APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-4307

[Filed June 12, 2018]

MARIE GILLISPIE,
Appellant

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

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D. C. Civil No. 2-13-cv-01534)
District Judge: Honorable Mark R. Hornak

Argued on September 26, 2017

Before: SMITH, Chief Judge, McKEE and
RESTREPO, Circuit Judges

(Opinion filed: June 12, 2018)

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OPINION OF THE COURT

McKEE, Circuit Judge

We are asked to determine whether the District Court erred in dismissing a claim under the "whistleblower" protection provision of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd. The dispute here arises from Marie Gillispie's allegations that the Southwest Regional Medical Center (the "Medical Center") terminated her employment because she reported the Medical Center's allegedly improper discharge of an unstable patient and because she reported its alleged substandard care of an admitted patient.

The District Court granted summary judgment in favor of the Medical Center based upon its conclusion that Gillispie had not established a prima facie case for retaliation under EMTALA and because various

common law claims that Gillispie included in her complaint were preempted by state statutes. For the reasons that follow, we will affirm.

I.

A. Legal Background

Although hospital emergency rooms were once used primarily to treat life-threatening injuries and serious medical conditions, they have since morphed into little more than primary care facilities for those who cannot afford routine medical care.[1]

This shift from medical emergency management to primary care treatment has resulted in a "grave financial challenge" for hospital administrators.[2] Many of them responded to this economic pressure by engaging in a practice known as "patient dumping." That term refers to the practice of refusing to offer emergency room treatment to indigent patients who lack medical insurance, or transferring them to other medical facilities before their emergency medical

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[1] *See* Kevin Grumbach et al., *Primary Care and Public Emergency Department Overcrowding*, 83 Am. J. Pub. Health. 372, 372 (1993), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1694659/pdf/amjph00527-0070.pdf.

[2] *Genova v. Banner Health*, 734 F.3d 1095, 1097 (10th Cir. 2013); *Torretti v. Main Line Hosps., Inc.*, 580 F.3d 168, 173 (3d Cir. 2009) ("Congress enacted EMTALA in the mid-1980s based on concerns that, due to economic constraints, hospitals either were refusing to treat certain emergency room patients or transferring them to other institutions.") (citing 68 Fed. Reg. 53,222, 53,223 (Sept. 9, 2003)).

condition has been stabilized.[3] Congress attempted to address this situation by enacting EMTALA.[4] EMTALA imposes certain mandates on hospitals regardless of whether a patient who presents to an emergency room has the ability to pay for treatment.[5]

EMTALA requires hospitals to first examine each patient to determine whether an emergency medical condition exists.[6] "[I]f the examination reveals the patient is suffering from an emergency medical condition, the hospital usually must stabilize the patient before getting into the business of trying to [discharge or] transfer him [or her] elsewhere."[7] A hospital that either (1) fails to properly screen a patient, or (2) releases a patient without first stabilizing his or her emergency medical condition thereby violates EMTALA.[8]

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[3] *Torretti*, 580 F.3d at 173.

[4] *Power v. Arlington Hosp. Ass'n,* 42 F.3d 851, 856 (4th Cir. 1994) (internal quotation marks omitted) ("Congress enacted EMTALA to address a growing concern with preventing 'patient dumping,' the practice of refusing to provide emergency medical treatment to patients unable to pay, or transferring them before emergency conditions were stabilized." (citation omitted)).

[5] *Id.*

[6] 42 U.S.C. § 1395dd(a).

[7] *Genova*, 734 F.3d at 1097 (citation omitted); *see also* 42 U.S.C. § 1395dd(b)(1).

[8] A negligent violation of these provisions can subject a hospital or physician to civil penalties not exceeding $50,000. 42 USC

Congress included a whistleblower provision in EMTALA to maximize the likelihood that violations would be reported, and that employees who reported them would not be punished by the employer hospital. That provision states in relevant part: "A participating hospital may not penalize or take adverse action . . . against any hospital employee because the employee reports a violation of a requirement of this section."[9]

B. Factual Background

Marie Gillispie, a registered nurse, worked for the Southwest Regional Medical Center[10] for 13 years and held the position of Quality Project Coordinator when she was terminated in November 2012. Her responsibilities as Quality Project Coordinator included evaluating patient care as well as addressing patient care issues involving possible medical errors.

On October 23, 2012, a pregnant patient, whom we will call "E.R.," went to the Medical Center's emergency room complaining of discomfort, pain and vaginal bleeding. After examining E.R., the Medical Center's emergency room personnel discharged her and instructed her to "[g]o directly to Uniontown Hospital" to see a gynecologist. The Medical Center did not have

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§ 1395dd(d)(1)(A). Additional penalties are provided for gross violations of EMTALA.

[9] 42 U.S.C. § 1395dd(i).

[10] Appellee Essent Healthcare owns and operates the Medical Center, which also operates as a subsidiary of Appellee RegionalCare Hospital Partners, Inc.

a gynecologist on staff.[11] The Medical Center's personnel did not transport E.R. to Uniontown Hospital, and they were unable to contact Uniontown to confirm whether E.R. got there.

