

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARY McGOWAN, M.D.,	:	Case No. <u>15-1756</u>
	:	
Plaintiff-Appellee/Cross-Appellant,	:	On Appeal from the Hamilton County Court of Appeals First Appellate District
	:	
vs.	:	
	:	
MEDPACE, INC.,	:	Appellate Case No. C-140634, C-140652
	:	
Defendant-Appellant/Cross-Appellee.	:	Common Pleas Case No. A-1108336
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF
 PLAINTIFF-APPELLEE/CROSS-APPELLANT
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I. EXPLANATION OF WHY THIS CASE PRESENTS AN ISSUE OF PUBLIC AND GREAT GENERAL IMPORTANCE.

This case presents two important legal issues which challenge the well-established standards for meeting the clarity element of a claim for wrongful discharge in violation of public policy developed by this Court's jurisprudence over the last twenty-five years in *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), and its progeny. First, this case raises the question of whether the source of a sufficiently clear public policy must impose an affirmative duty on an employee to report a violation; expressly prohibit the employer from retaliating against an employee who reports a violation; or protect the public's health and safety in order to satisfy the clarity element of a *Greeley* claim. Second, this case presents a question of whether R.C. 2913.47 and the Health Insurance Portability and Accountability Act, 29 U.S.C. § 1181 et. seq. ("HIPAA") manifest sufficiently clear public policies to satisfy the clarity element of a *Greeley* claim.

The answers to both questions implicate the rights of at-will employees throughout Ohio who are afforded protection from wrongful termination for good faith reporting of violations of R.C. 2913.47 and HIPAA, except in the First District where its new criteria for the clarity element leave employees subject to discharge or retaliation by unscrupulous employers who have incentive to prevent such violations from coming to light. This Court's jurisprudence has never required that the public policy source on which a *Greeley* claim is based parallel the employee reporting and/or employer anti-retaliation provisions of the Whistleblower statute, nor that the public policy regulate public health and safety. In fact, the treatise and analysis adopted by this Court when it articulated the four elements of a *Greeley* claim expressly rejected this narrow approach. See *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 652 N.E.2d 653 (1995) (adopting wrongful discharge claim analysis in H. Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 588 Univ. Cin. L. Rev. 397, 407-08). This Court's *Greeley* claim precedents, as well

as common sense, clearly argue against depriving employees in the First District of rights and protections afforded other employees in the state, based on the First District's inconsistent and contradictory application of the law.

Under this Court's jurisprudence, the clarity element is met when the court finds that a clear public policy exists and is manifested in a state or federal constitution, statute or administrative regulation, or in the common law. *Painter v. Graley*, 70 Ohio St.3d 377, 639 N.E.2d 51 (1994), paragraph three of the syllabus. The clarity element requires neither that the public policy derive from a statute nor that the source of the public policy impose an affirmative duty on an employee to report a violation; expressly prohibit the employer from retaliating against an employee who reports a violation; or protect the public's health and safety. *Id.* While these employment-related and public health and safety factors may inform a court's analysis of whether a particular public policy is sufficiently clear in some circumstances, under this Court's precedents they cannot form the basis for a bright-line test to discount well-recognized sources of clear public policy from consideration as the basis for a *Greeley* claim.

In this case, the practical effect of applying the First District's criteria articulated in *Dean v. Consol. Equities Realty #3, LLC*, 182 Ohio App.3d 725, 2009-Ohio-2480, 914 N.E.2d 1109 (1st Dist.), is to allow the firing of an at-will employee who acted in good faith to report violations of HIPAA and the Ohio insurance fraud statute and to preclude a *Greeley* claim based on these violations. When faced with similar violations of these statutory provisions, no other court of appeals has adopted any new clarity test to replace or supplant the standard established by this Court. Rather, other appellate courts have applied the clarity test as articulated by this Court and have afforded protections against wrongful discharge under *Greeley* and its progeny based on these same sources of clear public policy. See *Anders v. Specialty Chem. Resources, Inc.*, 121 Ohio App.3d 348, 700 N.E.2d 39 (8th Dist. 1997) (clarity element met based on R.C. 2913.47 where employee refused

to commit insurance fraud by overstating an insurance damages claim following a fire at employer's facility); and *Wallace v. Mantych Metal-Working*, 189 Ohio App.3d 25, 2010-Ohio-3765, 937 N.E.2d 174 (2d Dist.) (clarity element satisfied based on HIPAA's clear public policy favoring patient privacy and confidentiality of medical records). *See also Alexander v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 95727, 2012-Ohio-1737 (holding that nothing requires the source of public policy to be employment-related or otherwise set forth an employer's responsibilities or an employee's rights to meet the clarity element).

This Court has acknowledged that “[i]t is our responsibility to determine when public-policy exceptions must be recognized and to set the boundaries of such exceptions.” *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, ¶ 8 (citing *Kulch v. Structural Fibers Inc.*, 78 Ohio St.3d 134, 161, 677 N.E.2d 308 (1997)). In this case, the First District has set its own boundaries for the clarity element which contravene and conflict with the boundaries established by this Court. The *Dean* criteria allow employers to discharge employees for objecting to conduct constituting insurance fraud or HIPAA violations, and grant employers incentive to discourage the reporting of such violations by threatening termination or other forms of retaliation. At a time when healthcare facilities are facing increasing scrutiny for HIPAA compliance and risk fines or other sanctions for failure to comply, and when spiraling health care costs, including prescription drug costs, are of great concern to employees, employers, and the public at-large, the First District's decision here encourages unscrupulous employers to discharge or otherwise retaliate against those employees who make good faith reports of fraudulent prescription writing practices or HIPAA violations. This Court should ensure uniformity in the application of its precedent and specifically in the analysis of what constitutes a sufficiently clear public policy to meet the clarity element of a *Greeley* claim so that at-will employees throughout Ohio are afforded the same protections against wrongful discharge in violation of public policy regardless of the appellate

district in which they assert such a claim.

II. STATEMENT OF THE CASE AND FACTS.

A. Procedural Posture.

Dr. Mary McGowan (“McGowan”) sued Medpace on October 19, 2011 for, among other claims, wrongful discharge in violation of Ohio public policy. (T.d. 2). The case was tried to a jury from September 8-18, 2014. Medpace moved for a directed verdict at the close of McGowan’s case, and again at the close of all the evidence, and the trial court denied the motions. (T.d. 78; T.p. 771:21-795:20, 1407:16-1408:4). The jury returned a unanimous verdict in McGowan’s favor on her wrongful discharge claim. (T.d. 95).

