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Acquittal of Texas nurses who reported physician standard-of-care concerns

By Joan B. Killgore, JD, RN and Janice A. Anderson, JD, BSN

Editor's note: Joan B. Killgore, Shareholder in the St. Louis offices of Polsinelli Shughart PC, may be contacted by e-mail at jkillgore@polsinelli.com or by telephone at 314/889-7008.

Janice A. Anderson, Shareholder in the Chicago offices of Polsinelli Shughart PC, may be contacted by e-mail at janderson@polsinelli.com or by telephone at 312/873-3623.

On February 11, 2010, a Texas jury returned a “not guilty” verdict in a criminal case involving two nurses who were charged with allegedly misusing official information when they filed a report with the Texas Medical Board (TMB). The nurses alleged patient care and safety concerns involving a hospital physician, Dr. Arafiles. If found guilty, the nurses would have been subject to fines of up to \$10,000 and a possible ten-year jail sentence.

This case has captured national attention over the past year, due in large part to the alleged “story” behind the indictment (detailed by numerous news organizations and Web bloggers) and by the highly publicized vocal and financial support provided to the indicted nurses by various nursing organizations, including the Texas Nurses Association and the American Nurses Association.¹

In August of 2009, the nurses, who were terminated from employment with Winkler County Memorial Hospital (WCMH) shortly after they were identified as the authors of the TMB report, filed a civil lawsuit in the

Texas federal district court against Dr. Arafiles, WCMH, the hospital administrator, the Winkler County sheriff, and the Winkler County attorney and district attorney.² The Complaint alleges:

- violation of the nurses’ constitutional right to free speech and due process;
- conspiracy to intimidate and threaten the nurses from filing any civil action;
- violation of the Texas Whistleblower Statute, the Texas Occupational Code, and the Texas Health and Safety Code; and
- interference with the nurses’ business relationship and at will employment.

Of special interest are the supporting exhibits attached to the Complaint, which highlight a remarkable sequence of events.

According to the Complaint, the nurses (i.e., Anne Mitchell and Vickilyn Galle) were employed by WCMH, a Texas political subdivision and hospital owned by Winkler County, Texas. Mitchell was the hospital’s compliance officer and Galle was in charge of Quality Improvement and Utilization Review. Pursuant to their job duties, Mitchell and Galle allegedly identified certain “standard of care/patient safety” issues involving Dr. Arafiles’ patients and presented their concerns to the hospital’s Board of Control. Believing that the hospital was not taking adequate action against Dr. Arafiles, Mitchell and Galle contacted the TMB.

According to the anonymous report sent to the TMB,³ the hospital’s administration

followed a policy of “self review,” which allegedly prohibited reporting of concerns to any outside third party, unless the hospital was notified beforehand of the intent to report.

The Texas Occupations Code provides, in relevant part, that a nurse may report:

in a written, signed report to the appropriate licensing board or accrediting body . . . a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to: (1) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or (2) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.”⁴

The report’s author noted that the reason for sending the report to the TMB anonymously was “[d]ue to the ‘economic climate’, the fact that I am over 50, female, and have been employed by [the hospital] since the 1980’s,” and that enforcement of the self review policy would “create an opportunity” for the hospital to terminate the reporter’s employment.

The TMB notified Dr. Arafiles that it received a complaint alleging possible violations of the Texas Medical Practice Act, and requested that Dr. Arafiles respond.⁵ The TMB’s letter specifically identified ten patients by name and date of birth, and further explained that the TMB was “HIPAA exempt,” and that Dr. Arafiles could “legally provide protected health information without further patient consent.”

The complaint does not address whether Dr. Arafiles formally responded to the TMB; however, it alleges that Dr. Arafiles provided a copy of the TMB’s letter to the

Winkler County sheriff, who also allegedly was a patient and a business associate of Dr. Arafiles.⁶ The sheriff subsequently contacted the patients listed in the letter and then contacted the TMB, requesting a copy of the report filed against Dr. Arafiles. The letter from the sheriff to the TMB explained that he was “conducting a criminal investigation for the offenses of Misuse of Official Information (PC 39.06) and Harassment (PC.42.07).” The Texas Penal Code, Section 39.06 “Misuse of Official Information” applies, in relevant part, to a public servant who discloses or uses non-public information accessed by virtue of the person’s employment by the state (which would include employment by a hospital district), for a non-governmental purpose with the intent to harm or defraud.⁷

The TMB assumed that the sheriff’s request was pursuant to a criminal investigation of a TMB “license holder” (e.g., a physician holding a Texas medical license), in which case disclosure of the confidential report was permitted. The TMB promptly provided the sheriff with a copy of the anonymous report.⁸ According to the Complaint, the sheriff never corrected the TMB’s mistaken assumption.

