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SENATE BILL 673

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

John T. L. Grubesi c

AN ACT

**RELATING TO EMPLOYMENT; ENCOURAGING NOTIFICATION OF SUSPECTED
IMPROPER QUALITY OF PATIENT CARE; PROHIBITING EMPLOYER
RETALIATORY ACTION IN CERTAIN CIRCUMSTANCES; PROVIDING
GRIEVANCE PROCEDURES AND PENALTIES.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**Section 1. SHORT TITLE.--This act may be cited as the
"Conscientious Health Care Employee Protection Act".**

**Section 2. PURPOSE.--It is the purpose of the
Conscientious Health Care Employee Protection Act to improve
and maintain the level of health care throughout New Mexico by
encouraging health care employees to notify appropriate public
bodies of suspected improper quality of patient care. The
notification is encouraged in order to protect patients and
employees and to assist public bodies charged with ensuring**

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1 that health care is safe and adequate.

2 Section 3. DEFINITIONS. -- As used in the Conscientious
3 Health Care Employee Protection Act:

4 A. "commission" means the human rights commission;

5 B. "director" means the director of the division;

6 C. "division" means the human rights division of
7 the labor department;

8 D. "employee" means a health care professional who
9 performs services for and under the control and direction of an
10 employer for wages or other remuneration;

11 E. "employer" means a person who has four or more
12 employees and includes an agent of an employer and a public
13 employer;

14 F. "health care professional" means a person
15 licensed pursuant to Chapter 61, Article 2, 3, 4, 5A, 6, 7A, 8,
16 9, 9A, 10, 10A, 11, 12A, 12B, 12C, 12D, 12E, 13, 14A, 14B, 14C,
17 14D, 14E or 31 NMSA 1978;

18 G. "improper quality of patient care" means a
19 practice, procedure, action or failure to act on the part of an
20 employer that violates a law or a rule promulgated pursuant to
21 law;

22 H. "public body" means a state government
23 department or agency or a political subdivision of the state;

24 I. "retaliatory action" means the discharge,
25 suspension, demotion, disciplining or any discriminatory or

. 155135. 1

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1 adverse employment action against an employee in the terms and
2 conditions of employment; and

3 J. "secretary" means the secretary of labor.

4 Section 4. EMPLOYER RETALIATORY ACTION PROHIBITED. -- An
5 employer shall not take retaliatory action against an employee
6 because the employee does any of the following:

7 A. discloses, or threatens to disclose, to an
8 employer or to a public body an activity, policy or practice of
9 the employer that constitutes improper quality of patient care;

10 B. provides information to, or testifies before,
11 any public body as part of an investigation, hearing or inquiry
12 into improper quality of patient care, or a violation of law or
13 a rule promulgated pursuant to law; or

14 C. objects to or refuses to participate in an
15 activity, policy or practice that:

16 (1) is in violation of a law or a rule
17 promulgated pursuant to law;

18 (2) constitutes improper quality of patient
19 care; or

20 (3) is fraudulent or criminal.

21 Section 5. GRIEVANCE PROCEDURE. --

22 A. An employee claiming to be subject to a
23 retaliatory action prohibited by the Conscientious Health Care
24 Employee Protection Act, after exhausting all other
25 administrative grievance procedures, may file with the division

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1 a written complaint that states the name and address of the
2 person alleged to have engaged in the retaliatory action, all
3 information relating to the retaliatory action and any other
4 information that may be required by the commission. All
5 complaints shall be filed with the division within sixty days
6 after the alleged retaliatory action was committed.

7 B. The director shall advise the respondent that a
8 complaint has been filed and shall furnish the respondent with
9 a copy of the complaint. The director shall promptly
10 investigate the alleged retaliatory action. If the director
11 determines that the complaint lacks probable cause, the
12 director shall dismiss the complaint and notify the complainant
13 and respondent of the dismissal. The complaint shall be
14 dismissed subject to appeal as in the case of other orders of
15 the commission.