The next day, October 24, 2012, Cynthia Cowie, who was the Medical Center's Chief Executive Officer, organized a telephone conference to discuss what had happened to E.R. the night before. Gillispie participated in that call in her role as Quality Project Coordinator.

On October 25th, the day after the conference call, a root cause analysis (RCA) meeting was called to investigate whether E.R.'s discharge violated EMTALA and to determine whether the circumstances surrounding E.R.'s discharge triggered any reporting requirements under EMTALA.

Gillispie contends that she insisted that EMTALA required the appropriate personnel at the Medical Center to report the circumstances surrounding E.R.'s discharge to the Pennsylvania Department of Health and/or the Pennsylvania Patient Safety Authority.[12]

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[11] Appellant's App'x Vol. I 11.

[12] The Centers for Medicare and Medicaid Services (CMS) and the Office of Inspector General (OIG) are jointly responsible for enforcing EMTALA. The CMS authorizes investigations of EMTALA violations by State agencies and determines if a violation occurred. 42 C.F.R. § 489.20(m). The OIG assesses monetary penalties against violators. 42 C.F.R. § 1003.500(a). Although EMTALA does not require violators to self-report instances of non-compliance, "[i]t should be considered a mitigating circumstance if a hospital took appropriate and timely corrective action in

Despite Gillispie's alleged insistence that EMTALA required the Medical Center to self-report, Cowie instructed the meeting attendees not to report the incident.[13] Nevertheless, at the conclusion of the RCA meeting, Cowie did instruct two of the Medical Center's directors to visit Uniontown Hospital to follow-up on E.R.'s treatment.

Cowie convened a second meeting on October 25, 2012. According to Gillispie's deposition, everyone in that meeting agreed that the Medical Center's discharge of E.R. failed to comply with EMTALA.[14] Gillispie claimed that she and two other attendees argued that the Medical Center therefore had a legal obligation to report the circumstances of E.R.'s discharge to the appropriate agency or authority.[15] According to her deposition, Gillispie told the group "I think it's better to be on the safe side of safety and report it because they're gonna find out anyway . . .."[16] Gillispie also claims that she "protested with [Cowie] several times, or protested with the group several

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response to the violation." 42 C.F.R. § 1003.520(a). Any "corrective action [though]. . . must include disclosing the violation to CMS prior to CMS receiving a complaint regarding the violation from another source or otherwise learning of the violation." *Id.* Gillispie argues she told Appellees that there was a duty to report E.R.'s discharge. *See* Appellant's Br. 9.

[13] Report & Recommendation Mot. to Dismiss 3; SA 186.

[14] Appellees' App'x 206.

[15] Appellant's App'x 206–07.

[16] Appellant's App'x 206.

times that [they] better let them know because it would come out."[17] Despite Gillispie's alleged insistence, Cowie steadfastly maintained that the incident did not have to be reported. Consequently, no one at the Medical Center reported E.R.'s discharge to any regulatory authority or agency.

Representatives of the Pennsylvania Department of Health did arrive at the Medical Center the next day, but they did not come to investigate E.R.'s discharge. Rather, they came to investigate a complaint regarding a patient with the initials L.S. L.S.'s family had complained that, despite Cowie's contrary representations to them, the Medical Center had failed to discipline nurses for the poor care L.S. had received at the Medical Center. L.S.'s family had complained that L.S. was given all of his medications at once despite his inability to swallow the pills simultaneously. The family also complained that L.S. had not received certain medications on two separate occasions.

During an interview related to that investigation, Gillispie told the investigators about her involvement in the Medical Center's internal review of L.S.'s treatment. She informed them that only one of the two nurses who had been assigned to L.S. had been disciplined for errors in his treatment. According to Gillispie, Cowie had falsely told L.S.'s family that both nurses had been disciplined.

[17] Appellant's App'x 207.

That same day, Cowie learned of a letter that Gillispie had prepared to aid the Department of Health with its inquiry into L.S.'s treatment. According to Cowie, Gillispie claimed that the letter had previously been drafted in connection with the Medical Center's July 2012 investigation into L.S.'s care. The document was, in fact, dated July 2012, but the Medical Center's information technology personnel determined that the letter had not been created until the day of the Department of Health's investigation into L.S.'s treatment and that it had been backdated. At the conclusion of the Department of Health's visit, Cowie met with Gillispie and told her to leave the Medical Center's premises for the day.

Gillispie complied, but, at Cowie's request, she returned to the Medical Center on November 1, 2012—six days after the Department of Health's visit. Upon her return, Gillispie met with Cowie and gave her a letter that included the following text:

> I am also 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.[18]

Cowie terminated Gillispie's employment at the conclusion of that meeting.

Although Gillispie had not reported the Medical Center's discharge of E.R. to any agency prior to her termination, she did subsequently report it.[19] She also filed this suit alleging that her termination violated EMTALA's whistleblower protection.

C. Procedural History

Gillispie's original five-count complaint alleged that her discharge violated EMTALA as well as Pennsylvania's public policy. She subsequently amended the complaint by adding four counts under the Pennsylvania Medical Care Availability and Reduction of Error (MCARE) Act.[20] The District Court subsequently dismissed those counts because the applicable statute of limitations had passed.

