

No. S205568

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

MARK FAHLEN, M.D.,

Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS,
STEVE MITCHELL, et al.,

Defendants and Appellants.

SUPREME COURT
FILED

JUL 23 2013

Frank A. McGuire Clerk

Deputy

After Published Decision by the Court of Appeal
Fifth Appellate District
Case No. F063023

**DR. FAHLEN'S SECOND REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF ANSWERING BRIEF OF PLAINTIFF AND
RESPONDENT; SUPPORTING MEMORANDUM;
DECLARATION OF STEPHEN D. SCHEAR**

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Attorneys for Plaintiff and Respondent Mark Fahlen, M.D.

REQUEST FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452 and 459, Plaintiff and Respondent Mark Fahlen, M.D. hereby requests that this Court take judicial notice of the following documents constituting legislative history of the enactment of Health and Safety Code section 1278.5 in 1999:

Exhibit 1: Senate Health and Human Services Committee Analysis of Senate Bill (SB) 97, March 10, 1999.)¹

Exhibit 2: Senate Appropriations Committee Analysis of SB 97, April 19, 1999.

Exhibit 3: Senate Floor Analysis of SB 97, April 22, 1999.

Exhibit 4: Assembly Health Committee Analysis of SB 97, June 15, 1999.

Exhibit 5: Assembly Appropriations Committee Analysis of SB 97, June 23, 1999.

Exhibit 6: Assembly Floor Analysis of SB 97, June 25, 1999.²


Exhibit 7: Senate Floor Analysis of SB 97, June 30, 1999.

The accompanying Memorandum sets forth the grounds for the request and the accompanying Declaration of Stephen D. Schear authenticates the documents and includes the documents at issue in this request.

¹ Exhibit 1 is identical to Exhibit C of Dr. Fahlen's first Request for Judicial Notice, dated April 3, 2013. It is also included here for the convenience of the Court, so that the entire legislative history of SB 97 submitted by Dr. Fahlen is contained in one volume.

² Exhibit 6 is listed as the Assembly Floor Analysis in the California Legislature's website, although the document itself does not so state. See http://www.legislature.ca.gov/cgi-bin/port-postquery?bill_number=sb_97&sess=9900&house=S&author=burton

Dated: July 22, 2013

By: 
Stephen D. Schear
Jenny Huang
Justice First, LLP
Attorneys for Plaintiff and
Respondent Mark Fahlen, M.D.

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE**

**I. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE
LEGISLATIVE HISTORY IN EXHIBITS 1 THROUGH 7.**

Exhibits 1 through 7 contain 1999 legislative history of Senate Bill No. 97, the bill that became Section 1278.5, as set forth above. In the trial court, Dr. Fahlen requested judicial notice of the legislative history of the 2007 amendment to Section 1278.5 which is most pertinent to the question presented here. He did not request judicial notice of the legislative history of the 1999 enactment of the bill in the trial court.

On or about February 4, 2013, Sutter requested that this Court take judicial notice of additional legislative history concerning both the 1999 passage of SB 97 and the 2007 passage of Assembly 632, the amendment to Section 1278.5. Dr. Fahlen did not oppose that request. However, Sutter only included one document from the legislative history of SB 97, the Assembly Health Committee's Analysis. It did not include other relevant documents from the legislative history. The legislative history of SB 97 demonstrates the purpose of the bill and the opposition of the California Hospital Association and Kaiser-Permanente to the bill. It is therefore relevant to the question presented here. Legislative committee reports and analyses are subject to judicial notice under Evidence Code section 452. (*Kaufman v. Broad Communities, Inc.* (2005) 133 Cal.App.4th 26, 32.)

This Court should take judicial notice of Exhibits 1 through 7 as legislative history relevant to the issues presented here.

Dated: July 22, 2013

Respectfully submitted,



Stephen D. Schear

Jenny Huang

Attorneys for Plaintiff and

Respondent Mark Fahlen, M.D.

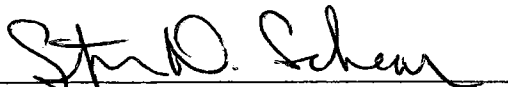
DECLARATION OF STEPHEN SCHEAR

I, Stephen D. Schear, declare:

1. I am an attorney at law duly licensed to practice before the courts of the State of California. I am one of the attorneys who represents Plaintiff/Respondent Mark Fahlen, M.D., in this proceeding and I served as counsel in all of the proceedings below, including the peer review hearing, the civil case in Stanislaus County Superior Court, and the appeal before the Fifth District Court of Appeal. I have personal knowledge of the following facts, and if called upon as a witness, I could and would testify competently to the contents of this declaration.

3. Attached as Exhibits 1 through 7 are true and accurate copies of documents included in the legislative history of Senate Bill 1997, from the 1999-2000 regular session of the Legislature. The documents were obtained by me from the official website of the California Legislature.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 22, 2013, at Oakland, California.



Stephen D. Schear

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUTTER CENTRAL VALLEY
HOSPITALS, STEVE MITCHELL,
AND DOES 1-20 Inclusive,

Appellants/Defendants,

vs.

MARK T. FAHLEN, M.D.,

Respondent/Plaintiff.

