

ORAL ARGUMENT — 11/4/97
97-0454
CLARK V. TEXAS HOME HEALTH

WONG: The questions before this court are whether the petitioners are precluded from bringing a cause of action for being retaliated against them in their peer review of a licensed vocational nurse? The second issue is whether the petitioners are precluded from bringing a cause of action for retaliation against them under art. 4525a, §11(a), when they were demoted prior to the reporting but after they informed their employer that they were going to report?

 The petitioners, Karen Clark, Jan Woodard and Laverne Worrell are registered nurses. They were employed by Texas Home Health Inc. as nursing administrators overseeing approximately 450 employees, licensed vocational nurses, registered nurses and other types of health care workers. They were also members of a peer review committee established by the Texas Home Health agency. And in their actions as the peer review committee they had occasion to receive complaints regarding medication error, which subsequently resulted in the death of their client. The incident involved an RN supervisor, and the LVN who administered a second dose of insulin to the patient, which caused her to lapse into a coma, where she subsequently died.

 The petitioners participating in their peer review committee determined that the RN supervisor should be put on probation and reprimanded, and they determined also that the LVN should be reported to the appropriate board. They also determined that the LVN should be offered the opportunity to submit a rebuttal to the peer review committee, and the LVN did so at a later date.

 At that second peer review committee on this incident there was in attendance, Stephen Abshier, who is VP of Texas Home Health. He apparently was sitting in as part of the peer review committee. During that particular meeting, Stephen Abshier told the attorney for the LVN that they would wait for a written rebuttal statement from the LVN prior to taking any action by informing the licensing board.

 A few weeks later, the petitioners informed the Texas Home Health Agency that they were going to report the LVN to the licensing board, because they had talked to Texas Home Health's attorney, who told them that he did not believe that the LVN was ever going to file a written rebuttal statement. And the petitioners felt that it was imperative that they inform the licensing board so that the licensing board could do the investigation and take any appropriate measures against the LVN.

GONZALEZ: Do you concede the fact that there was no signed written complaint with the licensing board prior to the termination?

WONG: Yes, there was no signed report prior to the demotion and termination.

HECHT: Was there ever one?

WONG: A report was filed subsequent to that.

HECHT: Filed or sent?

WONG: Yes, it was filed. There is this dispute of facts as to when it was filed. The petitioners sent it certified mail, they have the green card with the board of vocational nurse examiners having received some document from Ms. Karen Clark. And then subsequent to that, they filed another report after they had learned that the board in fact did not have the report.

ENOCH: Do you agree with Texas Home Health that the *City of Beaumont v. Bouillion* case stands for the proposition that a report must be filed before the demotion occurs for there to be a cause of action?

WONG: No. We believe that the facts in the *City of Beaumont v. Bouillion* are distinguishable from the facts in our case. In the *Bouillion* case, the facts were that the police officers never reported to...well the first report they alleged was to the _____, and we agree that that's pretty clear from those facts, that that was not reported. But the subsequent meeting with the city manager, the police officers appear from the facts that they never told the city manager that they were reporting any violations. The nurses in our case did in fact report, and the police officers never did any report as far as we know.

GONZALEZ: To a proper investigative agency? The fact that it was reported to their employer is something else.

WONG: The petitioners did file a report with the appropriate board.

GONZALEZ: After the fact?

WONG: After the fact.

PHILLIPS: What about the respondent's policy arguments that reporting any violation internally does not serve the policy of the statute, in fact it might only tend to deter the ultimate correction of any problems?

WONG: The respondents were the ones who interfered with the actions of the peer review committee. The original peer review committee was composed of 5 registered nurses at the very first initial meeting surrounding the complaint. At the second meeting, Stephen Abshier, the Ex. VP, somehow he became a peer review committee member. The Texas Home Health Agency

wanted somebody in their management to operate within that review committee, so they became involved. And there was no way to preclude their knowing what the peer review committee was going to do. The employer all along consistently thought that the LVN should have been covered by the activities of the peer review committee, Texas Home Health Agency participated and we submit that the peer review activities should have been protected by the statute, because Texas Home Health Agency did feel that they were being covered by the peer review committee.

