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Case Involving Nurses Who Blew Whistle on Employer for Violating COVID Orders Moves Forward

Citing the seriousness of global health concerns that the pandemic poses, the court has found that the nurses' allegations are sufficient to survive the defendant's motion to dismiss and the case will move forward in litigation.

By **Jeffrey Campolongo and Faith Beckworth** | January 22, 2021



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In the past 10 months, we've seen an abundance of federal and state legislation pushed

through to address COVID-19 concerns in the workplace and, while the new laws vary somewhat from state to state, most are designed to manage issues such as sick leave for employees and family members or employer-reporting requirements. One area of concern that both employers and employees may want to keep in mind, however, is how the courts will receive whistleblowers who come forward about their employers' handling and enforcement of COVID-19 guidelines and regulations. Indeed, it may become clear sooner rather than later, as the U.S. District Court for the Eastern District of Pennsylvania just recently allowed a case that involves this very issue, to move forward.

In *Allen v. Northeast Treatment Centers*, [CIV.A.No. 20-5519](#) (E.D. Pa. Jan. 8, 2021) (*Allen v. NTC*), three nurses brought claims against their previous employer for racial discrimination and retaliation. Among their complaints of harassment and disparagement, the nurses also alleged that they were retaliated against (in their eventual firing) for bringing it to their director's attention that she had repeatedly "violated social distancing guidelines issued by Philadelphia and the commonwealth to mitigate the spread of COVID-19." The court noted that this conduct constitutes deviation from the standard of care for medical providers, as well as violates "various ethical codes of conduct." Citing the seriousness of global health concerns that the pandemic poses, the court has found that the nurses' allegations are sufficient to survive the defendant's motion to dismiss and the case will move forward in litigation.

In reaching this decision, the court pointed to other cases involving alleged lackadaisical administration and enforcement of medical care and protocols by one's employer. For instance, the plaintiff in *Sadati v. Primecare Medical*, No. 19-5452, 2020 WL 4805347, at *5 (E.D. Pa. Aug. 17, 2020) was employed as a medical director at Montgomery County Correctional Facility for about nine days before she was terminated. The plaintiff alleged that her termination was retaliatory and based on her complaints of racial discrimination and sexually offensive conduct, as well as what the plaintiff viewed to be constitutional violations in the facility's failure to properly address inmates' need for medical care. The court there held that the plaintiff adequately established a causal connection between her role as a whistleblower and her termination very shortly thereafter, sufficient such that the case could move forward.

The nurses in the present case, *Allen v. NTC*, also point to the temporal proximity from the time that they made their reports of alleged wrongdoing (failure in following COVID-19 protocols) and their employer's alleged adverse action (terminating the nurses), which was a period of about one to two months. The court agreed that this amount of time was satisfactory in supporting a causal connection, particularly because of the close proximity of the events.

The court's opinion further drives home the importance of considering "public policy" concerns in terminating at-will employees, by referencing *Shick v. Shirey*, 716 A.2d 1231, 1235-36 (Pa. 1998). In that seminal case, a product salesman brought suit against his former employer, alleging that he had been wrongfully terminated due to his repeated objections in selling a particular product, which he believed posed a danger to users, until the product was eventually withdrawn from the market. Shick contended that his dismissal was a result of his opposition to selling a product which could be dangerous and, therefore, was a violation of public policy. While the court disagreed with Shick on that point due to the specific circumstances in the case, it did point out that there are certainly exceptions to an employer's

autonomy in dismissing at-will employees where such a dismissal will violate public policy.

Both the court in *Shick*, and the court here, in *Allen*, explicitly point out that what defines public policy is not limited to what has already been acknowledged in legislature but rather, it is “policy [that] is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring.” The court seems to agree that ensuring health and safety guidelines during the COVID-19 global pandemic are enforced, is so obviously for the public interest that nurses, though at-will employees, who do so and are dismissed because of it, could likely be found to have been wrongfully terminated.

It will certainly be interesting to follow the case as it progresses and many are anxious to see how the court will ultimately decide. In the meantime, though, it seems that some states are catching on to issues such as this that will inevitably arise in a post-COVID work environment. Legislatures are acutely aware that this case will not be the last of its kind and are responding in subtle but noticeable ways. California, for instance, has recently enacted a slew of new legislation catered to addressing COVID-related employment matters. Most notably, however, is Assembly Bill 1947, which will allow plaintiffs who prevail in whistleblower retaliation cases against California employers, to collect attorney fees. This signals that at least some state legislatures are not only prepared for courts to be faced with more cases like *Allen v. NTC* but are welcoming employees to bring their grievances regarding employers’ handling of COVID-19 protocols to light. It should not come as a surprise if other states soon follow suit.

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