Case No. S205568

(Court of Appeal Case No. F063023)

(Stanislaus County Superior Court
Case No. 662696)

**[PROPOSED] ORDER ON
DR. FAHLEN'S SECOND
REQUEST FOR JUDICIAL
NOTICE**

FOR GOOD CAUSE SHOWN, the second Request for Judicial
Notice by Respondent Mark Fahlen is hereby GRANTED in its entirety.

Dated: _____, 2013

The Honorable Tani Cantil-Sakauye
Chief Justice of the CA Supreme Court

SENATE HEALTH AND HUMAN SERVICES
 COMMITTEE ANALYSIS
 Senator Martha M. Escutia, Chair

BILL NO:	SB 97	S
AUTHOR:	Burton	B
AMENDED:	As introduced	
HEARING DATE:	March 10, 1999	9
FISCAL:	Appropriations	7
CONSULTANT:		
Umino		

SUBJECT

Health Facilities: Retaliation Against Employee or Patient
 with Grievance

SUMMARY

This bill prohibits a health facility from discriminating against a patient or employee who presents a grievance or cooperates in any investigation against that facility.

ABSTRACT

Existing law prohibits :

1. An employer from retaliating against an employee who provides information to a government or law enforcement agency about the employer's violation of law or regulation. A violation is considered a misdemeanor and is punishable by (a) imprisonment in the county jail not to exceed one year, (b) a fine not to exceed \$1,000, or (c) both. A corporation may be fined up to \$5,000.

Continued---

discriminating against an employee or patient, who has filed a grievance, or provided information to a governmental entity relating to care, services, or conditions at that facility. A violation is subject to a civil penalty of not more than \$10,000.

This bill:

1. Makes findings and declarations to encourage patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions.
2. Prohibits any health facility from retaliating or discriminating against an employee or patient, who has filed a grievance or provided information to a governmental entity relating to the care, services, or conditions at that facility.
3. Requires a health facility that violates this provision to be subject to a civil penalty of not more than \$25,000.
4. Establishes a "rebuttable presumption" that any discriminatory treatment taken by a health facility is retaliatory if it occurs against (a) a patient within 180 days of his/her filing a grievance or complaint or (b) an employee within 120 days of his/her filing a grievance or complaint.
5. Defines "discriminatory treatment of an employee" to include discharge, demotion, suspension, any other unfavorable changes in employment, or the threat of these actions.
6. Establishes a misdemeanor penalty of up to \$20,000 for any person who willfully violates the provisions in this bill.
7. Requires that an employee who has been discriminated against, pursuant to this bill, is entitled to reinstatement, reimbursement for lost wages and benefits, and legal costs associated with pursuing the case.
8. Exempts from the above provisions (a) an inmate of either

a Department of Youth Authority or Department of Corrections' correctional facility and (b) a long-term health care facility that is subject to existing law.

FISCAL IMPACT

Potential costs at state facilities from the General Fund. Both state hospitals and University of California hospitals, which are licensed health facilities owned and operated by the state, would be responsible for paying for fines and civil action incurred from violating provisions in this bill.

BACKGROUND AND DISCUSSION

Previous legislation includes: (1) AB 3309 (Burton, 1996) which failed passage in the Assembly Health Committee and (2) SB 253 (Burton, 1997) which was vetoed by Governor Wilson because "[t]here is no empirical data to indicate that health facilities workers require a higher level of protection than other employees."

Supporters argue:

1. The purpose of this bill is to extend to hospital patients and health care workers the same whistleblower protections that currently apply to long-term care facilities.
2. This bill would help protect nurses and patients who complain about possible unsafe patient care in hospitals.
3. Retaliatory actions against patients, nurses and other health care workers are on the increase. Nurses working in hospitals and other health care facilities who report unsafe patient care or conditions put their own jobs at risk and, therefore, are afraid to speak out.
4. Existing laws are so vague and general that they do not protect patients and employees in hospitals.

Opponents argue:

1. Retaliation against a whistleblower is already a crime that is subject to penalties. Employees who are subjects of retaliation can go to the Department of Industrial Relations, Division of Labor Standards Enforcement or to the courts for relief.

STAFF ANALYSIS OF SENATE BILL 97 (Burton)

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2. "Rebuttable presumption" is bad public policy. By creating the legal presumption that a hospital is guilty of retaliation unless it can prove itself innocent, this bill tilts the process in favor of one of the parties in a dispute. Furthermore, rebuttable presumption in this bill will have an adverse impact on patient care, if swift action cannot be taken against an incompetent employee.
3. This bill encourages an incompetent employee to file a frivolous complaint against a hospital due to the protections provided in this bill.
4. This bill creates no corresponding penalties for employees who willfully or negligently misuse the process for their own purposes.

The California Department of Health Services (DHS) reports:

1. An annual average of 11,000 complaints against all types of health facilities, including long-term care facilities and hospitals. An estimated 7,000 complaints per year are against long-term care facilities.

2. In fiscal year 1997-98, DHS issued 1,258 citations against long-term care facilities. One of these citations was against a long-term care facility for retaliation and discrimination against an employee.

3. DHS staff indicates that they receive a number of retaliation complaints against health care facilities, other than long-term care facilities, but without statutory authority they cannot follow-up on them.

