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NJ Appeals Court Upends Hospital Whistleblower Verdict

By **Michael Mello**

Law360, New York (March 23, 2015, 7:20 PM ET) -- A New Jersey appellate court ruled Monday that an X-ray technician whom the University of Medicine and Dentistry of New Jersey fired after a patient died wasn't protected under a whistleblower law, reversing the employee's jury win because he didn't reasonably believe the hospital violated a law.

The appellate court upended a \$690,000 verdict in favor of radiology technician Fernando Almeida, who was fired because he would not take a chest X-ray of a patient without first receiving written authorization. That patient later died.

Almeida had claimed that he believed taking the X-ray without authorization would break state law, but the appeals court found there was no such law or regulation requiring written authorization, aside from hospital policy. Because of that, the court ruled Almeida could not sue under the under New Jersey's Conscientious Employee Protection Act, which is designed to protect whistleblowers from retaliation.

"[W]e conclude that Almeida had no 'objectively reasonable belief' that a violation had occurred because there was 'no substantial nexus' between Almeida's belief that taking the X-ray without a written authorization was unlawful and the legal basis relied upon by Almeida, none of which actually or arguably require a writing," the appellate court said.

The trial judge should have granted the university's summary judgment motion, the appellate court ruled, entering a judgment in favor of the defendants.

"I think it's the right result," the hospital's attorney Jennine DiSomma of Saiber LLC told Law360 on Monday. "The facts accepted as the plaintiff presented them are not sufficient for a CEPA claim."

"It should never have gone to trial," DiSomma added, pointing to the panel's decision to reverse the trial court instead of ordering a new trial. "There's nothing to try."

At the time of the incident in question, in 2008, Almeida worked as a radiology technician at the hospital.

During one of Almeida's shifts, a doctor approached him and asked him to perform a chest X-ray on a patient who needed a pulmonary assessment. Almeida believed the law stipulated that X-rays could only be done through a written requisition from a doctor through the radiology department. Almeida told the doctor that he needed to make a written request through the department before Almeida could take an X-ray. The doctor said he would, according to the appellate decision.

Almeida checked with the radiology department more than once, but was told no written authorization for an X-ray for that patient had been filed. He left his overnight shift knowing that patient had not received an X-ray. A half-hour after Almeida left his shift, the patient died, the decision said.

After an investigation, a supervisor fired Almeida, citing "poor work performance" and "failure to follow directives." Almeida filed a complaint with the university, via email, but "Almeida's email made no reference to any statutes, regulations, or mandate of public policy," according to the appellate ruling. The university found Almeida was rightly terminated.

In 2009, Almeida filed a complaint under CEPA, alleging he was fired because hospital officials wanted him to do something he thought to be illegal.

At trial in 2013, a jury awarded Almeida \$690,000 in lost wages and punitive damages. The university appealed, saying Almeida failed to prove a prima facie case under CEPA. The trial judge ruled against the university and awarded Almeida's lawyers about \$212,000, the appellate decision said. The university hospital then petitioned the Appellate Division, leading to Monday's decision.

The panel noted Monday that despite Almeida's belief and apparent training, state laws about X-rays "contain no language that requires a written authorization by the licensed practitioner. That UMDNJ itself requires a written prescription [for an X-ray procedure] does not change the fact that the applicable statute and regulations do not."

Representatives of Almeida did not immediately respond to requests for comment.

Judges Carmen H. Alvarez, Alexander P. Waugh Jr. and Harry G. Carroll sat on the panel for the Appellate Division.

Almeida is represented by Greg B. Noble of O'Connor Parsons Lane & Noble LLC.

The university is represented by Jennine DiSomma of Saiber LLC, and Melissa H. Raksa, Jane A. Greenfogel and Robert P. Preuss of the New Jersey attorney general's office.

The case is Almeida v. University of Medicine and Dentistry of New Jersey et al., case number A-5628-12T2, in the Superior Court of the State of New Jersey, Appellate Division.

--Editing by Edrienne Su.