Thereafter, a Magistrate Judge filed a Report and Recommendation recommending that the Medical Center be granted summary judgment on each of the five original counts because Gillispie had not established that she had engaged in any protected activity. The judge also recommended that her remaining state law claims be dismissed because she

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[18] Appellant's Br. 11 (footnote added).

[19] SA 24–32.

[20] 40 Pa. Cons. Stat. § 1303.101 *et seq*.

had a statutory remedy for any such violations and therefore was not entitled to relief based upon violation of public policy. The District Court agreed and entered an order awarding appellees summary judgment. This timely appeal followed.[21]

II.

In reviewing a District Court's grant of summary judgment, we apply the same test the District Court utilized, "viewing those inferences that may be drawn from the underlying facts in a light most favorable to the nonmoving party."[22] "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."[23] However, when a party alleges facts that are blatantly contradicted by the record, we will "not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[24]

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[21] The District Court had federal question jurisdiction over Gillipsie's EMTALA claim pursuant to 28 U.S.C. § 1331. It had supplemental jurisdiction to hear Gillipsie's state law claims pursuant to 28 U.S.C. § 1367. The grant of summary judgment constitutes a final order. Thus, we have appellate jurisdiction under 28 U.S.C. § 1291.

[22] *Figueroa v. Buccaneer Hotel Inc.*, 188 F.3d 172, 175 (3d Cir. 1999) (citation and internal quotation omitted).

[23] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–587 (1986) (citation and internal quotation marks omitted).

[24] *Scott v. Harris*, 550 U.S. 372, 380 (2007).

III.

As we noted at the outset, Gillispie claims that the Medical Center's Chief Executive Officer fired her in retaliation for reporting an EMTALA violation based on the Medical Center's discharge of E.R., thus violating the whistleblower protection contained in EMTALA. Gillispie also contends that, to the extent her termination was motivated by her participation in the Department of Health's investigation of L.S.'s care, it also violated Pennsylvania public policy. We address each argument in turn.

1.

"In the absence of direct evidence of retaliation, courts [have applied] the *McDonnell Douglas*[25] burden-shifting framework to . . . [whistleblower claims]" under EMTALA.[26] That familiar approach was developed for claims brought under Title VII of the Civil Rights Act of 1964.[27] Although we have not yet specifically decided if we should apply that framework to resolve EMTALA claims, "we have found that if a statute does not provide for a burden-shifting scheme, *McDonnell Douglas* applies as the default burden-shifting framework."[28] Accordingly, we take this

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[25] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

[26] *See Elkharwily v. Mayo Holding Co.*, 823 F.3d 462, 470 (8th Cir. 2016) (collecting cases).

[27] 42 U.S.C. §§ 2000e *et seq*.

[28] *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157–58 (3d Cir. 2013) (citations omitted).

opportunity to hold that, absent direct evidence of retaliation, we should apply the burden-shifting scheme utilized in *McDonnell Douglas* to resolve whistleblower claims under EMTALA.[29]

Accordingly, Gillispie must first establish a prima facie case of retaliation by producing sufficient evidence to prove: (1) she engaged in conduct that is protected by EMTALA; (2) her employer subsequently took an adverse employment action against her; and (3) the employer did so because she engaged in protected activity.[30] As with Title VII claims, Gillispie need not prove an actual EMTALA violation. Rather, she need only establish that "[s]he was acting under a good faith, reasonable belief that a violation existed."[31] The District Court concluded that Gillispie had not established such a prima facie case because she had not "made a 'report' as that term is considered under EMTALA."[32]

EMTALA's whistleblower provision protects only employees who have "report[ed] a violation" of one of the statute's provisions.[33] The District Court held that

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[29] The parties here agree that this is the correct approach to resolve this dispute.

[30] *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015) (citation omitted).

[31] *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996) (citation and internal quotation marks omitted).

[32] Appellant's App'x Vol. I 3.

[33] 42 U.S.C. § 1395dd(i).

Gillispie's conduct was, at most, an expression of disagreement with the Medical Center's decision not to report a violation, rather than an actual report of an EMTALA violation.[34] On appeal, Gillispie argues that her EMTALA claim must survive summary judgment because she produced sufficient evidence to show that she had made a report within the meaning of the statute and that this report resulted in her retaliatory termination.

A.

The text of EMTALA does not define "report," and there is a dearth of case law defining that term as it is used in EMTALA's whistleblower provision. Accordingly, we must begin with the premise that Congress intended the ordinary meaning of that term.[35] If the language is clear, our inquiry is at an end.[36]

The Supreme Court has explained that "[a] 'report' is 'something that gives information' or a 'notification,' . . . or '[a]n official or formal statement of facts or

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[34] Appellant's App'x Vol. I 4.

[35] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" (internal quotation marks omitted)); *see also Araujo,* 708 F.3d at 158 ("Statutory analysis begins with the plain language of the statute, 'the language employed by Congress.'" (citation omitted)).