POSITIONS

Support: California Nurses Association (sponsor)
California School Employees Association
Congress of California Seniors

Oppose: California Healthcare Association
Kaiser Permanente Medical Care Program

Appropriations Committee Fiscal Summary

SB 97 (Burton)

Hearing Date: 4/19/99

Amended: 3/22/99

Consultant: David Maxwell-Jolly

Policy Vote: H&HS 6-2

BILL SUMMARY:

SB 97:

Prohibits retaliation or discrimination against a health facility employee, patient, or any other person who files a grievance or complaint with a licensing agency or cooperates in any investigation or proceedings of a governmental entity related to the care, services, or conditions in the facility. Retaliation is defined as discharge, demotion, suspension, or any other unfavorable change in the terms or conditions of employment, or the threat of any of these actions.

Establishes a rebuttable presumption that certain actions against a health facility employee or patient are retaliation by the employer if taken within 180 days of the employee's or patient's filing of the complaint.

Establishes a civil penalty for the health facility (fine of up to \$25,000) and a misdemeanor for a person who willfully retaliates (fine of up to \$20,000).

Fiscal Impact (in thousands)

<u>Major Provisions</u>	<u>1998-99</u>	<u>1999-2000</u>	<u>2000-01</u>
<u>Fund</u>			
Civil penalties			unknown potential penalties

STAFF COMMENTS:

Both state hospitals and UC hospitals are licensed health facilities owned and operated by the state. Operating departments or UC would be responsible for paying any fines if health facility supervisors violate these provisions and the civil action succeeds against the state.

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916)
327-4478

SB 97

THIRD READING

Bill No: SB 97
Author: Burton (D), et al
Amended: 3/22/99
Vote: 21

SENATE HEALTH & HUMAN SERV. COMMITTEE : 6-2, 3/10/99
AYES: Escutia, Figueroa, Hughes, Polanco, Solis,
Vasconcellos
NOES: Morrow, Mountjoy
NOT VOTING: Haynes

SENATE APPROPRIATIONS COMMITTEE : 8-0, 4/19/99
AYES: Johnston, Alpert, Bowen, Burton, Karnette, Mountjoy,
Perata, Vasconcellos
NOT VOTING: Escutia, Johnson, Kelley, Leslie, McPherson

SUBJECT : Health facilities: retaliation against
employee or patient with grievance

SOURCE : California Nurses Association

DIGEST : This bill prohibits a health facility from
discriminating against a patient or employee who presents a
grievance or cooperates in any investigation against that
facility.

ANALYSIS :

Existing law prohibits:

1. An employer from retaliating against an employee who

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agency about the employer's violation of law or regulation. A violation is considered a misdemeanor and is punishable by (a) imprisonment in the county jail not to exceed one year, (b) a fine not to exceed \$1,000, or (c) both. A corporation may be fined up to \$5,000.

2. A long-term health care facility from retaliating or discriminating against an employee or patient, who has filed a grievance, or provided information to a governmental entity relating to care, services, or conditions at that facility. A violation is subject to a civil penalty of not more than \$10,000.

This bill:

1. Makes findings and declarations to encourage patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions.
2. Prohibits any health facility from retaliating or discriminating against an employee or patient, who has filed a grievance or provided information to a governmental entity relating to the care, services, or conditions at that facility.
3. Requires a health facility that violates this provision to be subject to a civil penalty of not more than \$25,000.
4. Establishes a "rebuttable presumption" that any discriminatory treatment taken by a health facility is retaliatory if it occurs against (a) a patient within 180 days of his/her filing a grievance or complaint or (b) an employee within 120 days of his/her filing a grievance or complaint.
5. Defines "discriminatory treatment of an employee" to include discharge, demotion, suspension, any other unfavorable changes in employment, or the threat of these actions.
6. Establishes a misdemeanor penalty of up to \$20,000 for

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any person who willfully violates the provisions in this bill.

7. Requires that an employee who has been discriminated against, pursuant to this bill, is entitled to reinstatement, reimbursement for lost wages and benefits, and legal costs associated with pursuing the case.
8. Exempts from the above provisions (a) an inmate of either a Department of Youth Authority or Department of Corrections' correctional facility and (b) a long-term

health care facility that is subject to existing law.

- 9. Provides that nothing in the bill abrogates or limits any other theory of liability or remedy otherwise available in law.

Comments

The California Department of Health Services (DHS) reports:

- 1. An annual average of 11,000 complaints against all types of health facilities, including long-term care facilities and hospitals. An estimated 7,000 complaints per year are against long-term care facilities.
- 2. In fiscal year 1997-98, DHS issued 1,258 citations against long-term care facilities. One of these citations was against a long-term care facility for retaliation and discrimination against an employee.
- 3. DHS staff indicates that they receive a number of retaliation complaints against health care facilities, other than long-term care facilities, but without statutory authority they cannot follow-up on them.

Prior legislation

AB 3309 (Burton, 1996), which failed passage in the Assembly Health Committee.

SB 253 (Burton, 1997), which was vetoed by Governor Wilson because "[t]here is no empirical data to indicate that health facilities workers require a higher level of

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protection than other employees." It passed the Senate 21-15 - Noes: Brulte, Haynes, Hurtt, Johannessen, Johnson, Kelley, Knight, Kopp, Leslie, Lewis, McPherson, Monteith, Mountjoy, Rainey and Wright.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

According to Senate Appropriations Committee analysis:

Fiscal Impact (in thousands)

<u>Major Provisions</u>	<u>1998-99</u>	<u>1999-2000</u>	<u>2000-01</u>
<u>Fund</u>			
Civil penalties		unknown potential penalties	

STAFF COMMENTS:

Both state hospitals and University of California (UC) hospitals are licensed health facilities owned and operated by the state. Operating departments or UC would be responsible for paying any fines if health facility supervisors violate these provisions and the civil action succeeds against the state.