16 C. If the director determines that probable cause
17 does exist for the complaint, the director shall attempt to
18 achieve a satisfactory resolution of the complaint through
19 persuasion and conciliation. The director and staff shall not
20 disclose what transpired during an attempted conciliation and
21 shall not divulge information obtained during a hearing before
22 the commission or a commissioner prior to taking final action
23 on the complaint. An officer or employee of the labor
24 department who makes public in any manner whatever any
25 information in violation of this subsection is guilty of a

. 155135. 1

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1 misdemeanor and upon conviction shall be sentenced pursuant to
2 the provisions of Section 31-19-1 NMSA 1978.

3 D. A person who has filed a complaint with the
4 division may request and shall receive an order of
5 nondetermination from the director one hundred eighty days
6 after the division's receipt of the complaint. The order of
7 nondetermination may be appealed pursuant to the provisions of
8 Section 39-3-1.1 NMSA 1978.

9 E. In the case of a complaint filed by or on behalf
10 of a person who has an urgent medical condition and has
11 notified the director in writing of the test results, the
12 director shall make the determination whether probable cause
13 exists for the complaint and shall attempt conciliation efforts
14 within ninety days of the filing of the written complaint or
15 notification, whichever occurs later.

16 F. If conciliation fails or if, in the opinion of
17 the director, an informal conference cannot result in
18 conciliation and the complainant has not requested a waiver of
19 right to hearing pursuant to the provisions of Subsection I of
20 this section, the commission shall issue a written complaint in
21 its own name against the respondent, except that in the case of
22 a complaint filed by or on behalf of a person who has an urgent
23 medical condition, who has notified the director in writing of
24 the test results and who so elects, the director shall issue an
25 order of nondetermination, which may be appealed pursuant to

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1 the provisions of Section 39-3-1.1 NMSA 1978. The complaint
2 shall set forth the alleged retaliatory action, the secretary's
3 rule or the section of the Conscientious Health Care Employee
4 Protection Act alleged to have been violated and the relief
5 requested. The complaint shall require the respondent to
6 answer the allegations of the complaint at a hearing before the
7 commission or hearing officer and shall specify the date, time
8 and place of the hearing. The hearing date shall not be more
9 than fifteen nor less than ten days after service of the
10 complaint. The complaint shall be served on the respondent
11 personally or by registered mail, return receipt requested.
12 The hearing shall be held in the county where the respondent is
13 doing business or the alleged retaliatory action occurred.

14 G. Within one year of the filing of a complaint by
15 a person aggrieved, the commission or the director shall:

16 (1) dismiss the complaint for lack of probable
17 cause;

18 (2) achieve satisfactory resolution of the
19 complaint as evidenced by an order of the commission; or

20 (3) file a formal complaint on behalf of the
21 commission.

22 H. Upon the commission's petition, the district
23 court of the county where the respondent is doing business or
24 the alleged retaliatory action occurred may grant injunctive
25 relief, pending hearing by the commission or pending judicial

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1 review of an order of the commission, so as to preserve the
2 status quo or to ensure that the commission's order as issued
3 will be effective. The commission shall not be required to
4 post a bond.

5 I. The complainant may seek a trial de novo in the
6 district court in lieu of a hearing before the commission,
7 provided that the complainant requests from the director, in
8 writing, a waiver of the complainant's right to hearing within
9 sixty days of service of written notice of a probable cause
10 determination by the director. The director shall approve the
11 waiver request and shall serve notice of the waiver upon the
12 complainant and the respondent. The complainant may request a
13 trial de novo pursuant to Section 39-3-1 NMSA 1978 within
14 thirty days from the date of service of the waiver. Issuance
15 of the notice shall be deemed a final order of the commission
16 for the purpose of appeal pursuant to Section 39-3-1.1 NMSA
17 1978.

18 J. For purposes of this section, "urgent medical
19 condition" means a medical condition defined by an appropriate
20 medical authority through documentation or by direct witness of
21 a clearly visible disability that poses a serious threat to the
22 life of a person.

23 Section 6. HEARING PROCEDURES. --

24 A. The respondent to a complaint made pursuant to
25 Section 5 of the Conscientious Health Care Employee Protection
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1 Act may file a written answer to the complaint, appear at the
2 hearing, give testimony and be represented by counsel. The
3 respondent may obtain from the commission subpoenas for any
4 person or for the production of any evidence pertinent to the
5 proceeding. The complainant shall be present at the hearing
6 and may be represented by counsel. Each party shall have the
7 right to amend the complaint or answer.