On October 24, 2014, Medpace filed a motion for judgment notwithstanding the verdict, and alternatively for a new trial (T.d. 98). McGowan filed her own motion for judgment notwithstanding the verdict, and alternatively for a new trial, arguing that the jury had erred in its backpay computation. (T.d. 97). The trial court denied both motions. (T.d. 107). On November 6, 2014, Medpace filed a notice of appeal. (T.d. 103). On November 7, 2014, McGowan filed a notice of appeal based on the jury’s miscalculation of her backpay damages. (T.d. 104). On September 16, 2015, the First Appellate District issued its decision reversing and remanding the case. (Exhibit A, attached).

B. Factual Background.

McGowan, one of the most highly-regarded experts in the treatment of cholesterol disorders in the country, was hired late 2010 by Medpace as Executive Director of Medpace I-IV Clinics, including oversight of the Metabolic and Atherosclerosis Research Center (“MARC”), the Clinical Pharmacology Unit (“CPU”), and Evan Stein’s private practice, the Cholesterol Treatment Center (“CTC”). (T.p. 293:7-302:6 and McGowan Ex. 11).

Upon her arrival at Medpace in mid-2011, McGowan discovered serious issues in the CTC

and MARC (which shared the same small staff). (T.p. 334:1-342:25). MARC/CTC staff members asked her to write prescriptions as Stein had; namely for twice a patient's daily dose but orally instruct the patient to split the pill, which would allow the patient to receive twice the total amount of medicine for a single copay. (T.p. 334:12-336:19, 377:20-379:13). The patient chart would reflect the correct prescription; the prescription going to the pharmacy and claims going to Medicaid and the insurance company would not. (*Id.*)

McGowan also witnessed violations of HIPAA, including exposure of patients' records as their charts were left open on a table outside patients' rooms (T.p. 341:4-342:19), and combining CTC and MARC charts (which violated HIPAA because information about patients' personal lives irrelevant to MARC studies was nonetheless included in MARC files). (T.p. 330:2-332:17).

On July 22, 2011, McGowan met with the MARC/CTC staff to explain that she had been repeatedly asked to sign unlawful/unsafe prescriptions, and to discuss the HIPAA violations. (T.p. 334:3-345:14). **Before** the meeting, McGowan confirmed with Kate Hannah, a health care attorney, that McGowan's concerns were valid and the challenged prescription writing practices constituted insurance fraud. (T.p. 337:19-338:19, 468:16-470:23).

By July 25, Medpace co-founder Stein had learned of the July 22 MARC/CTC meeting, and on July 27, he sent a group email to MARC/CTC staff and copied McGowan to announce that she had no further responsibility for MARC or the CTC. (T.p. 348:1-24 and McGowan Ex. 26, 35).

The Medpace Employee Handbook required McGowan to report Stein's prescription and HIPAA-violative charting practices, and prohibits retaliation for reporting unethical or unlawful activities. (T.p. 350:11-353:17 and McGowan Ex. 5 at 5-7). Consistent with these directives for reporting suspected violations, McGowan met with Medpace General Counsel Kay Nolen, HR Manager Tiffany Khodadad, and CEO August Troendle on July 27, 2011 to address Stein's unlawful prescription practices and HIPAA violations, and his subsequent acts of retaliation. (T.p. 349:5-

350:11). McGowan made clear that her concerns were focused on ensuring that the patient chart and prescription matched (thus avoiding both the insurance fraud and patient safety issues), and correcting the HIPAA violations. (T.p. 334:3-345:14, 467:24-470:23, 593:8-594:8). Following Nolen's suggestion, McGowan contacted the Ohio Board of Pharmacy to confirm that Stein's prescription practices constituted insurance fraud. (T.p. 361:16-21, 985:22-986-2). McGowan spoke with Dr. Whittington and three lawyers at the Ohio Board of Pharmacy who confirmed that McGowan's concerns were valid. (T.p. 363:25-366:23, 1021:15-1022:22).

On August 17, 2011, Troendle asked to meet with McGowan and she repeated her concern that Stein's prescription practices jeopardized patient safety and constituted insurance fraud, and that his charting practices constituted HIPAA violations. (T.p. 474:16-475:1 and McGowan Ex. 44 at 2). McGowan told Troendle that both Dr. Whittington and three lawyers in his office had confirmed her concerns that Stein's prescription practices constituted insurance fraud. (*Id.*) McGowan also told Troendle that a private health care lawyer had agreed that Stein's prescription practice constituted insurance fraud. (*Id.*) Troendle fired McGowan the following day, claiming that it was "for cause" by falsely alleging that McGowan was confrontational when she protested Troendle's misstatements about what he said in the July 27, 2011 meeting. (T.p. 395:5-396:7).

III. ARGUMENT.

Proposition of Law I: Under this Court's Jurisprudence, a *Greeley* Claim Does Not Derive Solely from Statutes or Other Sources That Impose an Affirmative Duty on an Employee to Report a Violation, Prohibit an Employer from Retaliating Against an Employee Who Reports a Violation, or Protect Public Health and Safety.

This Court first recognized a public policy exception to Ohio's employment-at-will doctrine 25 years ago when it held that an at-will employee may not be discharged or disciplined for reasons that violate a statute or public policy. *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), paragraph two of syllabus. This Court later made clear that the source of public policy sufficient to establish a *Greeley* claim is not limited to statutory authority:

“‘[c]lear public policy’ sufficient to justify an exception to the employment-at-will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments, but may be discerned as a matter of law based on other sources, such as the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law.” *Painter v. Graley* (1994), 70 Ohio St.3d 377, 639 N.E.2d 51, paragraph three of the syllabus.

Since that time, this Court has repeatedly set forth the four elements of a public policy wrongful discharge claim: (1) a clear public policy exists and is manifested in a state or federal constitution, in statute or administrative regulation, or in the common law (the clarity element), (2) dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the jeopardy element), (3) the plaintiff’s dismissal was motivated by conduct related to the public policy (the causation element), and (4) the employer lacked an overriding legitimate business justification for the dismissal (the overriding-justification element). *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, at ¶ 9 (quoting *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 652 N.E.2d 653 (1995)). The clarity and jeopardy elements are questions of law and policy to be determined by the court, while the causation and overriding justification elements are questions of fact for the jury. *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 151, 1997-Ohio-219, 677 N.E.2d 308 (citing *Collins* at 70).