SUPPORT : (Verified 4/20/99)

California Nurses Association (source)
California School Employees Association
Congress of California Seniors
Health Access
Service Employees International Union (SEIU)
AARP
California Association of Medical Laboratory Technology
Emergency Nurses Association of California
Little Hoover Commission
California Resources for Independent Living
Engineers and Scientists of California
Region 8 States Council of the United Food and Commercial Workers
Hotel Employees, Restaurant Employees International Union

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California Conference of Machinists
California Labor Federation, AFL-CIO
Older Women's League of California
Consumer Attorneys of California
California Conference Board, Amalgamated Transit Union
American Nurses Association/California
American Federation of State, County and Municipal Employees, AFL-CIO

OPPOSITION : (Verified 4/20/99)

California Healthcare Association
Kaiser Permanente Medical Care Program
United Hospital Association
California Dialyses Council
California Association of Catholic Hospitals

ARGUMENTS IN SUPPORT : Supporters argue:

1. The purpose of this bill is to extend to hospital patients and health care workers the same whistleblower protections that currently apply to long-term care facilities.
2. This bill would help protect nurses and patients who complain about possible unsafe patient care in hospitals.
3. Retaliatory actions against patients, nurses and other health care workers are on the increase. Nurses working in hospitals and other health care facilities who report unsafe patient care or conditions put their own jobs at

risk and, therefore, are afraid to speak out.

4. Existing laws are so vague and general that they do not protect patients and employees in hospitals.

ARGUMENTS IN OPPOSITION : Opponents argue:

1. Retaliation against a whistleblower is already a crime that is subject to penalties. Employees who are subjects of retaliation can go to the Department of Industrial Relations, Division of Labor Standards Enforcement or to the courts for relief.

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2. "Rebuttable presumption" is bad public policy. By creating the legal presumption that a hospital is guilty of retaliation unless it can prove itself innocent, this bill tilts the process in favor of one of the parties in a dispute. Furthermore, rebuttable presumption in this bill will have an adverse impact on patient care, if swift action cannot be taken against an incompetent employee.
3. This bill encourages an incompetent employee to file a frivolous complaint against a hospital due to the protections provided in this bill.
4. This bill creates no corresponding penalties for employees who willfully or negligently misuse the process for their own purposes.

CP:sl 4/22/99 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

Date of Hearing: June 15, 1999

ASSEMBLY COMMITTEE ON HEALTH
Martin Gallegos, Chair
SB 97 (Burton) - As Amended: June 8, 1999

SENATE VOTE : 24-14

SUBJECT : Health facilities: protection of whistle blowers.

SUMMARY : Prohibits a health facility from discriminating against a patient or employee who presents a grievance or cooperates in any investigation against that facility. Specifically, this bill :

- 1) Makes findings and declarations to encourage patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions.
- 2) Prohibits any health facility from retaliating or discriminating against an employee or patient who has filed a grievance or provided information to a governmental entity relating to the care, services, or conditions at that facility.
- 3) Requires a health facility that violates this provision to be subject to a civil penalty of not more than \$25,000.
- 4) Establishes a "rebuttable presumption" that any discriminatory treatment taken by a health facility is retaliatory if it occurs against a patient within 180 days of his/her filing a grievance or complaint or an employee within 120 days of his/her filing a grievance or complaint.
- 5) Defines "discriminatory treatment of an employee" to include discharge, demotion, suspension, any other unfavorable changes in employment, or the threat of these actions.
- 6) Establishes a misdemeanor penalty of up to \$20,000 for any person who willfully violates the provisions in this bill.
- 7) Requires that an employee who has been discriminated against, pursuant to this bill, is entitled to reinstatement, reimbursement for lost wages and benefits, and legal costs associated with pursuing the case.

- 8) Exempts an inmate of a correctional facility of the Department of the Youth Authority or the Department of Corrections, or an inmate housed in a local detention facility, as specified, from the provisions of this bill.
- 9) Exempts a long-term health care facility, whose employees and patients are subject to similar protections, from the provisions of this bill.
- 10) Provides that nothing in this bill abrogates or limits any other theory of liability or remedy otherwise available in law.

EXISTING LAW :

- 1) Prohibits an employer from retaliating against an employee who provides information to a government or law enforcement agency about the employer's violation of law or regulation. A violation is considered a misdemeanor and is punishable by imprisonment in the county jail not to exceed one year, a fine not to exceed \$1,000, or both. A corporation may be fined up to \$5,000.
- 2) Prohibits a long-term health care facility from retaliating or discriminating against an employee or patient who has filed a grievance, or provided information to a governmental entity, relating to care, services, or conditions at that facility. A violation is subject to a civil penalty of not more than \$10,000.

FISCAL EFFECT : According to the Senate Appropriations Committee analysis, both state hospitals and University of California (UC) hospitals, owned and operated by the state, would be responsible for paying any fines if health facility personnel violate these provisions and a civil action succeeds against the state.

