Important New Court Decisions Regarding Physician's Assistants and Whistleblowers

By Robert C. Threlkeld

Recently, the Georgia Court of Appeals and the United States Court of Appeals for the Eleventh Circuit each issued decisions relating to supervision of physician's assistants and to treatment of whistleblowers that are of significant interest. In *Rockefeller v. Kaiser Foundation Health Plan of Georgia et al,* 2001 Ga.App. LEXIS 1122 (Oct. 3, 2001), the Court held that a physician cannot supervise a physician's assistants unless the physician is licensed by the Composite State Board of Medical Examiners to supervise. A physician who does supervise such physician's assistant without prior licensure exposes himself or herself to potential liability, regardless of the appropriateness of care offered by the physician's assistant. Further, violation of this statute could cause the physician's conduct to be subject to sanction by the Composite State Board of Medical Examiners.

In the *Rockefeller* case, Rockefeller was a member of the Kaiser Foundation Health Plan of Georgia ("Kaiser"). A physician, Dr. Sabin, was her primary care physician, and he was employed by a Kaiser subsidiary at the Gwinnett Medical Center in Duluth. Drs. Murphy and Ettinger were also physicians there, and Mr. McPeters was a physician's assistant. According to the Court of Appeals, although Dr. Sabin had filed an application with the Composite Board for approval to utilize Mr. McPeters as a physician's assistant, Drs. Murphy and Ettinger were not approved to supervise him.

Rockefeller presented at the Gwinnett Medical Center with nasal congestion, dry cough, and a fever. Mr. McPeters examined her and arrived at a provisional diagnosis of viral syndrome. He prescribed the use of a ventolin inhaler, cough syrup, Motrin, and Guaifenesin. The next day Ms. Rockefeller experienced severe shortness of breath, was taken by ambulance to the hospital, and diagnosed with pneumonia. Following admittance to the hospital, Rockefeller became comatose and remained so for several months, suffering permanent disabilities.

The Georgia Physician Assistant Act, O.C.G.A. §43-34-101, et. seq., allows a physician's assistants to perform certain services with the may take with supervision of a physician. Subsection B of that statute provides that a physician may have up to four physicians assistants licensed to him or her at any one time, provided that the physician seeks approval of the Board for such supervision and receives it. The statute further provides that a physician may supervise more than four physician's assistants while on call for a solo practitioner or as a member of a group practice, but that the physician taking call must be approved to supervise the physician's assistant of the physician for whom he or she is taking call. Because they were not so approved to supervise Mr. McPeters, the court concluded that its jury should determine whether Mr. McPeters was able to prescribe the medications that he did under the Georgia Physician Assistant Act without physician supervision and whether the physicians who were not licensed to supervise Mr. McPeters could be responsible for his conduct.

Unless overturned by the Georgia Supreme Court, the decision of the Court of Appeals providing that a physician may only supervise up to four physician's assistants, including situations where the physician is on-call, will present significant administrative challenges for large group practices. Moreover, the decision counsels all physicians and physician's assistants to be careful to ensure that the supervising physician is, in fact, licensed to supervise the physician's assistant, whether in a on-call situation or otherwise.

Another recent case of interest to healthcare providers is the Eleventh Circuit's recent decision in *O'Neal v. Garrison, et. al.*, 263 F.3d 1317 (11th Cir. 2001)[1]. Mr. O'Neal had been an officer of Master Health Plan. He alleged, among other things, that his employment was terminated because of his contributions to and cooperation with a governmental criminal investigation. He brought claims under the retaliatory discharge provisions of the False Claims Act, the Civil Rights Act of 1871, and various state law claims, including one under the Georgia RICO statute. At jury trial the jury awarded damages to Mr. O'Neal under the False Claims Act (that jury verdict is the subject of a seperate appeal. His other claims relating to his allegations of unlawful discharge were dismissed prior to trial, or were denied at trial. Mr. O'Neal appealed his claims, among others, for violation of the Civil Rights Act of 1871 and the Georgia RICO statute. Relying on the Supreme Court's decision in the companion Haddle v. Garrison case, 525 U.S. 121, the Eleventh Circuit reinstated O'Neal's RICO claim and his 1871 Civil Rights Act claim. In the Haddle case, the Supreme Court had held that an at-will employee in Georgia cannot be terminated in retaliation for cooperating with and testifying in a governmental investigation. The Eleventh Circuit held under the 1871 Civil Rights Act Et. Al., that Mr. O'Neal could not be discharged, even as an at will employee, in retaliation for assisting in and testifying in a governmental investigation. Mr. O'Neal's Georgia RICO claim was premised on the allegation that Michael Haddle, an employee at Healthmaster, an affiliate of Master Health Plan, had suffered similar treatment. The Eleventh Circuit also held this claim could proceed to trial. The *O'Neal* and Haddle cases provide important guidance to health care providers. Employers who find themselves the subject of a governmental investigation must be aware they cannot retaliate against an employee who cooperates in an investigation without violating a number of federal statutes that can enable the employee to recover compensatory and exemplary damages. This rule thus requires particular attention when a health care provider wishes to discharge an employee for poor job performance, and the provider has reason to believe the employee may be assisting a governmental investigation.

[1] The author was co-counsel for Mr. O'Neal and Mr. Haddle prior to joining Morris, Manning and Martin, L.L.P.