No. _____

In the
Supreme Court of the United States

MARIE GILLISPIE,

Petitioner,

v.

REGIONALCARE HOSPITAL PARTNERS, INC; ESSENT HEALTHCARE WAYNESBURG LLC, D/B/A SOUTHWEST REGIONAL MEDICAL CENTER; ESSENT HEALTHCARE PENNSYLVANIA INC.; ESSENT HEALTHCARE, INC.; ESSENT HEALTHCARE; SOUTHWEST REGIONAL MEDICAL CENTER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

Noah Geary, Esquire
Counsel of Record
Suite 225
Washington Trust Building
Washington, PA 15301
(724) 222-3788
noahgearylawoffices@gmail.com

Attorney for the Petitioner, Marie Gillispie

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. Does the *Precedential* ruling by the 3rd Circuit Court of Appeals directly contradict United States Supreme Court precedent of Schindler Elevator Corporation vs. United States ex. rel. Daniel Kirk, 563 U.S. 401,131 S. Ct. 1885, 179 L. Ed. 2d 825, (2011) and Kasten vs. Saint-Gobain, 563 U.S. 1, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011) as well as the intent of the United States Congress, which crafted the language of the anti-retaliation Whistleblower provision of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. Section 1395dd, by grafting onto the definition of the word "report" a requirement that the information conveyed by the Whistleblower be not already known?

II. In conjunction with the above, did the 3rd Circuit Court of Appeals also overlook critical evidence which establishes that the Petitioner's related common law cause of action brought pursuant to Pennsylvania's public policy exception to the at-will employment doctrine is *not* preempted by the state Medical Malpractice statute "MCARE" Act and consequently should be permitted to proceed?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions, Statutes and Rules:

OPINIONS AND ORDERS BELOW

This Court's grant of an Extension to Petitioner to file this Petition was granted on November 5, 2018.

The Ruling of the Court of Appeals for the Third Circuit denying Petition for Rehearing is dated August 1, 2018 and appears at Appendix page 52. The *Precedential* Order and Opinion of the Third Circuit Court of Appeals affirming the District Court's grant of Respondents' Summary Judgment Motion is dated June 12, 2018 and appears at Appendix page 1. The order of the District Court which adopted the Report and Recommendation of the Magistrate Judge was dated November 14, 2016 and appears at Appendix page 29. The Magistrate Judge's Report and Recommendation dated February 23, 2016 which granted the Respondents' Summary Judgment Motion appears at Appendix page 34.

STATEMENT OF JURISDICTION

Petitioner Marie Gillispie respectfully seeks this Honorable Court's review of the Judgment of the United States Court of Appeals for the Third Circuit entered on June 12, 2018. Rehearing was requested but was denied on August 1, 2018. A Petition for Extension of Time to File this Petition was granted on November 5, 2018. The Petitioner invokes this Honorable Court's jurisdiction pursuant to Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions, Statutes and Rules:

The Emergency Medical Treatment and Active Labor Act ("EMTALA"), Title 42 U.S.C. Section 1395dd is reproduced at Appendix, page 54

STATEMENT OF THE CASE

Facts pertinent to Issue #1.

The Emergency Medical Treatment and Active Labor Act ("EMTALA") is a Federal law which governs when and how an Emergency Department patient may be refused treatment or transferred from one hospital to another. Because Emergency Department patients often are dealing with life-threatening injuries, they are some of our most vulnerable patients. A practice of "patient-dumping" developed in the United States, wherein Hospitals were refusing to treat certain Emergency Department patients or were referring them to other Hospitals without first stabilizing the patients and making sure that the referral Hospitals were contacted and set up to receive the patients.