COMMENTS :

1) PURPOSE OF THIS BILL . The Nurses Association (CNA) is the sponsor of this bill. According to materials submitted by the author and sponsor, this bill would extend the same protections in place for retaliatory actions by long-term health care facilities to the employees and patients of acute

care facilities. Current law has been in effect for over 20 years and the number of complaints has been very small. Employees and patients blow the whistle on unsafe practices and issues relating to patient endangerment after they have pursued their complaints with hospital administrators. Without protection, employees must weigh whether or not they should sacrifice their jobs and patients worry that they will be denied health care services. Further, nurses are required by statute to serve as patient advocates. If a nurse believes that a hospital practice, an unsafe doctor or other conditions

jeopardize patients, the nurse is required to act to protect patients. In some cases, nurses are required to choose between losing their job or losing their license.

2)BACKGROUND . The Department of Health Services (DHS) reports an annual average of 11,000 complaints against all types of health facilities, including long-term care facilities and hospitals. An estimated 7,000 complaints per year are against long-term care facilities. In fiscal year 1997-98, DHS issued 1,258 citations against long-term care facilities. One of these citations was against a long-term care facility for retaliation and discrimination against an employee. DHS staff indicates that they receive a number of retaliation complaints against health care facilities, other than long-term care facilities, but without statutory authority DHS cannot follow-up on these types of complaints.

3)SUPPORT . The American Association of Retired Persons (AARP) supports this bill stating that health plans should be prohibited from retaliating against providers or health care workers if they, reasonably and in good faith, report quality concerns to appropriate governmental agencies or the appropriate management official. Health Access California writes that this bill provides important consumer protections by allowing whistle-blowers in hospitals to speak out about conditions without fear of retribution. Today, patients, their families and workers rightly fear that hospital managers may act against them if they reveal serious problems concerning hospital care.

4)OPPOSITION . The California Healthcare Association (CHA) opposes this bill. CHA states that retaliation against a whistle-blower is already a crime under the Labor Code and that existing protections are already very broad. CHA additionally states that by creating the legal presumption

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that a hospital is guilty of retaliation unless it can prove itself innocent, this bill tilts the process in favor of one of the parties in the dispute and as such this bill will encourage incompetent employees to file frivolous complaints. Kaiser Permanente also opposes this bill, stating that it will significantly increase the number of legal actions against health benefit providers such as Kaiser, resulting in a dramatic increase in the cost of legal defense. Kaiser also states that the Labor Code prohibits employers from retaliating against employees and that DHS is required, under existing law, to keep confidential the identities of employees who file complaints against hospitals.

5)PREVIOUS LEGISLATION . This bill is similar to AB 3309 (Burton) of 1996, which failed passage in the Legislature and SB 253 (Burton) of 1997, which was vetoed by Governor Wilson. In his veto message, Governor Wilson stated "[t]here is no empirical data to indicate that health facilities workers require a higher level of protection than other employees."

REGISTERED SUPPORT / OPPOSITION :

Support

California Nurses Association (sponsor)
American Association of Retired Persons
American Federation of State, County and Municipal Employees,
AFL-CIO
American Nurses Association/California
California Association of Medical Laboratory Technology
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Labor Federation, AFL-CIO
California Resources for Independent Living
California School Employees Association
Congress of California Seniors
Consumer Attorneys of California
Emergency Nurses Association of California
Engineers and Scientists of California
Health Access California
Hotel Employees, Restaurant Employees International Union
Little Hoover Commission
Older Women's League of California
Region 8 States Council of the United Food and Commercial
Workers

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Resources for Independent Living, Inc.
Service Employees International Union
1 Registered Nurse

Opposition

California Association of Catholic Hospitals
California Chamber of Commerce
California Dialyses Council
California Healthcare Association
Kaiser Permanente Medical Care Program
United Hospital Association

Analysis Prepared by : Ellen McCormick / HEALTH / (916) 319-2097

Date of Hearing: June 23, 1999

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Carole Migden, Chairwoman

SB 97 (Burton) - As Amended: June 8, 1999

Policy Committee: Health Vote: 9 - 4

Urgency: No State Mandated Local
Program: Yes Reimbursable: -

SUMMARY

This bill prohibits a health facility from discriminating against a patient or employee who presents a grievance or cooperates in any investigation against that facility. The bill establishes a "rebuttable presumption" that any discriminatory action taken by a health facility is retaliatory if it occurs against a patient within 180 days of the filing a grievance or complaint or an employee within 120 days of such a filing.

The bill establishes civil penalties and makes violations of its provisions punishable as a misdemeanor.

FISCAL EFFECT

The bill could result in additional civil penalties against the state, probably minor, to the extent proceedings are brought under the bill against the state regarding employees of state hospitals, developmental centers, and hospitals operated by the University of California.

COMMENTS

1) Purpose of the Bill . According to the sponsor, the California Nurses Association, this bill extends current protections for retaliatory actions by long-term health care facilities to employees and patients of acute care facilities. The sponsor argues that without protection, employees must weigh whether or not they should sacrifice their jobs to expose practices that endanger patients.

The Department of Health Services (DHS) indicates an average 11,000 complaints against health facilities, including

long-term care facilities and hospitals, are filed annually.

