

IN THE SUPREME COURT OF OHIO

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| MARY McGOWAN, M.D., | : | Case No. | 2015-1756 |
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| Appellant, | : | On Appeal from the Hamilton County | |
| | : | Court of Appeals, First Appellate | |
| vs. | : | District | |
| | : | | |
| MEDPACE, INC., | : | | |
| | : | | |
| | : | | |
| Appellee. | : | | |

MERIT BRIEF OF APPELLANT MARY McGOWAN, M.D.

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I. SUMMARY OF ARGUMENT

After becoming employed by Appellee Medpace, Inc., Appellant Mary McGowan, M.D. became aware of fraudulent prescription writing practices and patient privacy and confidentiality violations which concerned her so greatly that she held a meeting with her staff to advise that office practices must change to prevent further violations, and met with Medpace senior management to report these concerns. Rather than investigate her concerns, Medpace terminated Dr. McGowan's employment in retaliation for her good faith complaints of insurance fraud and violations of the Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. § 1181 et. seq. ("HIPAA"). As the jury unanimously concluded following trial on these claims, this retaliatory firing violates Ohio public policy and constitutes a wrongful discharge for which Dr. McGowan is entitled to damages. Notwithstanding the jury's unanimous verdict, the First District Court of Appeals reversed the judgment based solely on the erroneous legal conclusion that Dr. McGowan's wrongful discharge claim was not based on sufficiently clear public policy because neither the Ohio insurance fraud statute nor HIPAA impose an affirmative duty on employees to report a violation; expressly prohibits employer retaliation; or regulates public health and safety.

This case presents two important legal issues: (1) whether *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), and its progeny require the source of a sufficiently clear public policy to 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; and (2) whether R.C. 2913.47 and HIPAA manifest sufficiently clear public policies to satisfy the clarity element of a *Greeley* claim. As demonstrated more fully below, the prerequisites imposed by the First District in its analysis of the clarity element contravenes this Court's jurisprudence. Under the facts of this case, there is no question that R.C. 2913.47 and HIPAA manifest important expressions

of public policy which are sufficiently clear to support Dr. McGowan's *Greeley* claim arising out of her retaliatory discharge. Moreover, even assuming that the First District's new criteria for establishing the clarity element of a *Greeley* claim were applicable, HIPAA manifests a sufficiently clear public policy under the appellate court's analysis. As discussed below, HIPAA was enacted, in part, to protect and promote public health. In addition, HIPAA contains express anti-retaliation provisions intended to deter and prevent retaliation for reporting known or suspected violations of its patient privacy and confidentiality rules.

The First Appellate District's erroneous imposition of prerequisites to an analysis of the clarity element leaves 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 Ohio Whistleblower statute, nor that the public policy regulate public health and safety. 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.

II. STATEMENT OF FACTS.

A. Dr. McGowan Is a Nationally-Recognized Expert in Cholesterol Treatment.

Dr. McGowan is one of the most highly-regarded experts in the treatment of cholesterol disorders in the country. (T.p. 293:7- 302:6 and McGowan Ex.12, 12A). She is board certified by the National Lipid Association, was the Medical Director at the Concord (New Hampshire) Hospital's cholesterol treatment center for six years, and was the Director of the Cholesterol Management Center at the New England Heart Center of Catholic Medical Center in New Hampshire for 13 years. (T.p. 278:7-281:17).

In mid-2010, Dr. McGowan received an email from Evan Stein, whom she had known professionally for decades, asking her for recommendations of mid-career doctors who might be interested in running two units at Medpace, and Stein's own practice. (T.p. 424:2-13 and Medpace Ex. 20). In addition to offering a recommendation, Dr. McGowan expressed interest in these positions, and Stein invited her for an interview in December 2010. (T.p. 424:14-23). Medpace offered her a position as Executive Director of Medpace I-IV Clinics, which included oversight of the Metabolic and Atherosclerosis Research Center ("MARC"), the Clinical Pharmacology Unit ("CPU"), and Stein's practice, the Cholesterol Treatment Center ("CTC"). (T.p. 293:7-302:6 and McGowan Ex. 11).

B. Upon Her Arrival At Medpace, Dr. McGowan Discovered Serious Patient Safety And Privacy Issues And Instructed Her Staff That She Was Instituting Changes To Address Those Problems, As Medpace Policy Required.