In this case, the First Appellate District relied on two of its prior rulings to impose new criteria for establishing the clarity element of a *Greeley* claim. (Ex. A, Op. at pp. 8-9, ¶¶ 17-19) (discussing *Hale v. Volunteers of Am.*, 158 Ohio App.3d 415, 2004-Ohio-4508, 816 N.E.2d 259 (1st Dist.) and *Dean v. Consol. Equities Realty #3, LLC*, 182 Ohio App.3d 725, 2009-Ohio-2480, 914 N.E.2d 1109 (1st Dist.)). The court expressly held that: “[i]n a claim for wrongful discharge in violation of public policy, an employee satisfies the clarity element by establishing that a clear public policy existed, and that the public policy was one that imposed an affirmative duty on an employee

to report a violation, that prohibited an employer from retaliating against an employee who had reported a violation, or that protected the public's health and safety." (Ex. A, Op. at p. 11, ¶ 23). It concluded that even though R.C. 2913.47 and HIPAA "arguably establish[] a valid public policy" against insurance fraud and in favor of patient privacy rights, respectively, McGowan failed to satisfy the clarity element of a *Greeley* claim because neither statute places an affirmative duty on an employee to report a violation, prohibits an employer from retaliating against an employee who has reported a violation, or protects the public's health and safety. (Ex. A, Op. at pp. 12-13, ¶¶ 25-27).

This Court has never required such parallelism with the reporting and retaliation provisions of the Whistleblower statute for cases that are based on a clear public policy separate from that statute. See *Kulch*, 78 Ohio St.3d at paragraph three of the syllabus; *Pytlinski v. Brocar Prod. Inc.*, 94 Ohio St.3d 77, 760 N.E.2d 385 (2002). In fact, when this Court enunciated the elements of a wrongful discharge claim in *Collins*, it adopted the analysis set forth in the now seminal law review article by Villanova Law Professor H. Perritt which considered and rejected narrower formulations of a wrongful discharge claim, including the parallelism approach imposed in this case by the court below. See *Collins*, 73 Ohio St.3d at 69-70, 652 N.E.2d 653 (quoting *Painter*, 70 Ohio St.3d at 384, 639 N.E.2d at 57, n.8 and adopting H. Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 588 Univ. Cin. L. Rev. 397, 407-08). The *Kulch* Court later affirmed the Court's adoption of the Perritt analysis and its rejection of the parallelism approach. *Kulch*, 78 Ohio St.3d at 150-52. *Kulch* applied the Perritt analysis of the clarity element which "mandates consideration of the question whether clear public policy is manifested in a state or federal constitution, statute or administrative regulation, or in the common law," **not** whether the source of the clear public policy contains employee reporting requirements, employer anti-retaliation provisions, or public health and safety standards. *Id.* (emphasis added).

Indeed, if the First District's *Dean* criteria were required to establish the clarity element, the

very public policy claim recognized by this Court in *Collins* would fail to satisfy the *Dean* standard. In *Collins*, this Court recognized a *Greeley* claim based on Ohio's public policy against sexual harassment derived from several criminal statutes prohibiting sexual imposition, offensive sexual contact, and prostitution and procuring prostitution. 73 Ohio St.3d at 70-71, 652 N.E.2d 653. This Court found the public policy against offensive sexual conduct and sexual harassment evinced by these criminal statutes sufficient to satisfy the clarity element notwithstanding the fact that the statutes do not bar employer retaliation, impose an employee reporting duty, or address public health and safety.

Similarly, in *Sabo v. Schott*, 70 Ohio St.3d 527, 1994-Ohio-249, 639 N.E.2d 783 (1994), this Court reversed the First District for an improper application of a public policy claim based on an employee's refusal to provide false testimony at the behest of his employer. The Court held that "[p]laintiff's allegation that he was fired as a result of having testified truthfully, albeit unfavorably to the defendants, if proven to be true, would constitute conduct on the part of the defendants which violates the public policy of this state." *Id.* As the *Sabo* Court recognized, and as common sense dictates, the state's perjury law manifests a sufficiently clear public policy against giving false testimony to satisfy the clarity element, even though the perjury statute does not contain an anti-retaliation provision, nor is it a law regulating public health and safety. To hold otherwise would permit the discharge of honest employees who testify truthfully as required by law, and reward the unscrupulous employer who threatens termination or other forms of retaliation against employees who do not testify as their employer directs. This Court's jurisprudence under *Greeley* and its progeny recognizes that the law does not permit such unfettered application of the employment-at-will doctrine in contravention of a sufficiently clear public policy. Consequently, at no time in the last twenty years has this Court endorsed or adopted the rigid criteria for determining the clarity element espoused by the First Appellate District.

As this Court noted in *Dohme v. Eurand Am. Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, “clear public policies” have been recognized in a variety of circumstances, including preventing retaliatory employment actions against workers injured on the job, assisting investigations, permitting OSHA complaints, ensuring public safety, and eliminating unsafe working conditions. *Dohme* at ¶ 18 (citing with approval 2 Perritt, Employee Dismissal Law and Practice (5th Ed. 2006) 7-32 to 7-32.8, Section 7.05 (A)). Thus, the Eighth Appellate District has found a sufficiently clear public policy aimed at preventing defective products from being released into stream of commerce based on various sources including the Uniform Commercial Code and the Ohio Products Liability Act. *Zajc v. Hycomp*, 172 Ohio App.3d 117, 2007-Ohio-2637, 873 N.E.2d 337, ¶¶ 25-26 (8th Dist.). Moreover, as the *Zajc* court noted, “the wrongful discharge tort is not limited to situations in which the discharge violates a statute,” nor must the cited source of public policy prohibit discharge *per se*. *Zajc* at ¶¶ 27-28 (citing *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526). See also *Alexander v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 95727, 2012-Ohio-1737, ¶ 36 (relying on *Dohme*, court explicitly rejects argument that the clarity element cannot be satisfied unless the cited statute is employment related or otherwise sets forth an employer’s responsibilities and/or employee’s rights).

