

## UNPAID MEDICAL INTERN IS NOT AN EMPLOYEE UNDER THE HEALTH CARE WORKER PROTECTION ACT

### EXECUTIVE SUMMARY

In *Masri v. LIRC*, 2012AP1047 (April 2, 2013), the Wisconsin Court of Appeals affirmed a decision by the Labor and Industry Review Commission ("LIRC") that Wisconsin's Health Care Worker Protection Act ("HCWPA") applies only to employees of health care facilities and that an unpaid intern is not an employee for purposes of the statute. The court reasoned that, while tangible compensation is most often necessary to establish an employer-employee relationship, there are instances when an individual has received sufficient "tangible benefits" to establish an employer-employee relationship. The benefits conferred in this case, according to the court, did not rise to that level.

### THE DECISION: *MASRI V. LIRC*

In the summer of 2008, Asma Masri was serving as an unpaid "psychologist" intern in the transplant surgery unit of a Wisconsin hospital's medical college (the "College"). Masri worked 40 hours per week and was promised health insurance and the ability to pursue grants. In November 2008, Masri met with a College official to report numerous alleged medical ethics violations she supposedly observed during her internship. Shortly after raising her concerns, the College terminated her internship. Masri filed a retaliation complaint with the Equal Rights Division of Wisconsin's Department of Workforce Development, asserting a violation of the HCWPA codified in Wis. Stat. § 146.997.

The HCWPA protects employees of a health care facility from being disciplined at work for the good faith reporting to a state agency or to an officer or supervisory employee of the health care facility of the following: (1) any potential violations of state or federal law by the health care facility or provider; or (2) any situation where care is provided in a manner that violates state or federal standards or laws or recognized clinical or ethical standards. An employer who violates this section faces liability for an act of "employment discrimination" under the Wisconsin Fair Employment Act.

After an investigation, the Equal Rights Division ("ERD") dismissed Masri's complaint. The ERD concluded that Masri was not an employee protected under the statutes. As a result, the ERD did not have jurisdiction to hear the claim. An administrative law judge ("ALJ") subsequently affirmed this determination. Masri then filed a petition for review with the Labor and Industry Review Commission ("LIRC"), which affirmed the ALJ's decision in August 2011. In September 2011, Masri filed a petition for judicial review in Milwaukee County Circuit Court. The Circuit Court affirmed LIRC's decision, and Masri appealed.

In *Masri v. LIRC*, 2012AP1047 (April 2, 2013), the Wisconsin Court of Appeals affirmed the Circuit Court's decision by a 2:1 majority. The Court of Appeals held that LIRC's conclusion that the HCWPA applies only to an "employee" was consistent with the plain language of the statute and that LIRC's classification of Masri as a non-employee was a consistent and reasonable interpretation of the statute. According to the court, while the HCWPA does not expressly define the term "employee," other courts have consistently found that "some sort of compensation is essential to an employee/employer relationship" when the term has been undefined in other circumstances. Furthermore, the court noted that LIRC "has consistently looked to how an individual is compensated" when determining whether an individual is an employee, "requiring that there be some tangible benefit received apart from salary." Neither LIRC nor the Court of Appeals was persuaded by Masri's contentions that in spite of being an unpaid intern, her "all access security badge . . . office space, support staff, and parking" were tangible benefits sufficient to establish employee status.

In a lengthy and pointed dissent, Judge Ralph Adam Fine noted that the "dominant" purpose of the HCWPA was to protect the people of Wisconsin from health care facilities that "us[e] retaliation or the threat of retaliation in order to keep hidden their dirty linen." Concluding that "paid" work should not serve as a prerequisite to an "employment relationship," Judge Fine reasoned that it contravened the purpose of the HCWPA to restrict actionable claims only to those who received "tangible compensation."

The decision was recommended for publication.

### CONCLUSION/PRACTICAL TAKEAWAYS

This case reaffirms that health care facilities must exercise extreme caution when responding to claims that the organization has violated

state or federal law or recognized clinical standards. Furthermore, the decision serves as a pointed reminder that even an "unpaid" intern may qualify as an employee under the HCWPA, and the mishandling of a report of alleged violations of state or federal law or clinical standards may expose the facility to damages under Wisconsin's Fair Employment Act.

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