Dr. McGowan soon 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 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.*) Dr. McGowan had also been repeatedly asked by patients and CTC/MARC staff to refill prescriptions which Stein had originally written in the same misleading manner. (T.p. 334:3-345:14). Dr. McGowan's concerns involved **both** MARC and CTC. (T.p. 377:20-379:13, 458:7-463:21).

Dr. McGowan also witnessed violations of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), including exposure of patients' records to the public 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, Dr. McGowan met with the MARC/CTC staff to explain that she had been repeatedly asked to sign unlawful/unsafe prescriptions. (T.p. 334:3-345:14). **Before** the meeting, Dr. McGowan confirmed with Kate Hannah, a health care attorney, that Dr. McGowan's concerns were valid and Stein's prescription writing practices constituted insurance fraud. (T.p. 337:19-338:19, 468:16-470:23). Dr. McGowan told the staff that she understood why Stein was prescribing like this (to save a patient a copay) but she would not do it because it posed a threat to patient safety and was insurance fraud. (T.p. 343:1-344:16).

Dr. McGowan also expressed her concerns about the HIPAA violations, and told the staff that they would be separating patient charts to remove irrelevant information from the cholesterol study charts. (T.p. 494:1-7). HIPAA consent forms do not allow combining of charts, nor do they excuse the exposure of patient's charts to the public. (T.p. 497:2-499:3).

C. Dr. McGowan's Complaints Enraged Stein, Who Immediately Terminated Her From MARC And The CTC.

By July 25, 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 Dr. McGowan to announce that she had no further responsibility for MARC or the CTC. (T.p. 348:1-24 and McGowan Ex. 26, 35). Stein also contacted at least one study sponsor to have Dr. McGowan removed from her role as Principal Investigator on a cholesterol trial. (T.p. 407:10-17 and McGowan Ex. 40). Stein banned Dr. McGowan from CTC/MARC (T.p. 369:25-370:4), and urged Medpace CEO August Troendle, in a July 28, 2011 email, to shut down the CPU (and thus eliminate Dr. McGowan's last remaining position at Medpace). (T.p. 993:4-996:9 and McGowan Ex. 37).

D. Dr. McGowan Complained To Troendle, Medpace General Counsel Nolen, And Medpace Human Resources Manager Khodadad About Her Patient Safety, HIPAA, And Insurance Fraud Concerns.

The Medpace Employee Handbook required Dr. McGowan to report Stein's prescription and

charting practices, and made it clear she was ultimately responsible for ensuring that her staff was knowledgeable and in compliance with laws, policies and procedures related to their job responsibilities:

All employees are held accountable for their actions and required to report unethical or unlawful activities. Managers are ultimately responsible for ensuring that the employees they supervise are knowledgeable and in compliance with laws, policies and procedures related to their job responsibilities. Any employee who violates this Code of Conduct . . . , or who is aware of, but fails to report unlawful or unethical business behavior, is subject to disciplinary action, including termination of employment and/or legal action.

(T.p. 350:11-353:17 and McGowan Ex. 5 at 5-7). That same section of the Medpace Employee Handbook specifically prohibits retaliation for reporting unethical or unlawful activities. (*Id.*).

Consistent with these directives for reporting suspected violations, Dr. McGowan met with Medpace General Counsel Kay Nolen, HR Manager Tiffany Khodadad, and CEO Troendle on July 27, 2011 after she sent an email asking for an immediate meeting to address Stein's unlawful prescription practices and his retaliation. (T.p. 349:5-350:11). Dr. McGowan explained that her concern was not pill-splitting *per se*, but rather that Stein had written one prescription in a patient's chart and orally given a different dosage to the patient, which created a patient safety issue and was insurance fraud. (T.p. 361:4-361:15 and McGowan Ex. 43).

Dr. McGowan was clear from July 2011 on that her concerns were focused on ensuring that the patient chart and prescription matched, thus avoiding both the insurance fraud and patient safety issues. (T.p. 334:3-345:14, 467:24-470:23, 593:8-594:8 and McGowan Ex. 6).

- Q. It was also said that, basically, who cares about how he writes the prescription, everybody may not have insurance.
- A. Well, you still have to write the prescription accurately. And there were patients that had insurance, because I saw their insurance cards. But even – even still for patient safety, you don't want to write a prescription one way and then have it in the chart another way. So it doesn't matter, a prescription always needs to be accurate.