Ohio courts have routinely recognized *Greeley* claims based on alleged violations of criminal statutes and other regulatory sources. In *McJennett v. Lake Waynoka Property Owners*, 12th Dist. Brown Co. NO. CA2013-05-006, 2013-Ohio-5767, the appellate court held that: “[t]he Ninth District has recognized that ‘a clear public policy does exist in favor of reporting crimes and preventing the escalation of crimes,’” including the reporting of potential crimes that occur at the workplace. *McJennett* at § 15. Similarly, in *McKnight v. Goodwill Industries of Akron, Inc.*, 9th Dist. Lorain No. 99CA007504, 2000 WL 1257810, *6 (Sept. 6, 2000), the court found a clear public policy in favor of reporting potential crimes, such as aggravated menacing, and threats of violence by one co-

worker against another sufficient to establish the clarity element of a *Greeley* claim. In fact, the *McKnight* court noted that applying the employee reporting and employer correction provisions of the Whistleblower statute to the case would produce an absurd result and would discourage employees from reporting threatening and violent behavior to law enforcement agencies. *Id.* at * 5. See also *Bailey v. Priyanka Inc.*, 9th Dist. Summit No. 20437, 2001–Ohio–1410 (recognizing Ohio’s strong public policy favoring reporting criminal activity and cooperating with law enforcement officials based on various criminal statutes); *Armstrong v. Trans–Service Logistics, Inc.*, 5th Dist. Coshocton No. 04CA015, 2005–Ohio–2723 (finding that federal and state policies favoring reporting violations of food and drug regulations is so great as to establish clear public policy and that the discharge of an employee for reporting such violations would defeat this policy); *Avery v. Joint Township Dist. Mem. Hosp.*, 286 Fed. Appx. 256, 262 (6th Cir. 2008) (clarity element established based on regulations and “abundance of authority prohibiting falsification of medical records.”).

These cases uniformly hold that the clarity element of a claim for wrongful discharge in violation of public policy is met when a plaintiff articulates a clear public policy based on citation to specific provisions in the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law. They do not require that the source of the public policy be employment-related or regulate public health and safety. The First District’s decision in this case undermines this uniformity, leaving at-will employees within the First District with less protection against wrongful termination in violation of clear public policy than those in the rest of the State.

Proposition of Law II: The Public Policies Manifested by R.C. 2913.47 and HIPAA Are Sufficiently Clear to Satisfy the Clarity Element of a *Greeley* Claim.

McGowan was terminated from Medpace in retaliation for her good faith reports of conduct which violated R.C. 2913.47 prohibiting false and fraudulent reports to insurers and federal law safeguarding patient health and privacy rights under HIPAA, and for refusing to continue the illegal practices about which she complained. McGowan articulated R.C. 2913.47 and HIPAA as two

sources of clear public policy, among others, directly implicated by the concerns she raised at Medpace.

R.C. 2913.47 establishes a clear public policy designed to prevent, deter, and punish persons who commit insurance fraud.¹ HIPAA's patient privacy requirements seek to protect, not simply regulate, patient privacy because disclosure of the confidential information contained in patient documents causes threats or hazards to the public's health, safety, and privacy.² As other Courts have held, both R.C. 2913.47 and HIPAA are sources of sufficiently clear public policy to satisfy the clarity element of a *Greeley* claim. *Anders v. Specialty Chem. Resources, Inc.*, 121 Ohio App.3d 348, 700 N.E.2d 39 (8th Dist. 1997); *Wallace v. Mantych Metal-Working* (2d Dist.), 189 Ohio App.3d 25, 2010-Ohio-3765, 937 N.E.2d 177, ¶¶ 42-45.

In *Anders*, the Eighth District recognized a public policy wrongful discharge claim by an employee who was discharged for refusing to inflate damages claims resulting from a fire at his employer's facility. 121 Ohio App.3d at 358-59, 700 N.E.2d 39. The *Anders* court held that a claim

¹ The statute provides: No person, with purpose to defraud or *knowing that the person is facilitating a fraud*, shall . . . : (1) Present to, or cause to be presented to, an insurer any written or oral statement that is part of, or in support of, an application for insurance, a claim for payment pursuant to a policy, or a claim for any other benefit pursuant to a policy, knowing that the statement, or any part of the statement, is false or deceptive; (2) Assist, aid, abet, solicit, procure, or conspire with another to prepare or make any written or oral statement that is intended to be presented to an insurer as part of, or in support of, an application for insurance, a claim for payment pursuant to a policy, or a claim for any other benefit pursuant to a policy, knowing that the statement, or any part of the statement, is false or deceptive. R.C. 2913.47(B) (emphasis added).

² HIPAA was enacted to "combat waste, fraud, and abuse in health insurance and health care delivery ... and other purposes." Pub. L. No. 104-191, 110 Stat. 1936 (1996). As explained in the House Report, "safeguards" must be put in place when managing health information in order to "(1) ensure the integrity and confidentiality of the information, [and] (2) protect against any reasonably anticipated threats or hazards to the security or integrity of the information and the unauthorized uses or disclosures of the information[.]" H.R. REP. NO. 104-496, 100, reprinted in 1996 U.S.C.C.A.N. 1865, 1901 (emphasis added).

based on an employee's refusal to participate in conduct which arguably violates R.C. 2913.47 clearly falls within the scope of wrongful discharge sufficient to establish a *Greeley* claim. *Id.* at 121 (citing *Collins*, 73 Ohio St.3d at 71) (even where "no actual crime" has been committed, "there is nevertheless a violation of public policy to compel an employee to forego his or her legal protections or to do an act ordinarily proscribed by law."). Like the *Anders* plaintiff, McGowan complained about insurance fraud, refused to engage in the fraudulent practice, and directed her subordinates at Medpace to cease such practices. Yet unlike the *Anders* plaintiff, McGowan has been left unprotected from a wrongful discharge imposed because of her good faith efforts to comply with the law, to report alleged fraudulent prescription writing practices, to safeguard patient privacy and confidentiality and to prevent further violations of R.C. 2913.47 and HIPAA.