[36] *Robinson*, 519 U.S. at 340 (citation omitted).

proceedings[.]'"[37] Put another way, it is "[a]n account brought by one person to another."[38] Thus, the term ordinarily refers to nothing more than the transmission of information. Given the absence of ambiguity in the text of EMTALA, our inquiry into the meaning of "report" need proceed no further. Viewing the record and all reasonable inferences derived therefrom in the light most favorable to Gillispie, it is clear that she failed to establish that she actually provided any information of an alleged EMTALA violation to anyone.

It is undisputed that the aforementioned series of meetings occurred on October 25, 2012. The first was the RCA meeting, which Cowie convened to investigate whether the Medical Center's care of E.R. complied with EMTALA. The second meeting was a follow-up to the first.

The parties disagree about exactly what happened in those meetings. Gillispie alleges that she first voiced her view that the Medical Center's discharge of E.R. violated EMTALA at the RCA meeting.[39] However, the District Court concluded that was not supported by the record. We agree; the record does not support Gillispie's

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[37] *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 408–09 (2011) (citing Webster's Third New International Dictionary 1925 (1986); Black's Law Dictionary 1300 (6th ed. 1990).

[38] *Schindler Elevator Corp.*, 563 U.S. at 408 (citing 13 Oxford English Dictionary 650 (2d ed. 1989)).

[39] SA 187; Appellant's App'x 268; Appellant's Br. 19.

claim that she made such an assertion at the initial meeting.

During his deposition, Michael Onusko, the Medical Center's Senior Administrative Director of Emergency Outpatient and Environmental Services, testified that, at the end of the RCA meeting, all of the attendees "felt comfortable" with the conclusion that the Medical Center had not violated EMTALA."[40] That testimony is consistent with other evidence in this record. A document labeled "Staff Timeline" indicates that, on October 25th, "it was decided . . . that this was not a potential EMTALA violation and would not be reported as such."[41] In addition, the following people attended the RCA meeting: Kathi Comandi, the Medical Center's Chief Nursing Officer; Pamela Carroll, the Medical Center's Chief Quality Officer ; and Bridgett Trump, the Medical Center's Director of the Emergency Department and Intensive Care Unit. They agreed that each attendee believed that the Medical Center's handling of E.R.'s visit had not violated EMTALA.[42] Gillispie's contention to the contrary is further undermined by her own deposition. She testified that the first meeting was a "fact-finding meeting"[43] and that "at the end of [the first] meeting . . . Cindy had made a decision to send Bridget Trump and Mike

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[40] SA 122–24.

[41] SA 101–02.

[42] SA 86, 87, 03–04.

[43] Appellant's App'x 204.

Onusko to Uniontown Hospital that evening."[44] When asked to recount the details of that meeting, Gillispie did not testify that she told the attendees she believed the Medical Center's discharge of E.R. violated EMTALA and that it should have been reported.

Although Gillispie is entitled to the benefit of all reasonable factual inferences at this stage, she must nevertheless point to some evidence in the record to support her factual assertions.[45] We agree with the District Court's conclusion that she failed to do so.

2.

Gillispie also contends that she reported the Medical Center's alleged violation during the second meeting. Her assertion is once again contradicted by her own deposition. According to her deposition, the second meeting began with an overview of the discussion Trump and Onusko had with Uniontown Hospital—the hospital to which E.R. had been referred. Gillispie testified that after Trump and Onusko reported on their meeting with Uniontown Hospital, "there was a discussion. [Cowie] said, [] we won't report this, we just had some EMTALA close calls in the last few weeks."[46] Gillispie testified that she responded by saying: "I think it's better to be on the side of safety

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[44] Appellant's App'x 205.

[45] Fed. R. Civ. P. 56(e); *see also Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) ("Summary judgment is the put up or shut up moment in a lawsuit.") (citation and internal quotation marks omitted).

[46] Appellant's App'x 206.

and report it . . . ."[47] She also testified that "[e]verybody in that meeting" "decided it was an EMTALA violation but it would not be reported . . . ."[48] The decision not to report the violation—which, according to Gillispie, everyone acknowledged—went unchanged even after Gillispie "protested with the group several times that . . . we better let them know because it would come out."[49]

Thus, according to Gillispie's own deposition, the attendees in the meeting were all aware of the potential EMTALA violation absent any information (or "report") from her. Gillispie neither alleged nor testified that the Medical Center personnel concluded that E.R.'s discharge violated EMTALA only *after* she notified them of the circumstances surrounding it. Any such evidence would paint a very different picture than the one that was before the District Court. Instead, Gillispie's deposition establishes that she expressed a contrary opinion about E.R.'s care only after everyone had already "decided it was an EMTALA violation but it would not be reported . . . ."[50]

We appreciate that Gillispie purportedly urged the attendees at the October meetings to report the circumstances surrounding E.R.'s discharge and told them that they "better let [the regulatory agencies]

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[47] Appellant's App'x 206.

[48] Appellant's App'x 206.

[49] Appellant's App'x 206.

[50] Appellant's App'x 206.

know because it would come out."[51] However, the chronology is significant here. Gillispie's deposition establishes that her efforts occurred only after Cowie and the other attendees had already concluded that E.R.'s discharge was a violation of EMTALA. That testimony is fatal to her attempt to now claim that she is entitled to the sanctuary of EMTALA's whistleblower provision because she made a "report" under EMTALA. It is clear that she did not provide any "information" or "notification" about E.R.'s discharge, and she does not allege anything to the contrary.[52] Rather, she testified that she merely disagreed with that decision.