An estimated 7,000 complaints per year are against long-term care facilities. In fiscal year 1997-98, DHS issued 1,258 citations against long-term care facilities. One of these citations was against a long-term care facility for retaliation and discrimination against an employee. DHS staff indicate they receive a number of retaliation complaints against health care facilities, other than long-term care facilities, but without statutory authority, they cannot follow-up on these complaints.

2)Opposition . The California Healthcare Association, representing hospitals, opposes this bill, arguing that retaliation against a whistle-blower is already a crime and that existing protections are therefore sufficient. The association also argues that by creating the legal presumption that a hospital is guilty of retaliation unless it can prove itself innocent, the bill tilts the process unfairly in favor of one of the parties, thereby encouraging frivolous litigation.

3)Prior Legislation . This bill is similar to AB 3309 (Burton) of 1996, which failed passage, and SB 253 (Burton) of 1997, which was vetoed by Governor Wilson. In his veto message, Governor Wilson stated "[t]here is no empirical data to indicate that health facilities workers require a higher level of protection than other employees."

4)Analysis Prepared by : William Wehrle / APPR. / (916)
319-2081

SENATE THIRD READING
SB 97 (Burton)
As Amended June 8, 1999
Majority vote

SENATE VOTE :24-14 _

HEALTH 9-4 APPROPRIATIONS 11-7

Ayes:	Gallegos, Corbett, Firebaugh, Kuehl, Steinberg, Thomson, Vincent, Wayne, Wildman	Ayes:	Migden, Kuehl, Papan, Romero, Shelley, Steinberg, Thomson, Wesson, Wiggins, Wright, Corbett
Nays:	Strickland, Aanestad, Bates, Zettel	Nays:	Brewer, Ackerman, Ashburn, Campbell, Maldonado, Runner, Briggs

SUMMARY : Prohibits a health facility from discriminating against a patient or employee who presents a grievance or cooperates in any investigation against that facility. Specifically, this bill :

- 1) Makes findings and declarations to encourage patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions.
- 2) Prohibits any health facility from retaliating or discriminating against an employee or patient who has filed a grievance or provided information to a governmental entity relating to the care, services, or conditions at that facility. Requires a health facility that violates this provision to be subject to a civil penalty of not more than \$25,000 and establishes a misdemeanor penalty of up to \$20,000 for any person who willfully violates the provisions in this bill.
- 3) Establishes a "rebuttable presumption" that any discriminatory treatment taken by a health facility is retaliatory if it occurs against a patient within 180 days of filing a grievance or complaint or an employee within 120 days of filing a grievance or complaint.

4) Defines "discriminatory treatment of an employee" to include

discharge, demotion, suspension, any other unfavorable changes in employment, or the threat of these actions.

- 5) Requires that an employee who has been discriminated against, pursuant to this bill, is entitled to reinstatement, reimbursement for lost wages and benefits, and legal costs associated with pursuing the case.
- 6) Exempts an inmate of a correctional facility of the Department of the Youth Authority or the Department of Corrections, or an inmate housed in a local detention facility, as specified, from the provisions of this bill. Exempts a long-term health care facility, whose employees and patients are subject to similar protections, from the provisions of this bill.
- 7) Provides that nothing in this bill abrogates or limits any other theory of liability or remedy otherwise available in law.

EXISTING LAW :

- 1) Prohibits an employer from retaliating against an employee who provides information to a government or law enforcement agency about the employer's violation of law or regulation. A violation is considered a misdemeanor and is punishable by imprisonment in the county jail not to exceed one year, a fine not to exceed \$1,000, or both. A corporation may be fined up to \$5,000.
- 2) Prohibits a long-term health care facility from retaliating or discriminating against an employee or patient who has filed a grievance, or provided information to a governmental entity, relating to care, services, or conditions at that facility. A violation is subject to a civil penalty of not more than \$10,000.

FISCAL EFFECT : According to the Assembly Appropriations Committee analysis, this bill could result in additional civil penalties against the state, probably minor, to the extent proceedings are brought under this bill against the state regarding employees of state hospitals, developmental centers, and hospitals operated by the University of California.

COMMENTS : California Nurses Association (CNA) is the sponsor of

this bill. The author states this bill would simply extend existing protections for retaliatory actions by long-term health care facilities to the employees and patients of acute care facilities. CNA argues that employees and patients report unsafe practices and patient endangerment after they have pursued complaints with hospital administrators and that without protection, employees must weigh whether or not they should sacrifice their jobs and patients must weigh whether their health care services will be compromised. Further, nurses are required by statute to serve as patient advocates. If a nurse

believes that a hospital situation will jeopardize patients, the nurse is required to act. In some cases, nurses must choose between losing their job or losing their license. The Department of Health Services (DHS) reports an annual average of 11,000 complaints against all types of health facilities, including long-term care facilities and hospitals, an estimated 7,000 of those complaints are against long-term care facilities.

DHS indicates that they receive a number of retaliation complaints against health care facilities, other than long-term care facilities, but without statutory authority DHS cannot follow-up on these types of complaints.

The American Association of Retired Persons (AARP) supports this bill stating that health plans should be prohibited from retaliating against providers or health care workers if they, reasonably and in good faith, report quality concerns to appropriate governmental agencies or the appropriate management official. Health Access California writes that this bill provides important consumer protections by allowing whistle-blowers in hospitals to speak out about conditions without fear of retribution.