Because the anonymous report identified the author’s age, gender, and length of employment by WCMH, the sheriff was able to ascertain the only two nurses at the hospital who met the author’s description—Mitchell and Galle. Pursuant to an Affidavit for Search and Arrest Warrant signed by the sheriff, which alleged that Mitchell and Galle used certain computers to draft a letter to the TMB “with the intent [to] harm or defraud . . . harass, annoy, alarm, abuse, torment, or embarrass” Dr. Arafiles, the sheriff obtained a search warrant for various computers. The computers were seized and a copy of the letter that matched the report that was sent to TMB was found.⁹

The hospital terminated Mitchell and Galle on June 1, 2009. Mitchell and Galle were each indicted by a grand jury on June 11, 2009 on a felony charge of “misuse of official information.”¹⁰ Charges against Galle were dropped before the February 8, 2010 jury trial commenced. According to several news accounts, the jury took only an hour to return its February 11, 2010 “not guilty” verdict in favor of Mitchell.¹¹

As for the civil suit brought by Mitchell and Galle, attempts at mediation failed in late 2009, and a November 16, 2010 court date has been set. However, the judge is requiring that the parties schedule another mediation by May 1, 2010.¹² (This article went to press before that date, so the outcome was unknown.)

One hopes that the indictment of Mitchell and Galle was the unusual result of a variety of isolated factors including, but not limited to, the alleged physician-patient and business relationships between Dr. Arafiles and the sheriff, as well as the TMB’s mistaken assumption that disclosure of the confidential report was permitted. However, there is concern that this nationally reported case will have a chilling effect on those who desire to report legitimate quality concerns. Perhaps this case is best used as a reminder to all health care organizations to evaluate whether they truly foster an environment where employees feel comfortable bringing legitimate quality and compliance concerns to the appropriate parties (including the ability to anonymously report), and to re-emphasize that employees will not be retaliated against for making good faith reports. A strong culture of compliance within an organization, coupled with the encouragement to report good-faith compliance and quality issues, and appropriate action in response to such reports would go a long way to preventing employees from going outside the organization to seek redress of their concerns. ■

- 1 See, for example, Kevin Sack: “Nurse to Stand Trial for Reporting Doctor.” *The New York Times* February 6, 2010. Available at <http://www.nytimes.com/2010/02/07/us/07nurses.html?pagewanted=1>.
- 2 *Mitchell et al. v. Winkler County et al.*, Civil Action No. P-09-CV-037 filed August 28, 2009 in the U.S. District Court for the Western District of Texas. Available at <http://www.casewatch.org/civil/mitchell/suit.pdf>.
- 3 See Exhibit A of the Complaint, dated April 7, 2009.
- 4 The Texas Occupations Code §301.4025
- 5 See Exhibit B of the Complaint, dated April 15, 2009.
- 6 Complaint, ¶¶30-31.
- 7 See Exhibit C of the Complaint, received by the Texas Medical Board on May 8, 2009 (date stamp).
- 8 See Exhibit D of the Complaint, dated May 11, 2009.
- 9 See Exhibit E of the Complaint, dated May 19, 2009. During a meeting with the sheriff, Mitchell and Galle reported alleged health care fraud involving “disproportionate share monies” accepted by WCMH and Winkler County. See Exhibit F of the Complaint, dated May 27, 2009.
- 10 Complaint, ¶¶43, 51. See Exhibit H and Exhibit I of the Complaint, dated June 11, 2009.
- 11 See e.g., Kevin Sack, Whistle-Blowing Nurse Is Acquitted in Texas, *The New York Times*, February 11, 2010, accessed on the Internet on 4/1/10 at <http://www.nytimes.com/2010/02/12/us/12nurses.html>. See also the Texas Nurses Association web site at <http://www.texasnurses.org>, which provides detailed information of the “Winkler County Nurses” and the events leading up to the February 8, 2010 trial, as well as daily accounts of the trial proceedings.
- 12 See Texas Nurses Association, Trial Date Set, Mediation Ordered for Civil Case, March 30, 2010. Available at <http://www.texasnurses.org/displaycommon.cfm?an=1&subarticlebr=538>.

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