It is beyond dispute that Ohio public policy strongly favors the privacy of patient medical records and personal information and encourages the confidentiality of those records. This Court has recognized the fundamental public policy in favor of patient confidentiality, and has likewise recognized that HIPAA evinces a clear public policy favoring the confidentiality of medical records and other personal information contained in patient medical files. *See Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 715 N.E.2d 518 (1999) (breach of patient confidentiality is a "palpable wrong."); *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153, ¶ 9 (In general, a person's medical records are confidential and numerous state and federal laws, including HIPAA, recognize and protect an individual's interest in ensuring that his or her medical information remains so.).

In *Wallace v. Mantych Metal-Working*, 189 Ohio App. 3d 25, 2010-Ohio-3765, 937 N.E.2d 177, ¶¶ 42-45 (2d Dist.), the Second Appellate District considered the question of whether HIPAA evinces "a clear public policy favoring the confidentiality and privacy of medical records manifest in the federal [statute]." *Wallace* at ¶ 41. Applying this Court's prior decisions in *Hageman* and

Biddle, the *Wallace* court held that “such a public policy clearly exists and is manifest in HIPAA, among other places.” *Id.* at ¶ 42. *See also Guardo v. Univ. Hosp. Med. Ctr.*, 2015 WL 1774374, 2015-Ohio-1492, ¶ 27 (11th Dist.) (where employee violated the general HIPAA prohibition against disclosure of confidential patient information, court held that “under normal circumstances, a violation of the general HIPAA prohibition is an act in contravention of public policy.”).

As Judge Hendon noted in her dissent in this case, “[t]he disclosure of a patient’s confidential medical information can have far-reaching effect, and . . . patient-privacy rights directly implicate the public’s health and safety. For this reason, I would conclude that McGowan satisfied the clarity element of her claim for wrongful discharge in violation of public policy. . . .” (Ex. A, Op. at 14). Nonetheless, the First District flatly rejected the public policy manifested by HIPAA as a valid basis for any wrongful discharge claim: “HIPAA manifests an important and useful public policy, but the protection of patient privacy is not the type of public policy contemplated by *Hale and Dean*.” (Ex. A, Op. at 13, ¶ 26). The First District’s use of the narrow *Dean* criteria has dismantled the uniform application of precedent established by this Court and imposed criteria for establishing the clarity element which effectively preclude *Greeley* claims based on HIPAA privacy violations regardless of the circumstances.

IV. CONCLUSION.

This Court’s jurisprudence dictates that employers cannot require at-will employees to forego their legal rights or to commit illegal acts, such as insurance fraud or HIPAA privacy violations, as a condition of employment. Under the lower court’s decision, an at-will employee in the First District who, in good faith, reports suspected insurance fraud or HIPAA patient privacy and confidentiality violations, is no longer protected from termination or retaliation by her employer for her compliance with and refusal to violate these statutes. The First District’s decision leaves such at-will employees subject to the retaliatory whims of unscrupulous employers who have every reason

to try and shield themselves from the legal and regulatory consequences of these violations. Application of the *Dean* criteria gives such an employer incentive to discourage the reporting of such violations by threatening termination or other forms of retaliation. This is the very type of retaliatory conduct this Court has long sought to prevent through the establishment of public policy wrongful discharge claim under *Greeley* and its progeny.

In short, using the *Dean* criteria to determine the clarity element conflicts with this Court's public policy wrongful discharge jurisprudence and will lead to situations in which the protections against wrongful discharge otherwise afforded to at-will employees throughout the state are denied to those employees bringing claims within the First District. Such a result defies common sense and contravenes the very essence of this Court's *Greeley* jurisprudence--that the right of employers to terminate employment for any cause does not include the discharge of an employee where the discharge contravenes public policy, regardless of whether the source of the public policy is employment related or regulates public health and safety. *See Greeley*, 49 Ohio St.3d at paragraph two of the syllabus. For these reasons, the Court should grant jurisdiction in this case and overrule the appellate court.

Respectfully submitted,



/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served *via* regular U.S. mail this 29th day of October, 2015, on the following:

Deborah S. Brenneman, Esq. (0062113)
George B. Musekamp, Esq. (0087060)
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312 Walnut Street, Suite 1400
Cincinnati, OH 45202

Counsel for Defendant-Appellant/Cross-Appellee, Medpace, Inc.

/s/ 

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



D111970954

MARY MCGOWAN, M.D.,	:	APPEAL NOS. C-140634
	:	C-140652
Plaintiff-Appellee/Cross-	:	TRIAL NO. A-1108336
Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
	:	
MEDPACE, INC.,	:	
	:	
Defendant-Appellant/Cross-	:	
Appellee.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Opinion filed this date.

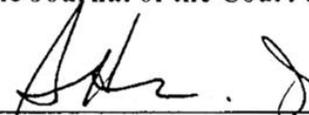
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on September 16, 2015 per Order of the Court.

By: _____


Presiding Judge

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SEP 16 2015

EXHIBIT
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**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

MARY MCGOWAN, M.D.,	:	APPEAL NOS. C-140634
		C-140652
Plaintiff-Appellee/Cross-Appellant,	:	TRIAL NO. A-1108336
	:	<i>OPINION.</i>
vs.		
MEDPACE, INC.,	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
	:	
Defendant-Appellant/Cross-Appellee.	:	SEP 16 2015

COURT OF APPEALS

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

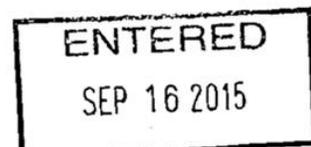
Date of Judgment Entry on Appeal: September 16, 2015

Freking & Betz, LLC, Randolph Freking and Brian P. Gillan, for Plaintiff-Appellee/Cross-Appellant Mary McGowan, M.D.,

Thompson Hine LLP, Deborah S. Brenneman and George B. Musekamp, for Defendant-Appellant/Cross-Appellee Medpace, Inc.,

The Gittes Law Group, Frederick M. Gittes and Jeffrey P. Vardaro, for Amicus Curiae the Ohio Employment Lawyers Association.

Please note: this case has been removed from the accelerated calendar.

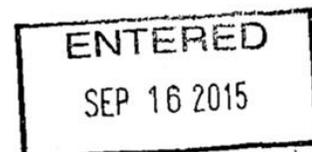


FISCHER, Judge.