The California Healthcare Association (CHA) opposes this bill, stating that retaliation against a whistle-blower is already a crime under the Labor Code and that existing protections are already very broad. CHA additionally states that by creating the legal presumption that a hospital is guilty of retaliation unless it can prove itself innocent, this bill tilts the process in favor of one of the parties in the dispute and as such this bill will encourage incompetent employees to file frivolous complaints. Kaiser Permanente also opposes this bill, stating that it will significantly increase the number of legal actions against health benefit providers such as Kaiser, resulting in a dramatic increase in the cost of legal defense. Kaiser also states that the Labor Code prohibits employers from retaliating against employees and that DHS is required, under existing law,

to keep confidential the identities of employees who file complaints against hospitals.

Analysis Prepared by : Ellen McCormick / HEALTH / (916) 319-2097

SENATE RULES COMMITTEE	SB 97
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-6614	Fax: (916)
327-4478	

UNFINISHED BUSINESS

Bill No: SB 97
 Author: Burton (D), et al
 Amended: 6/8/99
 Vote: 21

SENATE HEALTH & HUMAN SERV. COMMITTEE : 6-2, 3/10/99
 AYES: Escutia, Figueroa, Hughes, Polanco, Solis,
 Vasconcellos
 NOES: Morrow, Mountjoy
 NOT VOTING: Haynes

SENATE APPROPRIATIONS COMMITTEE : 8-0, 4/19/99
 AYES: Johnston, Alpert, Bowen, Burton, Karnette, Mountjoy,
 Perata, Vasconcellos
 NOT VOTING: Escutia, Johnson, Kelley, Leslie, McPherson

SENATE FLOOR : 24-14, 5/10/99
 AYES: Alarcon, Alpert, Baca, Bowen, Burton, Chesbro,
 Costa, Dunn, Escutia, Figueroa, Hayden, Hughes, Johnston,
 Karnette, Murray, O'Connell, Ortiz, Peace, Perata,
 Polanco, Schiff, Sher, Speier, Vasconcellos
 NOES: Brulte, Haynes, Johannessen, Johnson, Kelley,
 Knight, Leslie, Lewis, Monteith, Morrow, Mountjoy,
 Poochigian, Rainey, Wright
 NOT VOTING: McPherson, Solis

ASSEMBLY FLOOR : 46-26, 6/28/99 - See last page for vote

SUBJECT : Health facilities: retaliation against
 employee or patient with grievance

SOURCE : California Nurses Association

CONTINUED

DIGEST : This bill prohibits a health facility from discriminating against a patient or employee who presents a grievance or cooperates in any investigation against that facility.

Assembly Amendments add inmates housed in local detention facilities including a county jail or a juvenile hall, juvenile camp, or other juvenile detention facility to those exempted from the provisions of the bill.

ANALYSIS :

Existing law prohibits:

1. An employer from retaliating against an employee who provides information to a government or law enforcement agency about the employer's violation of law or regulation. A violation is considered a misdemeanor and is punishable by (a) imprisonment in the county jail not to exceed one year, (b) a fine not to exceed \$1,000, or (c) both. A corporation may be fined up to \$5,000.
2. A long-term health care facility from retaliating or discriminating against an employee or patient, who has filed a grievance, or provided information to a governmental entity relating to care, services, or conditions at that facility. A violation is subject to a civil penalty of not more than \$10,000.

This bill:

1. Makes findings and declarations to encourage patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions.
2. Prohibits any health facility from retaliating or discriminating against an employee or patient, who has filed a grievance or provided information to a governmental entity relating to the care, services, or conditions at that facility.

3. Requires a health facility that violates this provision to be subject to a civil penalty of not more than \$25,000.
4. Establishes a "rebuttable presumption" that any discriminatory treatment taken by a health facility is retaliatory if it occurs against (a) a patient within 180 days of his/her filing a grievance or complaint or (b) an employee within 120 days of his/her filing a grievance or complaint.

5. Defines "discriminatory treatment of an employee" to include discharge, demotion, suspension, any other unfavorable changes in employment, or the threat of these actions.
6. Establishes a misdemeanor penalty of up to \$20,000 for any person who willfully violates the provisions in this bill.
7. Requires that an employee who has been discriminated against, pursuant to this bill, is entitled to reinstatement, reimbursement for lost wages and benefits, and legal costs associated with pursuing the case.
8. Exempts from the above provisions (a) an inmate of either a Department of Youth Authority or Department of Corrections' correctional facility or to an inmate housed in a local detention facility and (b) a long-term health care facility that is subject to existing law.
9. Provides that nothing in the bill abrogates or limits any other theory of liability or remedy otherwise available in law.

Comments

The California Department of Health Services (DHS) reports:

1. An annual average of 11,000 complaints against all types of health facilities, including long-term care facilities and hospitals. An estimated 7,000 complaints per year are against long-term care facilities.

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2. In fiscal year 1997-98, DHS issued 1,258 citations against long-term care facilities. One of these citations was against a long-term care facility for retaliation and discrimination against an employee.
3. DHS staff indicates that they receive a number of retaliation complaints against health care facilities, other than long-term care facilities, but without statutory authority they cannot follow-up on them.

Prior legislation

AB 3309 (Burton, 1996), which failed passage in the Assembly Health Committee.