In order to encourage Whistleblowing of patient dumping, the United States Congress enacted EMTALA and included a Whistleblower/anti-retaliation provision in the statute. Section (i) of Title 42 U.S.C. Section 1395dd is titled **"Whistleblower Protections".** In pertinent part it states:

> "A participating hospital may not take adverse action against [a] hospital employee **because**

> **the employee reports a violation of a requirement of this section." (Emphasis added).**

At the time of the incident in question, your Petitioner was the second in command in the Quality Department of the Respondents' Hospital. She was employed initially by the Respondents as a Nurse.

A pregnant female presented herself to the Emergency Room Department. Emergency Room personnel examined the pregnant female. The Emergency Room personnel then referred the woman to a different Hospital (Uniontown Hospital). However, prior to the referral, the patient was not in stable condition per the Respondents' own medical records of the patient:

a. the patient was experiencing heavy vaginal bleeding;
(*Third Circuit Appendix Volume II, page 25; "visit reason: heavy bleeding");*

b. "the patient stated that she did pass a large piece of what appeared to be tissue last night and when she went to the bathroom here at the ER…She is very tearful".
(*Third Circuit Appendix Volume II, page 25; "Go directly to Uniontown Hospital").*

c. "Does patient have pain or discomfort: Yes Lower ABD Pain level: 10".
(*Third Circuit Appendix Volume II, page 28; "Go directly to Uniontown Hospital").*

In addition, the Emergency Room personnel failed to contact a physician at the Uniontown Hospital to accept the patient, failed to contact and give a verbal report to a nurse at Uniontown Hospital and failed to arrange transportation for the patient to Uniontown Hospital. These failures were in violation of EMTALA.

Consequently, the Respondents' CEO tasked your Petitioner with investigating and reporting to the CEO whether an EMTALA violation had in fact occurred. *(Third Circuit Appendix Volume II, page 194 and continuing).* Petitioner, the Quality Project Coordinator, was in charge of a fact-finding meeting. She was provided an Investigation Work Sheet by her superior, the Head of the Quality Department to utilize in her investigation. Petitioner interviewed several of the staff who were involved with the handling of the situation. A second meeting was held the next day. Petitioner verbally reported to the Respondents' CEO during this second meeting that an EMTALA violation had in fact occurred and that the Defendants needed to report the violation to the Department of Health and the Patient Safety Authority. Significantly, the Hospital had recently been investigated for committing two other EMTALA violations. The Respondents' CEO, Cindy Cowie, stated that because the Hospital had recently been the subject of two other EMTALA investigations, no one was to report the violation to the Pennsylvania Department of Health. At a meeting the next week, Gillispie hand-delivered a letter to the Respondents' CEO, Cowie. *(See Third Circuit Appendix Volume II, page 21).* In pertinent part, it read:

> "I am also very concerned about the EMTALA violation that occurred last week regarding the pregnant female and transfer of her from our ER to Uniontown Hospital's ER. This is a serious EMTALA violation. As you know, you informed us that you decided to not report this incident to the Department of Health. As I stated to you at the meeting last week, I believe we must self-report this incident. Pam Carroll spoke up as well and agreed with me. I struggle to understand your reasons for deciding to not report this incident. I again suggest that you do so, immediately, as it would be in the Hospital's best interest."

Cowie fired Petitioner on the spot. Petitioner subsequently filed a Complaint with the Pennsylvania Department of Health reporting the EMTALA violation and the directed cover-up of the violation by the Respondents' CEO. (*Third Circuit Appendix Volume II, page 232-241*). Your Petitioner did not have the opportunity to file a Complaint with the Pennsylvania Department of Health prior to being fired.

To summarize, the Respondents' CEO tasked Petitioner, who was the Quality Control Coordinator, to (i) investigate whether or not a violation of EMTALA occurred; and (ii) to report to the CEO whether an EMTALA violation occurred. Petitioner investigated the situation, and dutifully reported to Cowie, first verbally and then in writing, that an EMTALA violation had in fact occurred.

Facts pertinent to related Issue #2.