Q. Okay. And tell us why it's a patient safety issue, for example, in your 80-milligram example?

A. Okay.

Q. Does it matter whether someone follows the oral instructions and cuts it in quarters and takes a 20-milligram pill a day as opposed to an 80-milligram pill?

A. So if we're talking about statins, and, obviously, cholesterol is pretty much my life, we know that as you increase the dose of statins, the risk of side effects increases substantially. We absolutely know that. And so, if somebody is really supposed to be on 20 milligrams and they look at their bottle and they forget, oh – they forget that they were told to cut the pills in quarters and they take 80 milligrams, the risk of liver toxicity increases. The risk of muscle toxicity increases. It is absolutely well known that as you increase the dose of any statin, the side effect profile increases. Now that's the facts.

* * *

A. So, Ms. Brenneman, there's an honest way and a dishonest way to write a prescription, and I have no problem with pill splitting. And, in fact, some insurance companies ask you to do it, and they will send you a letter. So the important thing is that the insurance company, the patient and the doctor all know you're not trying to be deceptive. If everybody knows and the prescription is written accurately, it's written, take half a pill, some of the insurance companies will give their clients a break.

But the important thing, the very important thing, especially for a lawyer to know, is it important for the doctor, the insurance company, and the patient, everybody has to be on the same page, everyone has to know. You can't deceive, it's theft by deception.

(T.p. 338:21-340:5; 480:25-481:19).

Dr. McGowan asked Nolen in that meeting for help identifying the proper authority to confirm that Stein's prescription practices constituted insurance fraud. (T.p. 361:16-21, 985:22-986-2). Nolen told Dr. McGowan she could confirm that with the Ohio Board of Pharmacy. (T.p. 361:16-21, 985:22-986-2). Dr. McGowan promptly followed up on Nolen's suggestion and spoke with Dr. Whittington and three lawyers at the Ohio Board of Pharmacy who confirmed that Dr. McGowan's concerns were correct. (T.p. 363:25-366:23, 1021:15-1022:22).

Dr. McGowan also expressed concerns about HIPAA violations, including exposure of patient charts to public view.

Q. Now did you notice anything else with respect to HIPAA, the privacy violation? Did you notice anything else about the files in addition to the fact that they were both combined?

A. Yeah, the other big issue that I noticed at the Cholesterol Treatment Center/MARC was that what routinely happened – now you can imagine if you’re combining a chart that Dr. Stein had seen some people for 30 years, plus they have been in a bunch of studies, some of these charts were about this fat. (Demonstrating.)

So a typical thing that’s done in a hospital is there’s a little lucite container, a plastic container outside the examining room, and the chart is put in backwards, so you don’t see the patient’s date of birth, you don’t see the patient’s name, you see no identifiers, and then the physician can go and grab the chart and go into the room. But the practice at MARC – these are huge charts remember, they were left wide open on these little carts that they leave outside the door, so I noticed that as well.

Q. And what concerns did that raise?

A. Well, that’s a big concern, you know, you have some – you have patients walking through. And, remember, it wasn’t just the CTC and MARC patients, often the CPU patients who were just coming in, these normal, healthy volunteers off the street coming in to be screened, they would be milling about. And so, they would be walking through to get to whatever examining room they were going to, and there would be this chart wide open. When I walk by this, I could read it, so they could see, a patient’s name, a patient’s date of birth, what their medications were, so I didn’t think that that was right. It wasn’t right.

(T.p 341:4-342:19).

E. Medpace Fired Dr. McGowan In Retaliation For Raising These Concerns.

On August 17, 2011, Troendle asked Dr. McGowan to stay after a staff meeting to tell her that she needed to apologize to Stein; Dr. McGowan repeated her concern that Stein’s prescription practices jeopardized patient safety and constituted insurance fraud. (T.p. 474:16-475:1 and McGowan Ex. 44 at 2). Dr. McGowan told Troendle that she had called the Ohio Pharmacy Board

as Nolen had suggested, and both Dr. Whittington and three lawyers in his office had confirmed her concerns that Stein's prescription practices constituted insurance fraud. (*Id.*) Dr. McGowan also told Troendle that a private health care lawyer, Kate Hannah, had agreed that Stein's prescription practice constituted insurance fraud. (*Id.*)

Troendle fired Dr. McGowan the next day, August 18, claiming that it was "for cause" by falsely alleging that Dr. McGowan was confrontational when she protested Troendle's misstatements about what he said in the July 27, 2011 meeting concerning Stein's unlawful practices and retaliatory behavior. (T.p. 395:5-396:7).