ENOCH: The issue of this rebuttal that comes up, is there any question in this case that the nurses had an obligation to report or had the authority of the statute to make a report on the conduct of this LVN? Is there any question that they had the authority under the statute to make this report?

WONG: They do have authority to make this report under one of the sections. It's not the mandatory reporting, it's one of the permissive reporting statutes that the registered nurse may file a report on a licensed health care practitioner.

ENOCH: On the issue of the demotion and the report, is there any argument issue raised in this case about the cause of action for the retaliation other than simply the demotion occurred before the report was made?

WONG: The demotion occurred before the report was made, and the fact that their activities under the peer review committee should also have been protected by a different statute.

ENOCH: But that's a separate statute you are arguing about, the protection of their work on the peer review committee. But I'm talking about the issue on the retaliation for making the report. The only issue in this case is that the report...there's no issue that it was reported to the proper agency. There's a dispute as to whether they received it. But there's no issue that the licensing board was the appropriate agency. The only issue here is that, in fact, in terms of time, the report was not made until after the demotion?

WONG: Correct.

ABBOTT: Is it clear summary judgment evidence that Texas Home Health knew of the nurses intent to file with the appropriate authorities?

WONG: Yes. The deposition of Karen Clark, she was very clear in her deposition that Texas Home Health Agency and the three other defendants were very well aware that they had every intention upon filing the report.

ABBOTT: So it had been clearly and unequivocally expressed to Texas Home Health that the nurses were going to file this document with the proper authorities?

WONG: Yes.

ABBOTT: And then sometime between then and the time of it actually being filed, Texas Home Health demoted and terminated the nurses?

WONG: Texas Home Health demoted them at the very same meeting where the nurses told them that they were going to report, and then the nurses resigned from their employment that day, and the next day they sent the initial letter to the board of vocational nurses.

HECHT: And you say it doesn't matter that the report was sent in later, that's your argument?

WONG: Yes.

HECHT: What if the report had never been sent? What if they changed their minds?

WONG: Then we would have never sued.

HECHT: What if they took as long as nurse Shaw took to respond to the allegations, waited until instead of October, December, the following January?

WONG: There is no time limits in the statute for reporting.

HECHT: So if they ever do it, then they have a whistleblower action?

WONG: Yes.

HECHT: There's no obligation to be prompt?

WONG: I think that in other statutes there has to be a reasonable time. I think the worker's compensation act has a 60-day window. I don't believe that there's a similar window under the whistleblower's act.

HECHT: And should there be some requirement for promptness?

WONG: I believe that a reasonable time would be as long as there's some causal connection that's reasonable, a reasonable time would serve the purpose of this statute. Otherwise, if any employer has ever heard that any nurse was going to make any type of report, and that they felt that particular report was wrong, that they could just take any adverse action against the nurse at anytime.

HECHT: By the same token an employer could take an adverse action and the employee

could say: well, I'll fix that, I will file a report, then I will have a whistleblower case?

WONG: In this particular case Texas Home Health Agency was well aware that that report was imminent.

ENOCH: Is it even disputed that they were demoted because they were going to make the report? I mean that issue is not even here. They're accepting your position that your clients were demoted because they were going to file a report?

WONG: Correct.

HANKINSON: Is there any legislative history to the statute that supports your position that a reasonable time to report should be read into the statute?

WONG: No, there is none. I have not been able to find any legislative history.

HANKINSON: Do you have any legislative history that supports your view that the statute should be construed to further its remedial intent that contradicts what we've been cited to by the respondent in the brief, the legislative history that contemplates the filing of a report?

WONG: No, I don't believe there is any legislative history. There is only other cases that talked about the remedial purposes of statutes, such as, *Birch v. The City of San Antonio*, that talks about a similar type violation and has openness and compel compliance with the law by protecting those who inform authorities of wrongdoing. And we feel that the petitioners should also be covered by that particular type of statute.

The courts have also liberally construed both the Texas Whistleblower's Act and the Worker's Compensation Act, so as to uphold the purposes for the enactment of those particular laws. And the purpose of having a retaliation type segment in the statute was to protect those who are covered by the statute.

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RESPONDENT

GONZALEZ: Do you concede the fact that these nurses who are petitioners here were removed from the peer review committee, stripped of their administrative duties, and demoted because your client knew that a complaint to the proper licensing agency was imminent?