The employees of the Respondents' Hospital referred the pregnant patient to Uniontown Hospital. Upon her arrival at Uniontown Hospital, the pregnant patient required and received additional health care services. The proof of this is contained in the 144 pages of the Patient's redacted records from Uniontown Hospital, *(Third Circuit Appendix Volume II, page 50-193).*

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. The *Precedential* ruling by the 3rd Circuit Court of Appeals is in direct conflict with United States Supreme Court precedent of Schindler Elevator Corporation vs. United States ex. rel. Daniel Kirk, 563 U.S. 401, 131 S. Ct. 1885, 179 L. Ed. 2d 825 (2011) and Kasten vs. Saint-Gobain, 563 U.S. 1, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011) as well as the intent of the United States Congress, which crafted the language of the anti-retaliation Whistleblower provision of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. Section 1395dd, because the 3rd Circuit has grafted onto the definition of the word "report" a requirement that the information conveyed by the Whistleblower be not already known.

Issue: Did your Petitioner make a "report" of an EMTALA violation pursuant to EMTALA's Whistleblower/anti-retaliation provision?

The Third Circuit Court of Appeals used a Webster's Dictionary definition of "report" to identify the meaning of "report" in the anti-retaliation provision of

EMTALA's Whistleblower provision. This Court did the same in interpreting what the word "report" meant under the Federal False Claims Act in Schindler Elevator Corporation vs. United States ex. rel. Daniel Kirk, 563 U.S. 401,131 S. Ct. 1885, 179 L. Ed. 2d 825, (2011). Similarly, this Court did likewise in Kasten vs. Saint-Gobain, 563 U.S. 1, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011) to determine the meaning of "file a complaint" under the Fair Labor Standards Act.

The definition of "report" using Webster's is "a report is something that gives information", or a "notification" or "an official or formal statement of facts or proceedings." The Third Circuit emphasized that the term "ordinarily means nothing more than the transmission of information". A Whistleblower under EMTALA, according to the Third Circuit, is "**anyone who informs someone about something** that she believes in good faith to be a violation of EMTALA (*Appendix, page 22).* **(Emphasis added).**

However, the Third Circuit went on to add a requirement which is not contained in Webster's definition: that the information reported not be otherwise known. Here, the Respondent's CEO was present during the second Fact-Finding meeting when Your Petitioner reported that an EMTALA violation occurred. At that point, the participants were still gathering and processing information. Petitioner followed up in writing (*Third Circuit Appendix Volume II, page 21*). The Third Circuit ruled that Petitioner did **not** make a "report" under EMTALA because the CEO was present during the Fact-Finding meeting and privy to the information which was being gathered. This is

clear error. First of all, the Third Circuit improperly and unfairly expanded the definition of "report" in Webster's Dictionary by adding a requirement that whom a report is made to must not have known about the information conveyed. The expansion of the definition of the word "report" is contrary to the intent of Congress in protecting EMTALA Whistleblowers. Secondly, such an ad hoc expansion is in direct conflict with this Court's precedents of Schindler Elevator Corporation vs. United States ex. rel. Daniel Kirk, 563 U.S. 401, 131 S. Ct. 1885, 179 L. Ed. 2d 825 (2011) and Kasten vs. Saint-Gobain, 563 U.S. 1, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011). In those cases, this Court did not expand the definition as it was set forth in Webster's Dictionary. Here, Petitioner **did** make a report. She was also immediately fired and did not have the opportunity to file a Complaint with the Pennsylvania Department of Health until after she was fired. To conclude to the contrary is serious error. The language of the EMTALA statute is broad. It does not specify that a report must be in writing. It does not require that a report be made within a specific time period. It does not specify **to whom** a report must be made. The Third Circuit contradicted itself as well. It identified the definition, "**anyone who informs someone about something**" and then strayed from its own definition. (*Appendix, page 22).*

Furthermore, public policy should encourage whistle-blowing, especially in this context: Petitioner, a Nurse, was standing up for a patient, a pregnant mother, who could have lost her child. Why should the word 'report' be construed so narrowly and so technically as to **discourage** whistleblowing? Who is

more deserving of protection than a Nurse who stands up for vulnerable patients in Hospital Emergency Departments?