Gillispie's claimed protests that the better course would have been for the Medical Center to self-report the violation was not, without more, a "report" under EMTALA. They did not inform the Medical Center's management of anything that was not already known. As the District Court explained, Gillispie's "argument would appear to boil down to an assertion that EMTALA's anti-retaliation provisions reach . . . an employee's disagreement (which we must and will presume here to have been made in good faith) with the

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[51] Appellant's App'x 207.

[52] *See Schindler Elevator Corp.*, 563 U.S. at 407–08. We realize, of course, that the Court was interpreting "report" as used in a different statute (the False Claims Act) in *Schindler Elevator*. However, the Court clearly stated that it was applying the ordinary meaning of "report" because there, as here, the statute did not define the term. *See id.*

decision of hospital management not to report as an EMTALA violation a specific episode."[53]

Title VII's anti-retaliation provision is once again illustrative. Unlike EMTALA, Title VII provides protection against retaliatory discharge of an employee who "opposed" a Title VII violation or "participated in any manner" in an investigation into a violation.[54] We cannot ignore the difference between the breadth of that protection and the much narrower protection Congress provided under EMTALA for an employee who reports a violation. Congress had the benefit of hindsight when it drafted EMTALA, and its decision to exclude certain conduct that would be protected under Title VII suggests that EMTALA's whistleblower protection is narrower than the analogous provision of Title VII.[55]

It is undisputed that Gillispie did not give anyone at the Medical Center any information about E.R.'s emergency room visit or discharge that they were not already aware of. Thus, Gillispie has failed to demonstrate that she engaged in activity protected by EMTALA's whistleblower provision. She did not make

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[53] Appellant's App'x Vol. I 4.

[54] 42 U.S.C. § 2000e-3(a).

[55] *See Richerson v. Jones*, 551 F.2d 918, 928 (3d Cir. 1977) ("[W]here a statute with respect to one subject contains a specific provision, the omission of such provision from a similar statute is significant to show a different intention existed. This principle of construction applies with equal force to statutory words." (citation and internal quotation marks omitted)).

a "report" and cannot establish a prima facie case for relief as a protected whistleblower under EMTALA.[56]

3.

In dismissing Gillispie's EMTALA claim, the District Court explained: "there is no record evidence that the Plaintiff went to any governmental or regulatory agency with a 'report' of an EMTALA violation."[57] However, no such evidence is necessary to establish that a "report" of an EMTALA violation has been made. Had Congress intended to limit EMTALA's whistleblower protections to information given to regulatory agencies or governmental authorities, it could have easily done so.[58] Title 42 U.S.C. § 1395dd(i) is not limited to employees who make "official reports" or who report violations to regulatory or governmental agencies. Rather, Congress more broadly provided that "participating hospital[s] may not penalize . . . any hospital employee because the employee reports a violation of " EMTALA. Congress clearly intended to include the transmission of information under the

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[56] The defendants also assert that, even if Gillispie has established a *prima facie* case of whistleblower retaliation, her claim nonetheless fails because Gillispie has not shown that the defendants' claim that it fired her only because she backdated a document was pretextual. Given our holding that she cannot establish that she engaged in protected conduct, we need not reach this issue.

[57] Appellant's App'x Vol. I 3.

[58] *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998) (noting that we must construe remedial legislation liberally).

protective umbrella of a "report." Thus, covered medical facilities cannot penalize anyone who informs someone about something that s/he believes in good faith to be a violation of EMTALA that was not otherwise known or had not otherwise been discovered.

Indeed, a contrary interpretation would strip employees (and patients) of the very protection Congress intended to provide in enacting this statute. It would encourage medical facilities to quickly fire any employee who made an internal report of a violation before the report was made to an outside authority. In such a situation, the hospital could correctly claim that the employee had not been penalized for any report under EMTALA because no such report had been made when the employee was penalized.

Accordingly, we hold that EMTALA's whistleblower provision protects employees who inform personnel in a covered facility of a possible EMTALA violation even though the employee does not also inform any governmental or regulatory agency.

4.

Count II of the amended complaint alleged that the Medical Center discharged E.R. in violation of the safeguards provided by statutory and common law.[59] Count V alleged that the Medical Center provided L.S. with poor care by giving him his medications all at once and twice failing to give him medications individually.[60]

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[59] SA 188–89

[60] Appellant's App'x Vol. I 35.

In Pennsylvania, an employer may terminate an employee without cause provided that "the dictates of public policy," contract, or a statutory provision do not prohibit such termination.[61] Absent any such prohibition, there is no common law cause of action in Pennsylvania for "wrongful termination."[62] Gillispie argues that, even though she claims wrongful termination in counts II and V, her claims may nevertheless survive summary judgment because they allege violations of various public policies. We have previously determined that Pennsylvania law does not recognize a common law cause of action for violating public policy if a statutory remedy exists. As we explained in *Wolk v. Saks Fifth Ave., Inc.*, "the availability of a [statutory] remedy precludes other common law remedies even where the statute is not invoked."[63] Although Gillispie's wrongful discharge claims are cloaked in the rhetoric of public policy, they are clearly prohibited as common law claims for violation of public policy because she could have brought them under Pennsylvania's MCARE Act.

