

New Jersey Appellate Division Upholds Immunity for Health Care Entity That Provided Negative Information About Former Employee in Response to Request for a Reference

By Daniel R. Levy

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On December 1, 2011, the Superior Court of New Jersey, Appellate Division, upheld immunity from civil liability for certain health care entities that provide information in good faith about a current or former employee's job performance to another health care entity. *Senisch v. Carlino*, A-6218-09T3 (N.J. App. Div. Dec. 1, 2011). Specifically, the court granted civil immunity to a health care entity under the New Jersey Health Care Professional Responsibility and Reporting Enhancement Act (the "Act"),¹ in connection with its reporting of negative, but truthful, information to another health care entity about a former health care professional's termination of employment.

By way of background, on May 3, 2005, the Act, also known as the Cullen Act, was passed in response to news accounts relating to Charles Cullen, a registered nurse accused of killing approximately 40 patients under his care while working in several hospitals in New Jersey and Pennsylvania. Despite a questionable employment history, Cullen had been able to obtain nursing jobs at various health care entities.

Under the Act, upon an inquiry from another health care entity, a health care entity must truthfully "provide information about a current or former employee's job performance as it relates to patient care," and in the case of a former employee, the reason for that employee's separation.² If a health care entity fails to make such disclosure, it is subject to penalties, as determined by the Department of Health and Human Services.³

Notably, the Act provides for immunity from civil liability if a health care entity complies with its provisions. Specifically, the Act states that a health care entity that "provides information in good faith and without malice to another health care entity concerning a

¹ See L. 2005, c. 83 (codified at N.J.S.A. 26:2H-12.2a to -12.2d, with amendments to other statutory provisions).

² N.J.S.A. 26:2H-12.2c(a)(2).

³ N.J.S.A. 26:2H-12.2c(d).

health care professional, including information about a current or former employee's job performance as it relates to patient care, is not liable for civil damages in any cause of action" arising out of the reporting of that information.⁴

In *Senisch*, the plaintiff was employed as a physician's assistant ("PA") in the cardiology department of defendant Deborah Heart and Lung Center ("Deborah"). Although the plaintiff had received favorable performance reviews in his first few years of employment at Deborah, his 1999 performance evaluation was unfavorable. Deborah later terminated plaintiff's employment as a result of specifically stated deficiencies in his performance as a PA. In 2001, plaintiff filed a lawsuit against Deborah alleging violations of the New Jersey Conscientious Employee Protection Act ("CEPA")⁵ and New Jersey's Law Against Discrimination.⁶ Plaintiff and Deborah entered into a confidential settlement of that lawsuit. The settlement agreement was silent as to any modification to plaintiff's employment records.

Subsequently, in 2007, the plaintiff obtained a position with a surgical orthopedic practice. The position required the plaintiff to obtain his PA credentialing at Underwood Memorial Hospital ("Underwood"). As part of that credentialing process, Underwood requested information about the plaintiff from Deborah. Defendant Dr. Lynn McGrath responded to the information request from Underwood, stating that, based on plaintiff's performance, as documented by his supervisor, plaintiff "was involuntarily terminated from employment at Deborah following a series of unsuccessful attempts to achieve consistent improvement in his performance." The response also listed the performance deficiencies documented in plaintiff's personnel file. Thereafter, the plaintiff withdrew his name from consideration for credentialing with Underwood and also resigned from his employment at the orthopedic practice.

Plaintiff filed a lawsuit alleging retaliation by Deborah, in violation of CEPA. He also claimed common law causes of action against individuals employed by, or affiliated with, Deborah for defamation and tortious interference with prospective economic advantage. The trial court granted defendants' motion for summary judgment, and the plaintiff appealed.

The Appellate Division decided in favor of Deborah and the other defendants, ruling that they were required by the Act to disclose the information to Underwood upon request. The court held that the defendants were protected under the civil immunity provision of the Act because there was no evidence that the information provided in response to the request was "in bad faith or with malice." Accordingly, the plaintiff could not prevail on his claims of tortious interference and defamation, or retaliation under CEPA, because the defendants were protected "against civil liability for reporting the circumstances of plaintiff's termination[.]" The court further found that the defendants were protected under the qualified privilege espoused in *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 564-65 (1990), where the Supreme Court of New Jersey held that a former employer has a qualified privilege to provide a negative reference in response to an

⁴ N.J.S.A. 26:2H-12.2c(c).

⁵ N.J.S.A. 34:19-1 to -8.

⁶ N.J.S.A. 10:5-1 to -49.

inquiry from a prospective employer, and that such qualified privilege could be overcome only by showing that the publisher knew the statement to be false or acted in reckless disregard of the truth.

Although many states outside of New Jersey have enacted legislation granting qualified immunity to employers providing reference information, few have gone as far as New Jersey to require health care entities to disclose such information in response to a request by another health care entity. Generally, states that grant qualified immunity to employers with respect to references require that the employer act in good faith, but other requirements for qualified immunity can vary significantly from state to state. Further, most state immunity laws limit immunity to instances where the employer provides information directly related to the employee's job performance, and not for information unrelated to job performance, e.g., that the employee had filed a discrimination charge against the employer.

Even if a state does not have a law requiring disclosure, an employer who chooses to respond to a reference request but fails to provide truthful information may be vulnerable to a defamation claim. Moreover, questions may exist as to whether liability may attach for references provided across state lines, where the reference laws among those states differ. Hence, health care entities, as well as other employers, should determine their rights and obligations under all applicable state laws prior to responding to a reference request.

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*This Client Alert was authored by **Daniel R. Levy**. For additional information about the issues discussed in this Client Alert, please contact the author or the Epstein Becker Green attorney who regularly handles your legal matters.*

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Lynn Shapiro Snyder, Esq.
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