PUBLICATION

Maryland's New Whistleblower Retaliation Standard

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Maryland's highest court announced on August 30, 2023, that a health care employee who claims to have "blown the whistle" on their employer's alleged misconduct must satisfy the "but for" standard of causation to prevail on a claim under the Maryland Health Care Worker Whistleblower Protection Act (HCWWPA). The HCWWPA is a statutory scheme that aims to protect employees in health care settings against adverse employment consequences when they raise health and safety concerns in the workplace.

In *Bridget Romeka v. RadAmerica II, LLC, et al.*, the Supreme Court of Maryland held that the standard of proof for causation under the HCWWPA requires an employee to demonstrate that "but for" their disclosure of the employer's alleged wrongdoing, the employer would not have taken the adverse personnel action against the employee. The court's opinion is the first pronouncement of the requisite causation standards under the HCWWPA and is a big victory for health care employers in the State.

The HCWWPA

Enacted in 2002, the HCWWPA protects licensed or certified health care professionals who in good faith disclose to a supervisor or board a violation by their employer of a law, rule, or regulation that poses a danger to public health or safety. If an employer retaliates against the employee for making such a disclosure, the employee may be entitled to a range of remedies, including injunctive relief, compensation for lost wages and benefits, reinstatement, and reasonable attorneys' fees and costs. The employer has a defense under the HCWWPA, however, if it can demonstrate that the personnel action was based on grounds other than the employee's protected disclosure.

The Facts

In May 2019, a radiation therapist filed suit against her former employer alleging unlawful termination in violation of the HCWWPA. Specifically, the therapist alleged that she was fired in retaliation for complaining to her supervisor on May 17, 2018, that a component of a radiation machine was inoperable and posed a patient safety risk. The employer maintained that it terminated the plaintiff for a number of serious performance and behavioral reasons, including falsification of a patient medical record and disrespect of staff, all of which had occurred prior to the plaintiff's alleged disclosure.

The circuit court granted summary judgment in favor of the employer, finding that there was no genuine dispute that the plaintiff's termination was unrelated to her protected disclosure because, the court explained, the evidence demonstrated that the employer was in the process of termination *before* the plaintiff made any conceivable protected disclosure on May 17, 2018. In April 2022, the Appellate Court of Maryland affirmed the circuit court's decision, holding that liability under the HCWWPA requires proof of but-for causation, which the court found the employee did not establish.

The Supreme Court of Maryland's Decision

The employee then petitioned for a writ of certiorari, which the Supreme Court of Maryland granted. In her briefing before the Supreme Court, the employee argued that the courts below applied an improper – and heightened – causation standard to the HCWWPA claim. Specifically, the employee argued that the HCWWPA

imposes only a contributing factor standard of causation, which requires a plaintiff to prove only that the adverse personnel action contributed to the protected conduct. The employer, on the other hand, maintained that the plain language of the HCWWPA – which states, in pertinent part, that an employer "may not take or refuse to take any personnel action as reprisal against an employee *because* the employee [engages in protected activity]" – imposes a but-for causation standard that requires a plaintiff to prove that "but for" their disclosure of the employer's wrongdoing, they would not have been fired or otherwise subjected to an adverse personnel action by the employer.

The Supreme Court agreed with the employer and affirmed the Appellate Court's entry of summary judgment in August 2023, holding that: (1) the HCWWPA requires proof of but-for causation; and (2) the plaintiff's termination was not protected under the HCWWPA. In reaching that conclusion, the court applied the three-step evidentiary burden-shifting framework established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and since adopted in Maryland for employment retaliation claims.

Applying this framework to the facts of the case, the Supreme Court concluded that the employee's HCWWPA claim failed because she did not present evidence to genuinely dispute the employer showing that it terminated her for reasons unrelated to her protected disclosure. In other words, the court ruled that the employee failed to show she would not have been fired "but for" her protected disclosure. In reaching this decision, the court highlighted the following undisputed evidence: (1) that the employee had not yet made her protected disclosure at the time her supervisors made the decision to terminate her; and (2) that the ultimate termination decision-makers were unaware of the employee's protected disclosure at the time they authorized the decision to terminate her.

Key Takeaways

This case sets an important precedent not only for retaliation claims brought under the HCWWPA specifically but potentially for claims brought under similarly worded whistleblower statutes as well. Employers, particularly those in the health care industry, should be comforted by the legal framework and standards outlined and applied in *Romeka*; under this new standard, an employer can prevail if it can demonstrate that it had other legitimate reasons for the termination – unrelated to the protected behavior – and would have taken the same action regardless of the employee's protected activity. Nevertheless, employers should still closely review and consider their termination decisions and should not carelessly terminate employees.

If you have questions about this ruling, please reach out to Jennifer L. Curry, Alison C. Schurick, or any member of Baker Donelson's Labor and Employment Group or Health Law Group.