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[61] *Spierling v. First Am. Home Health Servs., Inc.*, 737 A.2d 1250, 1253 (Pa. 1999) (citation omitted); *see also Geary v. U.S. Steel Corp.*, 319 A.2d 174, 180 (Pa. 1974) (noting that "an employee at will has no right of action against his employer for wrongful discharge" where "no clear mandate of public policy is violated").

[62] *See, e.g.*, *Geary*, 319 A.2d at 180; *see also, Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 918 (Pa. 1989) ("It should be noted that, as a general rule, there is no common law cause of action against an employer for termination of an at-will employment relationship.").

[63] 728 F.2d 221, 224 n. 3 (3d Cir. 1984).

Although counts II and V of Gillispie's amended complaint explicitly allege that the appellees "violated, undermined[,] and implicated . . . the MCARE Act[,]" she now contends that the MCARE Act is inapplicable. [64] Her belated attempt to disclaim the MCARE Act, despite relying upon it at the outset, is likely explained by the District Court's determination that counts VI-IX, which were brought solely pursuant to the MCARE Act, were time-barred by the applicable statute of limitations.[65] If she is correct about the inapplicability of the statute, the MCARE Act would not preclude her from recovering based upon common law and public policy. But Gillispie is wrong. Despite her protestations to the contrary, Gillispie's claims are covered by the MCARE Act, and she is therefore precluded from relying on the alleged violations of common law and public policy.

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[64] Am. Compl. ¶¶ 48 (count II), 122 (count V), ECF No. 32. The "MCARE Act" refers to The Medical Care Availability and Reduction of Error Act of March 20, 2002.P.L. 154, *as amended,* 40 P.S. § 1303.101–1303.910, replaced its predecessor, the Health Care Services Malpractice Act (Malpractice Act) of October 15, 1975, P.L. 390, No. 111 § 101 *et seq., as amended,* 40 P.S. § 1301.101 *et seq.* The MCARE Act was established to safeguard reasonable compensation for victims of medical negligence and malpractice.

[65] *Gillispie v. Regionalcare Hosp. Partners, Inc.*, 2015 WL 1839149, at *1 (W.D. Pa. Apr. 21, 2015) (noting that Gillispie "failed to assert her claims within the 180-day statute of limitations set forth in the Pennsylvania Whistleblower Statute, [43 Pa. Cons. Stat. § 1424(a)]").

Pennsylvania's MCARE Act expressly incorporates the provisions of the Pennsylvania Whistleblower Law. The MCARE Act provides in relevant part as follows:

> [a] health care worker who reports the occurrence of a **serious event or incident** . . . shall not be subject to any retaliatory action for reporting the serious event or incident and shall have the protections and remedies set forth in . . . the Whistleblower Law.[66]

Pennsylvania's Whistleblower Law generally provides a civil cause of action for an employee whose public employer retaliates for reporting the employer's "wrongdoing or waste."[67] As we have explained, Gillispie is alleging that she was terminated in retaliation for reporting the Medical Center's discharge of E.R. (count II) and deficient care of L.S. (count V). Her claims fall squarely within the ambit of the MCARE Act if they involve either an "incident" or a "serious event." Gillispie concedes that she is not alleging she reported a serious event. Accordingly, we need only determine if her claim involves an "incident" under Pennsylvania law.[68]

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[66] 40 Pa. Cons. Stat. § 1303.308(c) (emphasis and footnote added).

[67] 43 Pa. Cons. Stat. § 1423(a).

[68] A "serious event" is "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." 40 Pa. Cons. Stat. § 1303.302.

The Whistleblower Law defines an "incident" as: [a]n 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.[69]

Count II clearly alleges retaliation for Gillispie's alleged report of an "incident." It is uncontested that E.R.'s discharge could have, but did not, result in injury.[70] Gillispie argues E.R.'s discharge does not qualify as an "incident" because it did require the delivery of additional health care. She does not cite to anything in the record in making this argument. Accordingly, as the District Court correctly held, Gillispie's assertion is unavailing because it completely lacks evidentiary support.[71] Thus, we agree with the District Court's conclusion that the claims in count II clearly could have been brought pursuant to the MCARE Act.

Count V, which concerns the treatment of L.S., is similarly precluded because it too could have been brought under the MCARE Act. In an attempt to remove the claim from the ambit of the MCARE Act,

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[69] *Id.* § 1303.302 (footnote added).

[70] *See* Appellant's Br. 29; SA 220.

[71] *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (summary judgment should be entered against nonmoving party who fails to make showing sufficient to establish existence of element essential to that party's case).

Gillispie argues that her report to the Department of Health regarding L.S.'s care did not involve an "incident" because the alleged poor care could not have caused L.S. injury.[72] But again, Gillispie has failed to produce evidence to defeat a motion for summary judgment. The District Court therefore had "little difficulty finding that a hospital patient receiving medication in a manner ill-suited for his physiology as well as failing to receive required medication as needed could have resulted in an injury to him and/or required that he received additional health care services."[73] Gillispie has made no attempt to refute this finding, and contrary evidence does not exist in the record.[74]

The MCARE Act provides Gillispie with a statutory remedy, and, as a result, she may not also allege a public policy-based wrongful discharge claim. Accordingly, counts II and V of the amended complaint were properly dismissed.