Following the termination of her employment, Dr. McGowan brought suit against 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 Dr. 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 Dr. 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). Dr. 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, Dr. 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. (Appx. 5). Dr. McGowan filed her notice of appeal to the Supreme Court of Ohio on October 30, 2015, and a Memorandum in Support of Jurisdiction. (Appx. 1). On February 24, 2016, the Supreme Court granted jurisdiction to hear the case and allowed the appeal.

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 over 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*, 70 Ohio St.3d 377, 639 N.E.2d 51 (1994), 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, 677 N.E.2d 308 (1997) (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. (Appx. 12-13) (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.” (Appx. 15). 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, Dr. 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. (Appx. 16-17).

The practical effect of applying the First District’s *Dean* criteria in this case was 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. In stark contrast, 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 very 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 never required that a source of public policy "parallel" the reporting and retaliation provisions of the Ohio Whistleblower statute in cases that are based on a clear public policy separate from the Whistleblower 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 such 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 re-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). Imposition of the First District's prerequisites to analysis of the clarity element under *Greeley* would preclude, *a fortiori*, any public policy claims based on the Ohio or United States Constitutions as neither require employees to report violations nor contain anti-

retaliation provisions. Yet since the *Painter* decision over 22 years ago, this Court's jurisprudence has held expressly that the Constitutions of Ohio and the United States may be sources of public policy sufficient to support a *Greeley* claim. *Painter*, 70 Ohio St.3d at paragraph three of the syllabus.

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.

Similarly, in *Sabo v. Schott*, 70 Ohio St.3d 527, 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 in concert with their employer's directives. 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.

In *Dohme v. Eurand Am. Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, this Court noted that “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 Ohio 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.

Under this Court’s jurisprudence, courts are free to consider whether the source of public

policy relied upon by a plaintiff encompasses provisions such as those enumerated by the First Appellate District. Whether a specific constitutional provision, statute, rule, regulation, or source of common law is employment related, proscribes retaliatory conduct for reported violations, or regulates public health and safety are considerations which may well inform a court's determination as to the clarity of the public policy invoked in a particular case. However, there is a clear distinction between consideration of these factors, among others, to ascertain whether the public policy cited is sufficiently clear to give rise to a claim for wrongful discharge, and a prerequisite that the source of the public policy *must* contain one of these elements before a court may conclude it is sufficiently clear to give rise to a *Greeley* claim. The First Appellate District's decision in this case improperly imposes such a prerequisite and thereby contravenes this Court's well-established jurisprudence. This Court's *Greeley* claim precedents, as well as common sense, clearly counsel against depriving some employees of rights and protections afforded other employees in the state based on the First District's inconsistent and contradictory application of the law.

This Court has declared 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 discharging its responsibility, this Court has repeatedly restated the four factors of a *Greeley* claim first adopted by the *Painter* Court over 20 years ago. In all that time, 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 Ohio Whistleblower statute, nor that the public policy regulate public health and safety.

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 increased 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 places stringent and inflexible prerequisites on the source of public policy articulated by an employee seeking to assert a *Greeley* claim, requiring that the policy at issue place an affirmative duty on an employee to report a violation; expressly prohibit the employer from retaliating against an employee who reports a violation; or expressly provide for protection of the public's health and safety. The net effect of the First District's *Dean* criteria is to encourage unscrupulous employers to discharge or otherwise retaliate against those employees who make good faith reports of alleged fraudulent prescription writing practices or HIPAA patient privacy and confidentiality violations. Reversal and remand of the First Appellate District's decision is warranted in this case to ensure uniformity in the application of this Court's precedent concerning analysis of the clarity element and so 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.

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 Under the Facts of This Case.

Dr. 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. Dr. 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.

A. The Clear Public Policy Manifested by Ohio's Insurance Fraud Statute Is Directly Implicated by The Concerns Dr. McGowan Raised With Medpace Senior Management About Improper Prescription Writing Practices And Satisfies the Clarity Element

R.C. 2913.47 establishes a clear public policy designed to prevent, deter, and punish persons who commit insurance fraud. 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) (Appx. 19).