SB 253 (Burton, 1997), which was vetoed by Governor Wilson because "[t]here is no empirical data to indicate that health facilities workers require a higher level of protection than other employees." It passed the Senate 21-15 - Noes: Brulte, Haynes, Hurtt, Johannessen, Johnson, Kelley, Knight, Kopp, Leslie, Lewis, McPherson, Monteith,

Mountjoy, Rainey and Wright.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

According to Senate Appropriations Committee analysis:

Fiscal Impact (in thousands)

<u>Major Provisions</u>	<u>1998-99</u>	<u>1999-2000</u>	<u>2000-01</u>
<u>Fund</u>			
Civil penalties	unknown potential penalties		

STAFF COMMENTS:

Both state hospitals and University of California (UC) hospitals are licensed health facilities owned and operated by the state. Operating departments or UC would be responsible for paying any fines if health facility supervisors violate these provisions and the civil action

succeeds against the state.

SUPPORT : (Verified 6/28/99)

- California Nurses Association (source)
- California School Employees Association
- Congress of California Seniors
- Health Access
- Service Employees International Union (SEIU)
- AARP
- California Association of Medical Laboratory Technology
- Emergency Nurses Association of California
- Little Hoover Commission
- California Resources for Independent Living
- Engineers and Scientists of California
- Region 8 States Council of the United Food and Commercial Workers
- Hotel Employees, Restaurant Employees International Union
- California Conference of Machinists
- California Labor Federation, AFL-CIO
- Older Women's League of California
- Consumer Attorneys of California
- California Conference Board, Amalgamated Transit Union
- American Nurses Association/California
- American Federation of State, County and Municipal Employees, AFL-CIO

OPPOSITION : (Verified 6/28/99)

- California Healthcare Association
- Kaiser Permanente Medical Care Program

ARGUMENTS IN SUPPORT : Supporters argue:

1. The purpose of this bill is to extend to hospital patients and health care workers the same whistleblower protections that currently apply to long-term care facilities.
2. This bill would help protect nurses and patients who complain about possible unsafe patient care in hospitals.

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3. Retaliatory actions against patients, nurses and other health care workers are on the increase. Nurses working in hospitals and other health care facilities who report unsafe patient care or conditions put their own jobs at risk and, therefore, are afraid to speak out.
4. Existing laws are so vague and general that they do not protect patients and employees in hospitals.

ARGUMENTS IN OPPOSITION : Opponents argue:

1. Retaliation against a whistleblower is already a crime that is subject to penalties. Employees who are subjects of retaliation can go to the Department of Industrial Relations, Division of Labor Standards Enforcement or to the courts for relief.
2. "Rebuttable presumption" is bad public policy. By creating the legal presumption that a hospital is guilty of retaliation unless it can prove itself innocent, this bill tilts the process in favor of one of the parties in a dispute. Furthermore, rebuttable presumption in this bill will have an adverse impact on patient care, if swift action cannot be taken against an incompetent employee.
3. This bill encourages an incompetent employee to file a frivolous complaint against a hospital due to the protections provided in this bill.
4. This bill creates no corresponding penalties for employees who willfully or negligently misuse the process for their own purposes.

ASSEMBLY FLOOR :

AYES: Alquist, Aroner, Bock, Calderon, Cardenas, Cardoza, Corbett, Correa, Davis, Dutra, Firebaugh, Florez, Floyd, Gallegos, Havice, Hertzberg, Honda, Jackson, Keeley, Knox, Kuehl, Lempert, Leonard, Longville, Lowenthal, Machado, Mazzoni, Migden, Nakano, Papan, Reyes, Scott,

Shelley, Soto, Steinberg, Strom-Martin, Thomson,
Torlakson, Vincent, Washington, Wayne, Wesson, Wiggins,
Wildman, Wright, Villaraigosa

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NOES: Aanestad, Ackerman, Ashburn, Baldwin, Bates, Battin,
Baugh, Brewer, Briggs, Campbell, Cox, Dickerson,
Frusetta, House, Maddox, Maldonado, Margett, McClintock,
Olberg, Oller, Robert Pacheco, Pescetti, Runner,
Strickland, Thompson, Zettel
NOT VOTING: Cedillo, Cunneen, Ducheny, Granlund,
Kaloogian, Leach, Rod Pacheco, Romero

CP:sl 6/29/99 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

DECLARATION OF SERVICE

Re: *Fahlen v. Sutter Central Valley Hospitals, et al.* No. S205568

Court of Appeal No. F063023

I declare that I am over 18 years of age, and not a party to the within cause; my business address is 2831 Telegraph Avenue, Oakland, California, 94609. I served a true copy of the attached:

DR. FAHLEN'S SECOND REQUEST FOR JUDICIAL NOTICE

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Joseph M. Quinn
HANSON BRIDGETT, LLP
425 Market St., 26th flr.
San Francisco, CA 94105

Court of Appeal of California
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

The Honorable Timothy W. Salter
Department 22
Stanislaus Superior Court
801 10th Street
Modesto, CA 95353

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California Medical Association and
American Medical Association

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Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Attorney for Amici Curiae
Dignity Health and Adventist Health System/West

The envelope was then, on July 22, 2013, sealed and deposited with the U.S. Postal service for priority mail delivery. I declare under penalty of perjury that the foregoing is true and correct. Executed at Oakland, California, this July 22, 2013.


Stephen D. Schear