8 B. A panel of three members of the commission
9 designated by the chairman shall sit, and a decision agreed
10 upon by two members of the panel shall be the decision of the
11 commission. A commissioner who has filed a complaint shall not
12 sit on the panel hearing the complaint. Hearings also may be
13 conducted by a hearing officer employed by the division or, if
14 the hearing officer is unavailable, one member of the
15 commission may be designated by the chairman to act as a
16 hearing officer. A hearing officer shall have the same powers
17 and duties as the commission.

18 C. The complainant or the complainant's
19 representative shall present to the commission or the hearing
20 officer the case supporting the complaint. Evidence concerning
21 prior attempts at conciliation shall not be heard by the
22 commission. The director shall not participate in the hearing,
23 except as a witness.

24 D. The panel or a hearing officer shall not be
25 bound by the formal rules of evidence governing courts of law

. 155135. 1

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1 or equity, but shall permit reasonable direct examination and
2 cross-examination and the submission of briefs. Testimony at
3 the hearing shall be taken under oath and recorded by tape or
4 otherwise. Upon the request of any party, testimony shall be
5 transcribed. All costs of transcribing shall be paid by the
6 party who requested it. Each commissioner and hearing officer
7 may administer oaths.

8 E. Upon the conclusion of a hearing conducted by a
9 hearing officer, the hearing officer shall prepare a written
10 report setting forth proposed findings of fact and conclusions
11 of law and recommending the action to be taken by the
12 commission. The hearing officer shall submit the report to a
13 panel consisting of no more than three members of the
14 commission designated by the chairman. A commissioner shall
15 not sit on a panel that reviews a hearing officer's report
16 issued in connection with a complaint filed by the
17 commissioner. A decision by a majority of the members of the
18 review panel shall be the decision of the commission. If the
19 panel finds from the evidence presented at a hearing that the
20 respondent engaged in a retaliatory action, it shall make
21 written findings of fact and conclusions of law. The panel may
22 adopt, modify or reject the proposed findings of fact and
23 conclusions of law recommended by the hearing officer. Within
24 five days after an order is completed by the commission
25 following a hearing, the commission shall serve upon each party

. 155135. 1

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1 of record and each party's attorney, if any, a written copy of
2 the order by certified mail. The written order shall be mailed
3 to the party's address of record. All parties shall be deemed
4 to have been served on the tenth day following the mailing. As
5 part of its order, the commission may require the respondent to
6 pay actual damages to the complainant and to pay reasonable
7 attorney fees, if the complainant was represented by private
8 counsel. The commission may also take such affirmative action
9 as it considers necessary, including a requirement for reports
10 of the respondent's compliance with the commission's order.

11 F. If the commission finds from the evidence that
12 the respondent has not engaged in a retaliatory action, it
13 shall make written findings of fact and serve the complainant
14 and the respondent with a copy of the findings of fact and with
15 an order dismissing the complaint.

16 Section 7. ENFORCEMENT.--If a respondent to a complaint
17 filed pursuant to the Conscientious Health Care Employee
18 Protection Act does not comply with an order of the commission,
19 the attorney general or district attorney, at the request of
20 the secretary, shall secure enforcement of the commission's
21 order by a district court. The proceeding shall be initiated
22 by the filing of a petition in the district court where the
23 respondent is doing business or the alleged retaliatory action
24 occurred. A copy of the petition shall be served on the
25 respondent personally or by registered mail, return receipt

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1 requested. The court may make and enter upon the proceedings
2 an order to decree enforcement of the order of the commission.

3 Section 8. APPEAL. --A party may appeal the final decision
4 of the commission pursuant to the provisions of Section
5 39-3-1.1 NMSA 1978.

6 Section 9. POSTING OF LAW AND INFORMATION. --An employer
7 subject to the Conscientious Health Care Employee Protection
8 Act shall keep posted in a conspicuous place on the business
9 premises notices prepared by the division that set forth
10 excerpts of that act and other relevant information as
11 determined by the secretary.

12 Section 10. EFFECTIVE DATE. --The effective date of the
13 provisions of this act is July 1, 2005.