At trial, Dr. McGowan testified that when asked to renew patient prescriptions she became concerned that prescriptions as written gave rise to fraudulent conduct as well as serious patient health and safety concerns. As Dr. McGowan testified at trial, prior to the staff meeting at which she instructed staff to cease the questioned prescription writing practices, she contacted a private health care attorney, Kate Hannah, who confirmed that the practice of prescribing one dosage of a medication, with prescription directions to the pharmacy and the insurance company reflecting that dosage, while an oral instruction given to the patient directed the patient to split the pill, constituted fraud on the insurer. (T.p. 337:19-339:7; 469:22-470:16; 485:3-486:19). Dr. McGowan further testified that such practices could also endanger the health and safety of patients because the directions accompanying the medication did not reflect that a patient was instructed to take a ½ dose of the medication. (T.p. 339:8-341:3). If a patient were to forget or become confused by the oral instruction which was not reflected in the filled prescription, it could lead to serious adverse medical

consequences. (Id.). Dr. McGowan also made clear that her complaints to Medpace management were *not* about the practice of pill-splitting *per se*; rather, her concerns related to the fact that the written prescriptions did not match the medication dosage and instructions given to the patients as reflected in the patient charts. (T.p. 336:20-341:3; 477:18-22; 481:1-19; 484:16-485:10; 486: 7-19). Thus the written prescriptions were “false or deceptive statements” in violation of R.C. § 2913.47(B). Moreover, as her testimony reflects, Dr. McGowan believed the prescription writing practices posed a serious risk to patient health and safety.

In addition, after Dr. McGowan initially raised these concerns with Medpace management at the July 27, 2011 meeting, Medpace did nothing to investigate her complaints, but Medpace’s General Counsel, Kay Nolen, suggested that she contact the Ohio Board of Pharmacy. (T.p. 361:7-25, 363:4-24). Dr. McGowan did contact the Ohio Board of Pharmacy and spoke with Dr. John Whittington, Executive Director of the Ohio Board of Pharmacy, who confirmed her concerns and referred her to R.C. 2913.47. (T.p. 364:4-366:25). She was likewise advised by staff of the Ohio fraud hotline that the challenged prescription writing practices about which she had grave concerns did constitute insurance fraud under Ohio law. (T.p. 365:25-366:5).

The fact that Dr. McGowan did not approve the refill of any fraudulent prescriptions, nor submit any insurance claims for improper prescriptions does not obviate the public policy violation inherent in the retaliatory termination she suffered based on the concerns she expressed to Medpace management. This Court’s jurisprudence has long recognized that “[a]lthough there may have been no actual crime committed, there is nevertheless a violation of public policy to compel an employee to forgo his or her legal protections or to do an act ordinarily proscribed by law.” *Collins*, 73 Ohio St.3d at 71. Thus, the Court has understood that where public policy forbids certain conduct, as in the case of Ohio’s insurance fraud statute, “even though the act, if consummated, may not have been criminally prosecuted, such fact would not serve to defeat a civil action where the plaintiff was fired

for refusing to do what public policy forbids.” *Id.* at 72 (citing *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1205 (8th Cir. 1984); *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534) (4th Cir. 1991).

Thus, Dr. McGowan pointed to a clear public policy against insurance fraud which seeks to prevent, deter, and/or and punish those who commit fraud or knowingly facilitate a fraud, by presenting, or causing to be presented, to an insurer any false or deceptive statement. The public policy manifested by Ohio’s insurance fraud statute was directly implicated by the conduct about which Dr. McGowan complained. (T.p. 378-379:13). The prescriptions in question constitute the kind of false or deceptive statement R.C. 2913.47(B) seeks to prohibit. The fact that some of the fraudulent prescriptions may have been written for a patient who did not have insurance does nothing to vitiate the public policy violation inherent in the practice about which Dr. McGowan complained. Moreover, Dr. McGowan also testified that some of the patients for whom she was asked to approve fraudulent prescriptions did, in fact, have insurance. (T.p. 338:15-339:7; 477:6-478:3). To hold as the First District did, that this public policy is not sufficiently clear because it does not require reporting by an employee, prevent retaliation, or directly regulate public health and safety would be to permit employers to end run important public policy and encourage unscrupulous employers to take retaliatory action against those employees who report violations of the insurance fraud statute.