5.

In an eleventh-hour attempt to save counts II and V, Gillispie now contends the public policy-based claims survive even in the light of an applicable remedial statute because any available remedies would be

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[72] Appellant's App'x Vol. I 35.

[73] Appellant's App'x Vol. I 35.

[74] At the motion to dismiss stage, the District Court did not dismiss counts II and V along with counts VI–XI because it could not, at that stage, determine whether the claims fell under the MCARE Act. Now that discovery is complete, it is clear that counts II and V are encompassed by that Act.

inadequate. In Pennsylvania, a statutory remedy is inadequate only if it either (1) does not allow adjudication of the issue raised by the appellant, or (2) allows irreparable harm to occur to the appellant during the pursuit of the statutory remedy.[75] The MCARE Act provides whistleblowers with the full "protections and remedies set forth in the . . . Whistleblower Law."[76] Gillispie cannot establish that the MCARE Act's damages are inadequate, and it is not at all apparent that they are. In any event, the District Court correctly concluded that the claims are now barred by the 180-day limitation period that governs claims brought under the MCARE Act.

IV.

For the foregoing reasons, we will affirm the judgment of the District Court.

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[75] *LCN Real Estate, Inc. v. Borough of Wyoming,* 544 A.2d 1053, 1058 n.8 (Pa. Commw. Ct. 1988).

[76] 40 Pa. Cons. Stat. § 1303.308(c).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13-1534

[Filed November 14, 2016]

MARIE GILLISPIE,	)
Plaintiff,	)
	)
vs.	)
	)
REGIONALCARE HOSPITAL PARTNERS,	)
INC.; ESSENT HEALTHCARE-WAYNESBURG	)
LLC *doing business as* SOUTHWEST	)
REGIONAL MEDICAL CENTER; ESSENT	)
HEALTHCARE-PENNSYLVANIA, INC.;	)
ESSENT HEALTHCARE INC.; ESSENT	)
HEALTHCARE; SOUTHWEST	)
REGIONAL MEDICAL CENTER,	)
Defendants.	)
	)

Judge Mark R. Hornak/
Chief Magistrate Judge Maureen P. Kelly

ORDER

AND NOW, this 14th day of November, 2016, after Plaintiff Marie Gillispie ("Plaintiff") filed an action in the above-captioned case, and after a Motion for

Summary Judgment was filed by Defendants, ECF No. 97, and after a Report and Recommendation was filed by the United States Magistrate Judge recommending that the Motion for Summary Judgment be granted, ECF No. 111, and upon consideration of the Objections filed by Plaintiff, ECF No. 112, along with the supplemental filings of the parties at ECF Nos. 127, 129, along with the matters adduced at oral argument held by this Court, and upon independent review of the record, and upon consideration of the Magistrate Judge's Report and Recommendation, which is adopted as the Opinion of this Court as supplemented by this Order,

IT IS HEREBY ORDERED that the Motion for Summary Judgment, ECF No. 97, is GRANTED.

The Court adopts the Report and Recommendation of the Magistrate Judge in full. The Court would also note that an issue explored with counsel at oral argument was whether the acts asserted by the Plaintiff to be protected were "reports" under the Emergency Medical Treatment and Active Labor Act ("EMTALA") such that they would support a claim under 42 U.S.C. § 1395dd(i).

As the Report and Recommendation correctly concluded, the term "report" is not defined in EMTALA, and it is therefore given its "ordinary meaning." *O'Connor v. Jordan Hospital*, 2013 WL 3105647, *5 (D. Mass. June 17, 2013). Central to that concept is the premise that a "report" gives information or a notification or is otherwise an official or formal statement of facts or proceedings. Here, the core of the Plaintiff's EMTALA retaliation claim is that she was

dismissed for two reasons: first, for taking the position at hospital managers' meetings on October 24 and 25, 2013 that an incident already well-known to hospital administration should be reported to state regulatory agencies as an EMTALA violation; and second, for reiterating that position in a letter she delivered to hospital management on the day of her dismissal. Considering the record before the Court in a light most favorable to the Plaintiff, the Court cannot conclude that there is an issue of fact that the Plaintiff made a "report" as that term is considered under EMTALA.

As noted by the Magistrate Judge in her Report and Recommendation, there is no record evidence that the Plaintiff went to any governmental or regulatory agency with a "report" of an EMTALA violation. Further, the record reveals that she voiced to hospital management her disagreement with management's conclusion that the hospital would not make a regulatory report under EMTALA as to an episode that hospital management was already well aware of, and in fact had made the subject of internal meetings which included Plaintiff. Thus, the Plaintiff's argument would appear to boil down to an assertion that EMTALA's anti-retaliation provisions reach and then cover an employee's disagreement (which we must and will presume here to have been made in good faith) with the decision of hospital management to not report as an EMTALA violation a specific episode.