{¶1} Defendant-appellant/cross-appellee Medpace, Inc., and plaintiff-appellee/cross-appellant Mary McGowan, M.D., have appealed from the trial court's order entering final judgment in favor of McGowan on her claim against Medpace for wrongful discharge in violation of public policy. Because McGowan failed to identify a clear public policy in support of her wrongful-discharge claim, we hold that the trial court erred by failing to grant a directed verdict to Medpace.

Background and Procedure

{¶2} Medpace is a research facility that designs and conducts clinical trials to test new pharmaceuticals. In the spring of 2011, Medpace hired McGowan as an at-will employee to take over duties from one of its retiring physicians, Dr. Evan Stein. McGowan was hired as the executive director of both Medpace's Clinical Pharmacology Unit ("CPU") and its Metabolic and Atherosclerosis Research Center ("MARC"). The CPU conducted phase one studies to observe participants' first exposure to a drug. The MARC conducted later-stage studies on various drugs. The sponsor of each drug study in the MARC selected a principal investigator to run the study. McGowan was responsible for recruiting new studies to the MARC, and she was additionally appointed by Stein to replace him as the principal investigator on studies that he had previously recruited. McGowan had additionally agreed to take over control of Stein's private practice, the Cholesterol Treatment Center ("CTC"). The CTC was not affiliated with Medpace and was solely owned by Stein, although it was located on Medpace's premises. Most participants in the MARC studies were patients at the CTC, and the two entities shared employees.



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{¶3} Shortly after taking over the CTC, McGowan observed several practices in the facility that troubled her. Stein had prescribed patients a larger dose of medication than was medically necessary, and had then directed the patients to split the prescribed pills. McGowan felt that this practice of pill splitting constituted insurance fraud and compromised patient safety because the written prescription provided to the pharmacy did not match the instructions in a patient's chart. McGowan was further troubled by Stein's practice of combining into one chart the medical records of CTC patients who were enrolled in a MARC study. In her opinion, personal information necessary to the CTC chart was irrelevant to treatment in the MARC and should not be contained in the MARC files. Last, McGowan was concerned with the MARC's practice of leaving patient charts open on carts outside of treatment rooms. She felt that these two practices were in violation of the Health Insurance Portability and Accountability Act ("HIPAA").

{¶4} McGowan contacted a health-care attorney regarding her concerns about Stein's pill-splitting and prescription-writing practices. After receiving confirmation from this attorney that her concerns were legitimate, McGowan called a staff meeting on July 22, 2011. At this meeting, she instructed the staff that they had to change the way that prescriptions were written and the way that charts were handled. McGowan stated that Stein's prescription-writing practices had been fraudulent. After learning of this meeting and McGowan's accusations, Stein removed McGowan from all activity in both the MARC and CTC via an email sent on July 25, 2011.

{¶5} On July 27, 2011, McGowan met with August Troendle, Medpace's president and CEO, and Tiffany Khodadad, Medpace's executive director of human

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resources. During this meeting, McGowan raised her concerns about Stein's prescription-writing practices and the HIPAA violations that she felt she had observed. Troendle told McGowan that it was inappropriate for her to have accused Stein of fraud in front of the staff. He stated that her concerns would be investigated, and he encouraged her to investigate them as well. According to Troendle, McGowan was adamant that Stein had committed fraud and that she had the right to air her concerns to whomever she wished. Troendle clarified to McGowan that she was still the executive director of the MARC, but that he could not control whether Stein retained control of the CTC or the studies at MARC that he had previously recruited. Neither McGowan's title nor salary changed after Stein took back control of the CTC and his MARC studies.

{¶6} On July 28, 2011, McGowan sent an email to Khodadad, Troendle, and Kay Nolan, Medpace's general counsel. In the email, McGowan stated that she felt she was being retaliated against for expressing her concerns about improper practices at the CTC. She stated that Troendle had informed her that she would not be restored to director of either the CTC or MARC until she apologized to Stein, and that Troendle had referred to Stein as an "asshole" and an "egomaniac." Troendle responded to this email, denying that he had referred to Stein in such a manner and clarifying that McGowan remained head of the CPU, but that he had no authority to remove Stein as the principal investigator on Steins' MARC studies.

{¶7} Following this meeting and email exchange, McGowan continued her duties as director of the CPU. But she felt that she could be fired from Medpace at any point, and she retained an attorney. On August 17, 2011, McGowan attended a standard Medpace staff meeting. At Troendle's request, she stayed after the meeting

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to speak with him. Troendle acknowledged that McGowan had hired an attorney to negotiate her departure from Medpace, but expressed his desire for her to continue her employment. McGowan told Troendle that she was disappointed that he had lied about calling Stein an asshole. Troendle again told McGowan that it had been inappropriate to accuse Stein of fraud in front of the staff. McGowan stated that Troendle could not stop her from speaking the truth and she accused Troendle of trying to intimidate her.

{¶8} After that meeting, Troendle determined that he had to terminate McGowan's employment with Medpace. On August 18, 2011, two representatives from Medpace's department of human resources informed McGowan that she had been fired.

{¶9} On October 19, 2011, McGowan sued Medpace for wrongful discharge in violation of public policy, sex discrimination, intentional infliction of emotional distress, and promissory estoppel. The case proceeded to a jury trial. At the close of McGowan's case, Medpace moved for a directed verdict. As relevant to this appeal, Medpace argued in its motion that McGowan's claim for wrongful discharge in violation of public policy failed as a matter of law, because she had failed to establish the first two elements of that claim. The trial court denied Medpace's request, both when initially made and when it was renewed at the close of all evidence. The jury found in favor of Medpace on McGowan's claims for sex discrimination, intentional infliction of emotional distress, and promissory estoppel. But it found in favor of McGowan on her claim for wrongful discharge in violation of public policy. It awarded her \$300,000 in compensatory damages, \$500,000 in punitive damages, and attorney fees.

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{¶10} After the trial court entered final judgment on that claim in favor of McGowan, Medpace filed a motion for judgment notwithstanding the verdict, and alternatively for a new trial. McGowan also filed a similarly titled motion, arguing that the jury had erred in its calculation of damages. The trial court denied both motions.

{¶11} Medpace has appealed the trial court's judgment. In three assignments of error, Medpace argues that the trial court erred in failing to dismiss McGowan's claim for wrongful discharge in violation of public policy, by providing the jury with improper and incomplete jury instructions, and by awarding McGowan all requested attorney fees. McGowan has also appealed the trial court's judgment. In one assignment of error, she challenges the jury's calculation of her damages.