II. Relatedly, by overlooking critical evidence which makes clear that Petitioner's public policy exception to the at-will employment doctrine claim is not preempted by Pennsylvania's MCARE Act, the Third Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's supervisory power.

The Third Circuit upheld the grant of the Respondent-Employer's Summary Judgment as to Count II. Count II is Petitioner's related claim under Pennsylvania's public policy exception to the at-will employment doctrine. The sole rationale was that no evidentiary support exists in the record that Count II could not have been brought under the anti-retaliation provision of Pennsylvania's MCare Act. *(Opinion at 19-20)*. **But this is not true.** The Panel overlooked 107 pages of medical records which were marked as "Exhibit D" in Appellant's Reproduced Record. These records establish that the patient's situation entailed in Count II of the Complaint did **not** qualify as an "incident" under the anti-retaliation provision of the MCare Act. Thus, the Petitioner in fact did **not** have a statutory remedy under the MCARE Act. This requires her to be permitted to proceed under her public policy exception to the at-will employment doctrine common law claim at Count II. Section 1303.308 of the MCare Act only gives a cause of action to health care employees who are retaliated for complaining about a "serious event" or an "incident".

A "serious event" is defined as "an event, occurrence or situation involving the clinical care of a patient in a medical facility that results in death or compromises patient safety and results in an unanticipated injury requiring the delivery of additional health care services to the patient".

An "incident" is defined as "an event, occurrence or situation involving the clinical care of a patient in a medical facility which could have injured the patient but did not either cause an unanticipated injury or require the delivery of additional health care services to the patient. The term does not include a serious event". Patient E.R.'s situation **did not** result in death or result in unanticipated injury. It thus did not constitute a "serious event". It did not qualify as an "incident" either, because the situation **did** require the delivery of additional health care services to patient E.R. as evidenced by Exhibit "D": the 100 + pages of medical records. Thus, the Petitioner does not have an available statutory remedy.

Further, Count II challenges that Petitioner was fired for protesting the cover-up of the EMTALA violation. This situation, protesting a directed cover-up, is clearly not encompassed in the MCare Act's definitions of "serious event" or "incident". Thus, again, the Petitioner did not have a statutory remedy under Count II. She therefore should/must be permitted to proceed therefore under her common law public policy exception claim.

This overlooking of the record evidence by the Third Circuit warrants exercise of this Court's supervisory power.

CONCLUSION

WHEREFORE, Marie Gillispie respectfully requests this Honorable Court to grant Certiorari in this case to address the *Precedential* Third Circuit Court of Appeals ruling which improperly grafted a requirement onto the word "report" in EMTALA's anti-retaliation provision which conflicts with this Court's precedent in Schindler Elevator Corporation vs. United States ex. rel. Daniel Kirk, 563 U.S. 401, 131 S. Ct. 1885, 179 L. Ed. 2d 825 (2011) and Kasten vs. Saint-Gobain, 563 U.S. 1, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011) as well as the intent of the United States Congress.

Petitioner secondly requests this Honorable Court to exercise its supervisory powers and to address the Third Circuit's departure from accepted and usual course of judicial proceedings wherein the Third Circuit clearly overlooked record evidence which warrants the Petitioner being permitted to proceed, at minimum, with her cause of action under the public policy exception to Pennsylvania's at-will employment doctrine. Your Nurse-Petitioner reported an EMTALA violation and was immediately fired for (i) reporting the violation and (ii) protesting the directed cover-up of the EMTALA violation, which endangered a pregnant Emergency Department patient and the child she was carrying.

Respectfully submitted,

Noah Geary, Esquire
Counsel of Record
Suite 225
Washington Trust Building
Washington, PA 15301
(724) 222-3788
noahgearylawoffices@gmail.com

Attorney for the Petitioner, Marie Gillispie