As courts in Ohio 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*, 189 Ohio App.3d 25, 2010-Ohio-3765, 937 N.E.2d 177, ¶¶ 42-45 (2d Dist.). 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 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, Dr. 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, Dr. 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.

B. Dr. McGowan’s Complaints About Patient Privacy Violations Directly Implicated The Clear Public Policy Manifested in HIPAA and Ohio Common Law, Which Seek to Protect Patient Confidentiality and Prevent and Deter Unauthorized and Unwarranted Disclosures of Personal Health Information, and Satisfies the Clarity Element

The patient privacy rules derived from HIPAA, and Ohio common law likewise manifest a clear public policy against the unauthorized and unprivileged disclosure of an individual’s personal health information. 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. 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) (Appx. 22). 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).

Sections 261 through 264 of HIPAA require the Secretary of Health and Human Services to publicize standards for the electronic exchange, privacy and security of personal health information, otherwise known as the law's Administrative Simplification provisions. *See* 42 U.S.C. Chapter 7, Subchapter XI, Part C, Administrative Simplification, §1320d et. seq. (Appx. 190-216). In August 2002, the U.S. Department of Health and Human Services issued what is known as the HIPAA "Privacy Rule" to implement that requirement. 45 C.F.R. §§ 160, 164. (Appx. 217, 223). The Privacy Rule standards address both the use and disclosure of individuals' health information, and standards for individuals' privacy rights to understand and control how their health information is used. *Id.* In summarizing the HIPAA Privacy Rule, the U.S. Department of Health and Human Services has explained that:

A major goal of the Privacy Rule is to ***assure that individuals' health information is properly protected*** while allowing the flow of health information needed to provide and promote high quality health care ***and to protect the public's health and well being***. The Rule strikes a balance that permits important uses of information, while protecting the privacy of people seeking care and healing.

U.S. Dep't of Health and Human Services, OCR Privacy Brief, *Summary of the HIPAA Privacy Rule*, Rev. 05/03, available at <http://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations>, last accessed on May 3, 2016.

Furthermore, it is beyond dispute that even before the enactment of federal laws under HIPAA, Ohio public policy has strongly favored the privacy of patient medical records and personal information and encouraged the confidentiality of those records. This Court recognized the fundamental public policy in favor of patient confidentiality in *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 715 N.E.2d 518 (1999) (breach of patient confidentiality is a "palpable wrong."). Thus, even before HIPAA was enacted, Ohio common law recognized an independent tort for the "unauthorized, unprivileged disclosure to a third party of nonpublic medical information[.]" *Biddle*,

86 Ohio St.3d at 401, paragraph one of the syllabus; *Sheldon v. Kettering Health Network*, 2015-Ohio-3268 (Ohio App. 2d Dist. 2015), 26432, ¶ 20 (same).

Subsequently, this Court 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. *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.). Other Ohio courts have likewise recognized that HIPAA establishes a public policy favoring and protecting the confidentiality of personal medical information contained in medical records. 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.”).

In this case, Dr. McGowan clearly testified that the way in which medical charts for MARC and CTC were merged appeared to violate HIPAA, and that the exposure of these charts to public view was likewise a HIPAA violation. (T.p. 330:6-332:17; 341:4-342:19; 492:19-493:22; 496:17-497:9; 498:25-499:3). These concerns were also expressed to Medpace management, and as the jury unanimously found, Dr. McGowan was subject to termination in retaliation for voicing her concerns

over potential HIPAA violations and for refusing to continue the charting practices which gave rise to the suspected violations in the first instance. The public policy favoring patient privacy as manifested in HIPAA and Ohio common law is abundantly clear and implicates the conduct about which Dr. McGowan complained in this case. Under these facts, it is beyond dispute that Dr. McGowan's assertion of suspected HIPAA violations satisfies the clarity element for purposes of a *Greeley* claim. The First Appellate District's conclusion to the contrary contradicts this Court's jurisprudence and leaves employees in the First District subject to termination or retaliation for reporting suspected HIPAA violations by employers who have every incentive to keep violations of HIPAA hidden from view. The First District's use of the narrow and overly restrictive *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.