Wrongful Discharge in Violation of Public Policy

{¶12} Medpace argues in its first assignment of error that the trial court's failure to dismiss McGowan's claim for wrongful discharge in violation of public policy was in error. Medpace contends that the trial court should have granted either its motion for a directed verdict or motion for judgment notwithstanding the verdict with respect to this claim.

{¶13} We review a trial court's ruling on a motion for a directed verdict de novo. See *Bennett v. Admr., Ohio Bur. of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, 982 N.E.2d 666, ¶ 14. A directed verdict should be granted when the trial court "after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion * * * and that conclusion is adverse to such party." Civ.R. 50(A)(4).

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{¶14} Medpace had employed McGowan as an at-will employee. Under the common law employment-at-will doctrine, the employment relationship between an employer and an at-will employee may be terminated by either party for any reason, and the termination of such an employee generally does not give rise to an action for damages. See *Collins v. Rizanka*, 73 Ohio St.3d 65, 67, 652 N.E.2d 653 (1995); see also *Dohme v. Eurand America, Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶ 11.

{¶15} But in *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), the Ohio Supreme Court recognized an exception to this employment-at-will doctrine. The *Greeley* court held that an at-will employee may maintain a cause of action for wrongful discharge when the employee is terminated in violation of a clearly expressed public policy. *Greeley* at 234. To establish a claim for wrongful discharge in violation of public policy, an employee must demonstrate that a clear public policy existed (the clarity element); that the employee's dismissal jeopardized the public policy (the jeopardy element); that the employee's dismissal was motivated by conduct related to the public policy (the causation element); and that the employer did not have an overriding business justification to support dismissal of the employee (the overriding justification element). See *Collins*, at 69-70. The clarity and jeopardy elements present questions of law, while the causation and overriding-justification elements present questions of fact. *Id.*

{¶16} McGowan contended that she had been wrongfully discharged for reporting her concerns about Stein's prescription-writing practices, which she alleged constituted insurance fraud and compromised patient safety. She argued

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that her firing on these grounds violated the public policy established in R.C. 2913.47, which prohibits insurance fraud. She further contended that she had been wrongfully discharged in violation of the public policy established in HIPAA for reporting her complaints about Stein's practices of combining the charts of patients in the MARC and CTC and of leaving patient charts open on carts.

{¶17} Medpace argues that the trial court should have dismissed McGowan's wrongful-discharge claim because she had failed to establish the clarity element with respect to both of her public policy arguments. Medpace specifically contends that neither R.C. 2913.47 nor HIPAA complied with the precedent established by this court in *Hale v. Volunteers of Am.*, 158 Ohio App.3d 415, 2004-Ohio-4508, 816 N.E.2d 259 (1st Dist.), and *Dean v. Consol. Equities Realty #3, LLC*, 182 Ohio App.3d 725, 2009-Ohio-2480, 914 N.E.2d 1109 (1st Dist.).

{¶18} In *Hale*, we considered whether two former employees of a residential treatment center for convicted felons could maintain an action against their former employer for wrongful discharge in violation of public policy based on a public policy that was independent of Ohio's whistleblower statute. *Hale* at ¶ 40. The employees had contended that they were wrongfully discharged for reporting their concerns about the operation of the rehabilitation center in violation of the public policy established by various regulations in the Ohio Administrative Code. *Id.* at ¶ 37. We determined that in the context of that claim, an "independent source of public policy must parallel the public policy set forth in the whistleblower statute." *Id.* at ¶ 45. Because the administrative code provisions relied on by the employees did not affirmatively require them to report their concerns, and did not prohibit the rehabilitation center from terminating employees for reporting their concerns, and

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because the employees had not alleged that they were terminated for reporting workplace-safety violations, we held that they had failed to establish that their employment was terminated in violation of a clear public policy independent of the whistleblower statute. *Id.* at 46-47.

{¶19} In *Dean*, a former employee of Colerain Ford had alleged that he had been wrongfully terminated in violation of public policy for reporting his concerns that the dealership's business practices constituted fraud. He argued that Ohio had a clear public policy against fraud, evidenced in R.C. 2921.13. *Dean* at ¶ 10. In rejecting *Dean*'s argument, we emphasized that the public-policy exception to the at-will employment doctrine should be narrowly applied. *Id.* at ¶ 12. We held that *Dean* had failed to establish an independent source of public policy to support the clarity element of his claim, because the statute that he had relied upon failed to impose an affirmative duty on an employee to report a violation, failed to prohibit an employer from retaliating against an employee who had filed complaints, and did not protect the public's health or safety. *Id.* at ¶ 11-12.

{¶20} McGowan argues that the Ohio Supreme Court has never similarly limited the type of public policy applicable to a wrongful-discharge-in-violation-of-public-policy claim and has never held that such a claim must be based on a public policy that either addresses the conduct of the employee or regulates the conduct of the employer. She contends that a public policy is sufficient to satisfy the clarity element when it is applicable to the employer and implicated in the employee's termination.

{¶21} Other appellate districts have adopted McGowan's position. *See Alexander v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 95727, 2012-Ohio-

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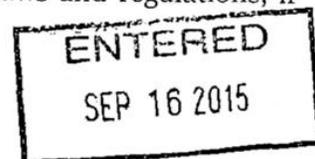
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1737, ¶ 36 (“We find, however, no requirement that a supporting statute be employment-related or otherwise set forth an employer’s responsibilities and/or an employee’s rights.”). But several federal courts have reached the same conclusion as this district and have cited *Hale* and *Dean* with approval. In *Crowley v. St. Rita’s Med. Ctr.*, 931 F.Supp.2d 824 (N.D. Ohio 2013), the United States District Court for the Northern District of Ohio held that

This Court finds more persuasive the reasoning of the Ohio courts that require the public policy invoked in a *Greeley* claim to parallel the policies underlying the whistleblower statute or protect employee or public safety. The courts of Ohio generally have found that *Greeley* claims cannot lie with every public policy, even ‘good’ ones, and appropriately so. Without these limitations, *Greeley* claims could evolve from exceptions to the employment at-will doctrine to the rule itself.

