Memo

Date: August 30, 2010

To: Patricia Ryan, Executive Director

From: John Gause, Commission Counsel

Re: E09-0342, v.
E09-0343, v.

You asked whether the above-referenced complaints should be administratively dismissed for failure to substantiate pursuant to our Procedural Rule § 2.02(H)(2). For the following reasons, the complaints should not be dismissed.

Complainant was employed as a case manager for Respondent, . Her position involved going into nursing homes to direct the overall care of hospice patients who were clients of One such nursing home was Respondent, (" "). Under the contract between and , provided standard nursing facility services to residents and supervised and evaluated certain residents' hospice care, including palliative care such as pain control and symptom management.

Complainant alleges that, in the course of providing hospice care to a patient at , she observed a bed sore on the patient that had been misclassified by as being less severe than it actually was, which had resulted in the wound being treated improperly. Complainant treated the wound and then reported to the patient and her daughter that it had been improperly under-classified in severity and that the dressing was not allowing the wound to heal. She then reported to the charge nurse that the wound had been misclassified, which conversation was overheard by the Director of Nursing. The Director of Nursing became visibly upset with Complainant and accused her of exceeding her authority when she performed a certain procedure (cutting away dead skin tissue) in treating the sore. Complainant subsequently reported the incident to the Clinical Services Director at . Complainant was subsequently terminated by , purportedly because of the manner in which she treated the wound. Complainant alleges that insisted upon her termination.

Complainant alleges that she was terminated because she reported a deviation from the applicable standard of care by and that her termination violated the Whistleblowers' Protection Act, 26 M.R.S.A. §§ 831 et seq. ("WPA"). Respondents assert that Complainant did not engage in WPA-protected activity. claims that Complainant does not allege that she was fired for reporting a deviation to her own employer, which states is required under the WPA. Both and assert that, regardless of who she reported it to, Complainant's report was not

protected because she does not allege that the deviation was committed by her own employer, which Respondents say is also required by the WPA.

With respect to the first issue, an employee's report is protected if it is made "to the employer, to the patient involved or to the appropriate licensing, regulating or credentialing authority." 26 M.R.S.A. § 833(1)(E). "The employer" to whom the report is made must be the reporting employee's employer. *See* 26 M.R.S.A. § 833(1)(E) ("No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because . . . The employee, acting in good faith and consistent with state and federal privacy laws, reports to the employer. . . .") (emphasis added). In her August 6, 2010 reply to the Commission, Complainant asserts that she met this requirement by reporting the incident to the Clinical Services Director, as she alleged in her complaint (¶ 13). Complainant also states that she reported the deviation "to the patient involved," 26 M.R.S.A. § 833(1)(E), as alleged in her complaint (¶ 9). It should be noted that Complainant's Maine Human Rights Commission complaint (¶ 21) ties her termination to her report to , not to her report to the Clinical Services Director or to the patient. Nevertheless, given Complainant's clarification in her August 6th reply, administrative dismissal is inappropriate on this basis.

With respect to the second issue, Complainant asserts retaliation for reporting a deviation of the standard of care by , not her own employer, . The Law Court has held, with respect to two other categories of protected activity in the WPA, that an employee's report of a violation of law is only protected if the violation is committed by the employee's employer. Specifically, the Law Court held as follows:

> Subsections (1)(A), (1)(C), and (2) of section 833, when read together, unambiguously limit the protection afforded by the WPA to (1) employees (2) who report to an employer (3) about a violation (4) committed or practiced by that employer.

Costain v. Sunbury Primary Care, P.A., 2008 ME 142, ¶ 8, 954 A.2d 1051, 1054. This holding is distinguishable from the present case, however, because Complainant relies on a different category of protected activity than what was at issue in *Costain*. She does not assert that she was terminated for reporting a violation of law or participating in a proceeding relating to such a report, which would be covered by subsections 833(1)(A) and (1)(C). Rather, Complainant relies on subsection 833(1)(E), which is the category of protected activity relating to reports of deviations from the applicable medical standard of care.

The rationale for the *Costain* holding is also not controlling. In *Costain*, the Law Court reached its conclusion by relying on the language in subsection 833(2). *Costain*, 2008 ME 142, ¶ 8, 954 A.2d at 1054. Subsection 833(2) provides, in relevant part, that subsection 833(1) "does not apply to an employee who has reported or caused to be reported a violation, or unsafe condition or practice to a public body, unless the employee has first brought the alleged violation, condition or practice to the attention of a person having supervisory authority with the employer and has allowed the employer a reasonable opportunity to correct that violation, condition or practice." 26 M.R.S.A. §

833(2). The Law Court apparently reasoned that a requirement that an employee report a violation, or unsafe condition or practice to her employer before reporting it to a public body would make no sense unless there were also a requirement that the employer was the one who committed the violation, condition or practice. If the violation could be committed by someone other than the reporting employee's employer, the reporting employee would have no reason to report it to her employer and allow her employer an opportunity to correct a violation it did not commit.

This rationale is inapplicable here, however, because subsection 833(2) does not apply to subsection 833(1)(E). Subsection 833(2) only applies to reports of "a violation, or unsafe condition or practice." 26 M.R.S.A. § 833(2). That refers to subsections 833(1)(A), (1)(B), and (1)(C), the first and third of which were at issue in *Costain*. A report covered by subsection 833(1)(E), by contrast, which is at issue here, is a report of "an act or omission that constitutes a deviation from the applicable standard of care." 26 M.R.S.A. § 833(1)(E) (emphasis added). It is not a report of "a violation, or unsafe condition or practice." Accordingly, an employee is protected if she reports a deviation from the applicable standard of care directly to a public body (in this context, the appropriate licensing, regulating or credentialing authority) without first bringing the deviation to the attention of her employer. Because there is no requirement that she first report the deviation to her employer, it is equally plausible that the intended deviation be by someone other than her employer.

Moreover, subsection 833(1)(E), by itself, is not limited to reports of a deviation by the reporting employee's employer. That subsection provides as follows:

> No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because . . . [t]he employee, acting in good faith and consistent with state and federal privacy laws, reports to the employer, to the patient involved or to the appropriate licensing, regulating or credentialing authority, orally or in writing, what the employee has reasonable cause to believe is an act or omission that constitutes a deviation from the applicable standard of care for a patient by an employer charged with the care of that patient. For purposes of this paragraph, "employer" means a health care provider, health care practitioner or health care entity as defined in Title 24, section 2502.

26 M.R.S.A. § 833(1)(E) (emphasis added). This language requires that the reported deviation of the standard of care be by "an" employer, which is defined as "a" heath care provider, etc. It does not require that the deviation be by the reporting employee's employer. Here, there is no dispute that Pine Point was "an employer charged with the care of" the patient at issue or that it was "a health care provider, health care practitioner or health care entity as defined in Title 24, section 2502." 26 M.R.S.A. § 833(1)(E).

In sum, because Complainant has sufficiently alleged protected activity under the WPA, the complaints should not be administratively dismissed.