedies are punitive damages.

The PSA Provides a Clear Mechanism to Enforce Public Policy and Thus Prohibits Plaintiffs from "Piggy-backing" under Harless.

Commonly, plaintiffs will attempt to "piggy-back" a claim under the PSA with a *Harless* claim. In *Harless v. First National Bank in Fairmont*, the Supreme Court of Appeals first noted that

> The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.[19]

The court stated that "manifest public policy" would be "frustrated" if an employee seeking to enforce such a policy could be "discharged *without being furnished a cause of action* for such a discharge."[20]

That language is absolutely critical for many PSA claims, though not often litigated, and finds support in related case law. A plaintiff is not entitled to bring a *Harless* claim when the law has already provided a cause of action or other mechanism to enforce the public policy, *i.e.*, the PSA. If the PSA did not create a private cause of action in the statute, then a colorable argument for a *Harless* claim premised on the public policy announced in the PSA. But that is not the case, as a health care worker with direct patient contact is clearly entitled to initiate a private, civil lawsuit premised on any discrimination or retaliation while engaging in activities protected under the PSA.

For instance, in *Hill v. Stowers*,[21] the plaintiff alleged that he had lost an election due to election fraud. The Supreme Court of Appeals rejected the plaintiff's *Harless* claim, stating that there were procedures in place that allowed the candidate to challenge the results of the election. In rejecting the claim, the Court reasoned that "In *Harless*, this Court found that a private cause of action was appropriate because *there was no other mechanism available* to enforce the public

[17] W. Va. Code § 16-39-6.
[18] *Id.*
[19] 246 S.E.2d 270, 271 (W. Va. 1978).
[20] *Id.* at 271 (emphasis added).
[21] 680 S.E.2d 66, 69 (W. Va. 2009)

policy at issue."[22] Since the Legislature had provided procedures to challenge the election, the Court refused to extend *Harless*.

In *Broschart v. West Virginia Department of Health & Human Resoruces*, a memorandum decision, the Supreme Court of Appeals upheld the dismissal of a plaintiff's *Harless* claim when a remedy was available under the whistleblower law.[23] The plaintiff argued on appeal that the "whistleblower law is not an exclusive remedy, but is intended to give an additional remedy under law for whistleblowers."[24]

The same reasoning applied in *Hope v. Board of Directors of Kanawha Public Service District*.[25] There, Judge Copenhaver dismissed the plaintiff's *Harless* claim because the plaintiff had also asserted a claim under the West Virginia Whistle-blower Law. Judge Copenhaver stated, "[w]ith a clear mechanism in place to enforce this public policy, a *Harless* cause of action is unavailable."[26] Other federal courts in West Virginia have come to the conclusion that "when a statutory scheme provides a private cause of action to ensure compliance with its underlying policy objectives, that statutory cause of action cannot be displaced by a *Harless* style common law tort action."[27]

Conclusion

Claims under the PSA are on the rise. As demonstrated, the PSA remains largely untested and a myriad of legal issues remain ripe for review. The PSA, however, provides a clear mechanism for enforcing the public policy against terminating health care workers that report poor patient safety practices to the health care entity. Because the PSA provides this mechanism for enforcing that public policy, *Harless* claims are unavailable to plaintiffs bringing claims under the PSA and should be subject to early dismissal. Defense counsel should be mindful to carefully analyze the applicability of the PSA to the case, and use the arguments in this article to achieve fairness for employers who are subject to inappropriately pled claims under the PSA.

[22] *Id.* at 76 (emphasis added).
[23] No. 11-C-38, 2013 WL 2301777 (W.Va. May 24, 2013).
[24] *Id.* at *1.
[25] 2013 WL 3340699 at *3–4 (S.D.W. Va., July 2, 2013).
[26] *Id.* at *4.
[27] *Jackson v. Vaughn*, No. 1:15-cv-128, 2015 WL 6394510, at *3 (N.D.W. Va. Oct. 22, 2015); *see Talley v. Caplan Indus., Inc.*, 2007 U.S. Dist. LEXIS 13191, at *4, 2007 WL 634903 (S.D. W. Va. Feb. 26, 2007) (same); *Knox v. Wheeling-Pittsburgh Steel Corp.*, 899 F. Supp. 1529, 1535-36 (N.D. W. Va. May 18, 1995) ("It is a well-established principle that federal and state anti-discrimination laws, such as Title VII and the West Virginia Human Rights Act, preempt *Harless*-type, tort-based actions for discriminatory treatment in the workplace.").