Crowley at 831. See *Gates v. Beau Townsend Ford, Inc.*, S.D. Ohio No. 3:08-cv-054, 2009 U.S. Dist. LEXIS 110005, * 27 (Nov. 24, 2009) (“[T]he clear public policy, if separate from the whistleblower statute, must parallel the whistleblower statute or be criminal in nature.”).

{¶22} A claim for wrongful discharge in violation of public policy was created as an exception to the employment-at-will doctrine. As recognized by the *Crowley* court, absent a narrow interpretation of the types of public policy applicable to these claims, the exception becomes the rule. With the continued and ongoing explosion in statutes, governmental regulations, and policies found under the Ohio Revised Code and the Ohio Administrative Code, as well as federal laws and regulations, if



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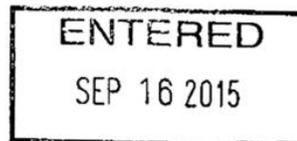
exceptions to the at-will-employment doctrine are not narrowly construed, the so-called “exceptions” will speedily and overwhelmingly undermine and eliminate the concept of at-will employment in this state. The employment-at-will doctrine is, as conceded by all parties herein, the starting point for an employment-law analysis for this type of claim. This doctrine has remained untouched by the legislature since its inception, and is effectively one of Ohio’s most basic “public policies” on employment issues. If this court were to disregard now longstanding case law like *Hale* and *Dean*, this most important public policy would be destroyed. Such a change in basic Ohio public policy should be left to the legislature, not this court.

{¶23} *Hale* and *Dean* are the law of this district and we continue to adhere to them. In a claim for wrongful discharge in violation of public policy, an employee satisfies the clarity element by establishing that a clear public policy existed, and that the public policy was one that imposed an affirmative duty on an employee to report a violation, that prohibited an employer from retaliating against an employee who had reported a violation, or that protected the public’s health and safety.

{¶24} We now consider whether the public policies relied on by McGowan meet these criteria. McGowan argued that she had been terminated for reporting her concerns about Stein’s prescription-writing practices, namely pill splitting, in violation of the public policy established in R.C. 2913.47. This insurance-fraud statute provides in relevant part that

No person, with purpose to defraud or knowing that the person is facilitating a fraud, shall do either of the following:

- (1) Present to, or cause to be presented to, an insurer any written or oral statement that is part of, or in support of, an application for



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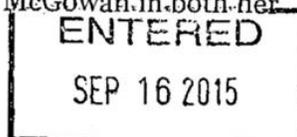
insurance, a claim for payment pursuant to a policy, or a claim for any other benefit pursuant to a policy, knowing that the statement, or any part of the statement, is false or deceptive;

(2) Assist, aid, abet, solicit, procure, or conspire with another to prepare or make any written or oral statement that is intended to be presented to an insurer as part of, or in support of, an application for insurance, a claim for payment pursuant to a policy, or a claim for any other benefit pursuant to a policy, knowing that the statement, or any part of the statement, is false or deceptive.

R.C. 2913.47(B).

{¶25} While this statute arguably establishes a valid public policy against insurance fraud, it cannot serve as the basis for an exception to the employment-at-will doctrine. *See Dean*, 182 Ohio App.3d 725, 2009-Ohio-2480, 914 N.E.2d 1109, at ¶ 12. This statute does not place an affirmative duty on an employee to report a violation, prohibit an employer from retaliating against an employee who has reported a violation, or protect the public's health and safety. Consequently, it will not support McGowan's wrongful-discharge claim.

{¶26} We reach the same conclusion with respect to McGowan's argument that her termination was in violation of the public policy established in HIPAA. In *Wallace v. Mantych Metal-Working*, 189 Ohio App.3d 25, 2010-Ohio-3765, 937 N.E.2d 177 (2d Dist.), the Second Appellate District recognized HIPAA as a valid source of public policy in a wrongful-discharge case. It held that HIPAA manifested a public policy favoring the confidentiality and privacy of medical records. *Wallace* at ¶ 41. As recognized by the Second District and explained by McGowan in both her



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appellate brief and at oral argument, HIPAA was enacted to help protect patient-privacy rights. HIPAA manifests an important and useful public policy, but the protection of patient privacy is not the type of public policy contemplated by *Hale* and *Dean*.

{¶27} Because McGowan failed to establish that she was discharged in violation of a clear public policy that imposed an affirmative duty on an employee to report a violation, that prohibited an employer from retaliating against an employee who had reported a violation, or that protected the public's health and safety, she has failed to satisfy the clarity element of her wrongful-discharge claim. Consequently, reasonable minds could only reach one conclusion on the evidence submitted—that McGowan could not succeed on her claim for wrongful discharge in violation of public policy. We hold that the trial court erred by failing to grant Medpace a directed verdict on this claim.

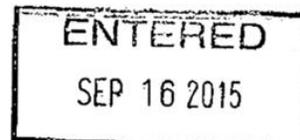
{¶28} Medpace's first assignment of error is sustained. Our resolution of this assignment of error renders Medpace's remaining assignments of error and the assignment of error raised in McGowan's cross-appeal moot.

Conclusion

{¶29} The trial court erred by failing to grant a directed verdict to Medpace on McGowan's claim for wrongful discharge in violation of public policy. We reverse the trial court's judgment in favor of McGowan, and remand this cause with instructions for the trial court to enter judgment in favor of Medpace on this claim.

Judgment reversed and cause remanded.

DEWINE, J., concurs.
HENDON, P.J., dissents.



HENDON, P.J., dissenting.

{¶30} I agree with the majority's determination that *Hale* and *Dean* are the law of this court, and that a public policy will not satisfy the clarity element of a claim for wrongful discharge in violation of public policy unless it comports with one of the requirements outlined in these cases. But I believe that McGowan has sufficiently established that she was discharged in violation of a public policy that met one of these requirements: HIPAA.

{¶31} The majority recognizes that HIPAA manifests a public policy in favor of protecting patient-privacy rights. The disclosure of a patient's confidential medical information can have a far-reaching effect, and, and in my opinion, patient-privacy rights directly implicate the public's health and safety. For this reason, I would conclude that McGowan satisfied the clarity element of her claim for wrongful discharge in violation of public policy and that the trial court did not err in failing to grant a directed verdict in favor of Medpace on her claim.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