McELHENNEY: For purposes of summary judgment that has to be assumed as true. There are different facts that aren't the record because this is a narrow issue, whether the petitioners fell within the protection of the statute.

Obviously, there's been a lot of emphases on some very sympathetic facts. Texas Home Health has a different version of those facts.

ENOCH: Texas Home Health did file a report with the nursing board?

McELHENNEY: That's correct.

ENOCH: So you felt there was conduct that required a report to be filed?

McELHENNEY: That's correct. At least there was the appearance of it, but Texas Home Health wanted to get all the facts before it made its report. For one significant reason: Texas Home Health is not protected under 4525a against retaliation for its reporting the license vocational nurse. And so it needed to be very careful it was very accurate in what it did.

ENOCH: Let's think through this peer review. I know it's one issue about LVN's weren't subject to peer review, but Texas Home Health appointed its own vice president at the peer review committee when this issue was being discussed. For the purposes of summary judgment, it appears that Texas Home Health felt peer review was the way to address the investigation of what happened at that death of this patient. Is there anyway for Texas Home Health to determine whether or not a report needed to be filed, or not filed without investigating the facts underlying the death of this patient? It occurred in a home, there was only the nurse and the patient there, death occurs, is there anyway for them to determine the conduct except through some sort of an investigative function?

McELHENNEY: That's correct. They would have to investigate and get statements from everyone involved, and there were two different versions of what happened in the home. We heard one version. Texas Home Health has chosen not to belabor the record by getting into disputed facts because of the nature of the very type.

ENOCH: So it's entirely consistent with what happened that nurse Clark, Worrell and Woodard, as a part of the Texas Home Health's peer review program obtained the information through this investigation that triggered the necessity to file a report?

McELHENNEY: They obtained the information through acting on a committee that was referred to as a "peer review committee", but "peer review" is defined by the law as the evaluation of a registered nurse.

ENOCH: Of course the statute for reporting doesn't care how they get the information, but the fact is in this case, there's no argument that it was through this peer operation that they obtained the information, as well as THH for filing this report. From the record, the nurses obtained the information that triggered the necessity to file the report as a result of participating in this peer review, whether it's statutory peer review or just simply THH put them in a position of investigating

this situation and this is how the information comes to light that triggered the report?

McELHENNEY: That's correct.

ENOCH: Under those circumstances, the VP of the company comes onboard, even though these nurses are the administrators. Clearly as the nurses are developing this information, they need to file a report, THH is obtaining the information that's triggering the necessity to file this report?

McELHENNEY: That's correct. THH was having(?) the information party to it.

ENOCH: Should the statute on reporting, under circumstances just like this, whether or not there is retaliation for filing a report or not filing a report depends solely on who's got the fastest car? I can get to the employee and fire them before they can get to the board to file the report?

McELHENNEY: I really think that is based upon the structure of the reporting process under the statute. The statute contemplates that a nurse under this particular reporting system, §7, the nurse will make that report directly to the licensing board without the involvement of the employer. The structure gives complete protection to the nurse, so this situation wouldn't happen. The nurse is free to look at the event, make the report directly to the licensing board, and the employer should never know about it.

ABBOTT: Wouldn't it be fair to say that typically the employer would know that they were going to be doing it?

McELHENNEY: Not necessarily that there would be a report. The employer may know there is an instant there that could lead to a report, but whether the nurses chooses to report, the employer wouldn't necessarily have knowledge.

ABBOTT: So your presumption then is, that the nurse would not be communicating with the employer about this, the nurse would do it behind the back of the employer?

McELHENNEY: That's correct. And that's consistent with the confidentiality provision of art. 4525a, §14, recognizes that all aspects of the report are confidential, the identity of the person making the report, and the report itself, and I think also, the person who is being reported.

ABBOTT: But you don't encourage the nurses to try to be up-front with the people at THH to let them know there's a problem for which a report needs to be filed?

McELHENNEY: There is a need for the employer to be aware of events under its control; however, that is not covered by art. 4525a. Article 4525a's purpose, it's a regulatory enforcement

statute. It's purpose was not to add the knowledge and party to the employer, but to have that knowledge a party to the licensing board.