C. Even Assuming That The *Dean* Criteria are Applicable, Dr. McGowan's Claims Based on HIPAA Violations Satisfy the Clarity Element Because the Public Policy Manifest in HIPAA and the Privacy Rule Protects Public Health and Includes Express Anti-Retaliation Provisions for Reports of Suspected Violations Such as Those Made by Dr. McGowan

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*." (Appx. 17). Assuming *arguendo* that the *Dean* criteria are applicable to an analysis of the clarity element, the First Appellate District erred in concluding the clear public policy set forth in HIPAA does not satisfy the *Dean* court's prerequisites. 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 Dr. McGowan satisfied the clarity element of her claim for wrongful discharge in

violation of public policy. . . .” (Appx. 18). Judge Hendon’s recognition that the HIPAA Privacy Rule directly implicates patient health and safety is clearly confirmed by the articulated purpose behind HIPAA’s Privacy Rule to “assure that individuals’ health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public’s health and well being.” (HHS, *Summary of the HIPAA Privacy Rule*, *supra*, at p. 1).

Moreover, the HIPAA’s Privacy Rule clearly sets forth anti-retaliation provisions designed to prevent, deter, and punish retaliatory actions taken against those who report suspected violations. The Privacy Rule expressly forbids a covered entity, such as Medpace, from retaliating against any person for exercising rights provided by the Rule, for assisting in an investigation by HHS or another authority, or for opposing an act or practice that the person believes in good faith violates the Rule. See 45 C.F.R. § 164.530(g); 45 C.F.R. § 160.316. (Appx. 223; 226). As noted above, the Privacy Rule was instituted to implement Administrative requirements of HIPAA. 45 C.F.R. § 160.101. (Appx. 217). The General Administrative Requirements established under HIPAA expressly provide that:

A covered entity may not threaten, intimidate, coerce, harass, discriminate against, or take any other retaliatory action against any individual or other person for– (a) Filing a complaint under § 160.306; (b) Testifying, assisting, or participating in an investigation, compliance review, proceeding, or hearing under this part; or (c) ***Opposing any act or practice made unlawful by this subchapter, provided the individual or person has a good faith belief that the practice opposed is unlawful, and the manner or opposition is reasonable and does not involve a disclosure of protected health information*** in violation of subpart E of part 164 of this chapter.

45 C.F.R. § 160.316 (emphasis added) (Appx. 226). In turn, the Privacy Rule’s Security and Privacy provisions likewise set forth express anti-retaliation standards:

(g) Standard: refraining from intimidating or retaliatory acts. A covered entity– (1) May not intimidate, threaten, coerce, discriminate against, or take other retaliatory action against any individual for the exercise by the individual of any right established, or for participation in any process provided for by this subpart, including the filing of a complaint under this section; and (2) Must refrain from intimidation

and retaliation as provided in § 160.316 of this subchapter.

45 C.F.R. § 164.530(g). (Appx. 223). These regulatory provisions make clear that under the HIPAA Privacy Rules, covered entities such as Medpace are precluded from retaliation against an employee who makes a good faith report of suspected HIPAA violations. Under the *Dean* criteria as articulated by the First Appellate District, such anti-retaliation provisions contained in the source of the public policy in question satisfy the clarity element of a Greeley claim. Thus, even if the *Dean* criteria articulated the requisite standards for assessing the clarity element of a *Greeley* claim, (which for all the reasons set forth above Appellant argues they do not), under the First Appellate District's *Dean* analysis, HIPAA does constitute a sufficiently clear public policy to support a wrongful discharge claim. Even applying the First Appellate District's own clarity test, the lower appellate court's analysis errs by failing to recognize that HIPAA both regulates public health and safety and prohibits retaliation against an employee who reports a violation of HIPAA's Privacy Rule. Accordingly, the lower court's decision should be reversed and remanded by this Court for this additional reason.

IV. CONCLUSION.

This Court's jurisprudence dictates that employers cannot require at-will employees to forgo 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 such violations. Application of the *Dean* criteria contradicts the clear public policies of this state and gives 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.

Moreover, even if the *Dean* criteria were applicable prerequisites to the analysis of the clarity element for *Greeley* claims, Dr. McGowan's complaints of HIPAA violations implicate the HIPAA Privacy Rule which both contains anti-retaliation provisions and is designed to safeguard and protect public health and safety. For all these reasons, the decision of the First Appellate District should be reversed and this case should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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