HECHT: But you somehow argue that it's the plaintiff's fault that they told their employer?

McELHENNEY: I'm saying it's much like the media in the *City of Beaumont* case. The plaintiffs in that case went to the media, and the court considered that not being a report. It's the same thing in this situation. The petitioners' admit to the employer, which is not part of the reporting structure. The reporting structure is very narrow. It contemplates just to report directly to the board without the involvement of the employer.

HECHT: The argument sounds as if, because you told us, which you didn't have to do and maybe you shouldn't have done, we can do anything we want to to you, and there's nothing you can do about it?

McELHENNEY: You're an employee-at-will until the time that the report is made. And so employment-at-will leads to the result where employers are free to discipline, terminate or take any action against employees for any reason unless they come within a specific exception to employment-at-will.

GONZALEZ: Isn't it a fact, that your client was so concerned about this matter that they offered these nurses to protect their salaries for 10 years if they kept quiet about this?

McELHENNEY: The petitioners had made a lot about this being a bribe. I think the testimony shows that it was more in the nature of indemnification, and it wasn't geared towards don't report this, we will give you ten years of your salary. It was, if you will wait until we have all the facts and you lose your license, you will be indemnified.

SPECTOR: Didn't the nurse who apparently gave the injection wrongfully was fired the next day?

McELHENNEY: That's correct, that's the license vocational nurse.

SPECTOR: So what more would the Texas Home Health company want to know about whether this should be reported?

McELHENNEY: There were two versions to what happened. The licensed vocational nurse maintains she didn't do anything wrong.

SPECTOR: So she got fired anyways?

McELHENNEY: She got fired and there were some threats about a lawsuit. She was fired. She said: I just did what I was supposed to do, the RN is the one that made the mistake. The three petitioners jumped on the LVN, and said: She not only should be fired, but her license should be pulled; and virtually nothing happened to the RN, who is the one who initiated the whole problem. And so it was that sort of distinction and apparent unfairness that motivated Texas Home Health to say: Let's get all the facts before the corporation reports it.

Now these individuals were told: If you want to report it in your individual capacity, you can do that. That's in the record. There were those discussions with the chief executive officer. They maintained, however, it's the corporation that has to report it, and we're going to cause the corporation to report it even without this rebuttal statement. And that's very important when you get to the fairness of it, that they were given the opportunity to go report it individually, but they wanted to do it as in their corporate capacity, which could have exposed Texas Home Health to liability for that. And it's just a situation if that they wanted to do it, they were told to go do it.

ABBOTT: Would you clarify that once more, because I thought I heard you say the opposite. I thought I heard you say that there was no liability for filing by the THH?

McELHENNEY: There's no protection from liability. There is a broad liability protection in 4525a, that you can't be sued for making a report, if it's a report within the statute. Texas Home Health's report of the LVN would not be within the statute. So it wouldn't have that absolute immunity that would apply to reports within the statute. It was outside the statute. And so it needed to be very careful on how it approached the reporting.

ABBOTT: And the way the nurses were approaching it would be in a way that could potentially hold THH libel?

McELHENNEY: Yes. Their actions would be attributable to THH, and if they reported in the corporate capacity, THH wouldn't have, for example: a defense to defamation action.

ABBOTT: But if you could have done it the way you wanted to have it done, it wouldn't expose to THH just a liability?

McELHENNEY: It would not have. No. The individual nurse's reports were under art. 4525a, and would have had the absolute protection. So they could not have been sued by the LVN for making a report.

HECHT: I'm not sure I understand your position now. If the plaintiffs say, we want to report individually, but we can't get around to it for a couple of weeks but we're going to do it, then there is no whistleblower action if they are disciplined for that?

McELHENNEY: That's correct.

HECHT: It's not just that they wanted to do it on behalf of THH. It's no matter who they wanted to do it on behalf of, there still would be no cause of action?

McELHENNEY: That's correct. Until the report is made there is no protection. They are employees-at-will until that point.

I believe that's consistent with just the causal language of the statute. That is, a person has a cause of action if they are discriminated against for reporting under the statute. And this requires the causal connection between the report under the statute and the action for which they complain. The report under the statute is referenced back to §7 of the statute, which says: The petitioners may file a signed written report to the licensing board if they believe there was some misconduct there. So there's no involvement of an employer. That connection to the employer simply was a report, and just like the media in the *City of Beaumont* was outside of the reporting structure.

This is really a plain language argument. The statute is clear and unambiguous. The CA interpreted it that way, and this court on many occasions has held that the statute is clear and unambiguous given its plain meaning. And the court is not responsible for any omissions by the legislature that isn't in the statute.

PHILLIPS: Under the worker's comp protection, a company just made a habit of firing every worker as soon as they were injured, they see an injury and they fire them, then no problem?

McELHENNEY: That actually is a problem, because the worker's comp statute addresses that. Under the worker's comp statute, there are 4 protected areas of conduct: instituting a comp proceeding; filing a claim; hiring a lawyer; and testifying. And the courts have held that notifying the employer of the injury is not filing a worker's comp claim, it's instituting a proceeding.

PHILLIPS: What if you see it? I mean you see them injured and you run over, you're the foreman, before they have a chance to even scream out they're injured, you're fired.

McELHENNEY: I believe in that situation, that that would amount to imparting knowledge on the employer of the injury. And that's really in the *Texas Steel* case, how it was analyzed, that to start the comp proceeding, the employer has to have knowledge of the injury. Now typically, that would come to the employee saying: I hurt my back yesterday. But certainly if the employer sees the injury, I think that starts the...

PHILLIPS: If that's true, if you see it or hear it or even if you have a sign up saying: If you're injured you can consider yourself fired. And that sounds like putting a little judicial gloss on

these words, which is precisely what you say we cannot do in this analogous statute?

McELHENNEY: I'm saying that you will apply the law according to its plain meaning. But in your dissent in *St Lukes v. Agbar(?)*, you pointed out that sometimes you need to look outside the plain meaning and look at the consequences of a particular interpretation. One of the consequences of the petitioner's interpretation is that no report would actually have to be made. It would protect persons that don't make reports.

PHILLIPS: That's not their position. They say they wouldn't have been here if they had not at first made a report?

McELHENNEY: Well it's questionable whether there's actually a report. There is the affidavit from the state agency saying: 5 months after the lawsuit was filed, no report had been made. And that's uncontroverted. There's reference to this cryptic certified mail receipt, but there's no summary judgment evidence.

ENOCH: Well the sent and the not received is just a fact issue. The summary judgment couldn't be based on the record in this case on whether or not they did not receive the report. You just have a dispute. That's a fact issue.

McELHENNEY: I think that would go to whether there's a mailbox rule that would apply to a 4525a report. That is, the statute is aimed at getting this information imparted to the licensing board. And I don't think by just dropping it in the mail, that would necessarily...

ENOCH: Well they had a green card that came back. There is some dispute over what that, who Clark is, and nobody knows them. But this isn't resulting around whether or not it was actually filed. It's undisputed it wasn't filed before they were demoted. And that's what the issue is in this case.

ABBOTT: What if you have a situation where a nurse who sees something that unequivocally should be reported, conveys to her employer (in this case, let's say THH) that she is going to report it and she has a situation where she's inundated with bills and she has to have her job. And in response to telling the employer that she's going to be filing this report, the employer says: If you do one more thing in any regard whatsoever to either pursue that report or if you file that report, you're fired. And so because she needs to keep her job, she doesn't do anything about it. And what you're saying is that situation is not actionable?

McELHENNEY: That's correct. And I think there are some policy reasons why it's not. The employee in that situation has put herself in a position to be pressured by the employer. And in that situation, the report probably isn't made.

ABBOTT: But doesn't that also put the employee in the situation where her license could be revoked for not reporting?

McELHENNEY: Not in this situation under §7, because it's a permissive reporting structure. But there again, under the reporting structure contemplated by the statute, that employee should never impart knowledge to the employer of an impending report. It's totally a confidential matter and by opening that door, the employer risks the consequences of no protection.

ABBOTT: So their main fault was talking to the employer about it?

McELHENNEY: They took steps outside of the reporting structure, and that statement to their employer: that we intend to make the report.

ENOCH: Not much is said in the briefing about the purposes behind this statute. The argument is made that maybe's it's to, as you're arguing, that an employee is not supposed to talk to the employer. But if the whole purpose of reporting and all this is to have safe medical treatment out there and requiring medical professionals to watch out for bad medicine by other medical professionals, isn't it inconsistent with that scheme to read a statute to be that medical professionals employed by other medical professionals are not to communicate about bad medical practice; otherwise, they're trumped on this statute that's supposed to improve medical practice. To say the employee shouldn't talk to the employer about some bad practices of a co-employee is supposed to be discourage by the statute, isn't that inconsistent?

McELHENNEY: That's not what I'm saying. That is certainly important for the employer to understand that. But the legislative history explains the purpose of the statute, and that is, that the employers were concerned with recycling of incompetent nurses, that nurses would be fired for incompetent actions and then would just go down the street and work for another health care provider. The statute was aimed at the situation not where the employer is left to discipline the nurse, but where the licensing board is left with the disciplining of the nurse. 4525a is a regulatory improvement statute, and that's pointed out in the legislative history, that the purpose is to improve the enforcement of the nursing law by causing reports to be made to the board and by protecting those persons who make the reports.

And so there's a lot of situations where you can say it may appear unfair if this happens, but I don't believe 4525a was intended as an _____ act to provide a cause of action for every perceived unfairness in the health care industry. I think it was intended to provide protection to those persons who actually fulfilled the objective of the statute, which is getting that information to the board and to do that promptly.

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REBUTTAL

WONG: In *Continental Coffee Products v. Juanita Casarez*, the standard of causation in whistleblower and similar cases should be that employees' protected conduct must be such that without it the employer's prohibited conduct would not have occurred when it did. And so, there is no time frame. It's whoever gets to the door first. Do I fire you before I put the letter in the mailbox?

SPECTOR: Is it disputed that Texas Health told the nurses to go ahead and file it individually; is that correct?

WONG: What they told the nurses was that, if you are going to file it, you're not going to file it under Texas Home Health. You're going to have to file individually. And at that point in time they were demoted from their administrative duties, and no longer part of the peer review committee.

SPECTOR: The argument is if they had filed it individually they would have been protected, correct?

WONG: They did file it individually after they resigned. The peer review committee told Texas Home Health: We're going to file against the LVN.

SPECTOR: Individually?

WONG: No, as the peer review committee.

SPECTOR: Of the health company?

WONG: Of the health company. And Texas Home Health said: No, you're not, we're going to take away your administrative duties; if you are going to file it, you're going to have to file it now as an individual, which they did.

GONZALEZ: When the nurses were demoted did they lose pay?

WONG: No. It was their duties.

GONZALEZ: So they were not fired. They resigned?

WONG: They resigned.

GONZALEZ: And they were reassigned to some other duties with no loss in pay?

WONG: Not that I am aware of at this time. They were only stripped of their administrative duties. Karen Clark was a nurse administrator; Jan Woodard and Laverne Worrell

were assistant nurse administrators. They were told to report in the duty uniform, which is the white uniform and be assigned a certain patient load.

HANKINSON: Do you agree with Mr. McElhenney's view that the primary purpose of this statute 4525a was to stop the recycling as he put it of nurses who were not practicing appropriately?

WONG: I believe that it was to allow nurses to report on other nurses.

HANKINSON: But the reason for that reporting was to stop the recirculation, as he put it, of bad nurses?

WONG: I don't know about the recirculation, but it was to inform their board of a possible misconduct by the nurses.

HANKINSON: And the goal of that was then to try to improve the practice of nursing?

WONG: Yes.

HANKINSON: And then as part of that statutory scheme, the action for retaliatory conduct was designed to provide protection within the statutory scheme?

WONG: To the reporters, retaliation by their employers.

HANKINSON: So it was a means to further this statutory intent of improving nursing practices in the State of Texas?

WONG: Yes. The legislature certainly didn't intend to give an employer a grace period in which to fire or take other adverse action against an employee.

BAKER: What about their argument that this is a plain meanings statute and there's no interpretation involved, so that you don't look at legislative history?

WONG: I think you have to look at the purposes behind the actual act itself, was to encourage nurses to police their own profession. And they put in specifically a retaliatory provision so that they would be allowed to report so as to provide more of an open atmosphere so that they could be encouraged to do the report.