In light of the construction of the term "report" as noted above, what Plaintiff did was not the "giving of information" or a "notification" of anything beyond her own opposition to the EMTALA position of

management, nor was it an "official or formal statement of facts or proceedings." While it is true that Plaintiff can be said to have "opposed" the position of the hospital in such regards—a position that may or may not have been legally incorrect—it is important to note that the anti-retaliation provisions of EMTALA do not contain the "opposition" language or concept commonly found in federal fair employment practices statutes. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 623(d)(Age Discrimination in Employment Act); 42 U.S.C. § 12203(a)(Americans with Disabilities Act). Unlike the case with those federal statutes, the foundation of an EMTALA retaliation claim is a "report," and not "opposition"; the record here, viewed in the light most favorable to the Plaintiff, supports at best only the latter, not the former. Thus, the grant of summary judgment on the EMTALA retaliation claim is proper for this additional reason.[1]

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[1] The *O'Connor* Court indicated that in considering an EMTALA retaliation claim, principles underlying the litigation of such claims under Title VII are relevant. However, an examination of that analysis reveals that the analogy is as to the allocation of the burdens of proof and persuasion, and the elements of such a claim. Under Title VII, the "protected activity" is either opposition to a practice made unlawful by Title VII, or participation in a Title VII proceeding. Under EMTALA, the "protected activity" is very different, namely a "report". Thus, a generalized reference to Title VII principles does not resolve the question. The Court would also note that the Plaintiff has filed a Motion for Leave to File Additional Legal Authority, ECF No. 127, which the Defendant has opposed. ECF No. 129. The Court grants the Motion, and has considered such matters, but does not find them dispositive. Finally, the Court directed the parties to file additional briefing as to subject matter jurisdiction, ECF No. 124, which they did. ECF

IT IS FURTHER ORDERED that, pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, if any party wishes to appeal from this Order a notice of appeal, as provided in Fed. R. App. P. 3, must be filed with the Clerk of Court, United States District Court, at 700 Grant Street, Room 3110, Pittsburgh, PA 15219, within thirty (30) days.

By the Court:
/s/ Mark R. Hornak
Mark R. Hornak
United States District Judge Court

cc: The Honorable Maureen P. Kelly
Chief United States Magistrate Judge

All Counsel of Record Via CM-ECF

Nos. 125, 126. Given the Court's disposition of this action, the Court need not consider such matters further.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13-1534

[Filed February 23, 2016]

MARIE GILLISPIE, Plaintiff, vs. REGIONALCARE HOSPITAL PARTNERS, INC.; ESSENT HEALTHCARE-WAYNESBURG LLC *doing business as* SOUTHWEST REGIONAL MEDICAL CENTER; ESSENT HEALTHCARE-PENNSYLVANIA, INC.; ESSENT HEALTHCARE INC.; ESSENT HEALTHCARE; SOUTHWEST REGIONAL MEDICAL CENTER, Defendants.	)))))))))))))))

Judge Mark R. Hornak/
Chief Magistrate Judge Maureen P. Kelly

Re: ECF No. 97

REPORT AND RECOMMENDATION

I. RECOMMENDATION

Presently before the Court is a Motion for Summary Judgment filed by Defendants RegionalCare Hospital Partners, Inc., Essent Healthcare-Waynesburg LLC *doing business as* Southwest Regional Medical Center, Essent Healthcare-Pennsylvania, Inc., Essent Healthcare Inc., Essent Healthcare and Southwest Regional Medical Center (collectively, "Defendants"). ECF No. 97.

For the following reasons, it is respectfully recommended that the Motion for Summary Judgment be granted.

II. REPORT

A. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Marie Gillispie ("Plaintiff") began her employment with Defendants in August, 1999 as a licensed practical nurse at Southwest Regional Medical Center ("SWRMC"). In 2012, Plaintiff was employed by SWRMC in the position of Quality Project Coordinator. As the Quality Project Coordinator, Plaintiff was responsible for raising patient care issues and investigating medical errors and complaints. She reported to Pam Carroll, the Chief Quality Officer. Plaintiff's employment was terminated involuntarily on November 1, 2012. ECF No. 99 ¶¶ 5, 15-20; ECF No. 102 at 1.

Plaintiff initiated this civil action on October 22, 2013, with the filing of a five-count Complaint. ECF No. 1. In her original Complaint, Plaintiff set forth various claims against Defendants for her alleged retaliatory discharge on November 1, 2012, in violation of the Emergency Medical Treatment and Active Labor Act ("EMTALA")(Count I) and for her alleged wrongful termination in violation of various public policies (Counts II through V). Defendants filed a Motion to Dismiss Counts II through V pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending that Plaintiff's common law wrongful discharge claims were preempted by applicable federal and state statutes, including the Pennsylvania Whistleblower Law, 43 P.S. § 1422 *et seq.,* and the Pennsylvania Medical Care Availability and Reduction of Error ("MCARE") Act, 40 P.S. § 1303.101 *et seq*. ECF No. 2. This Court denied the initial Motion to Dismiss, noting that EMTALA appears to contemplate the incorporation of state common law remedies into an EMTALA civil action, and discovery would be required to determine if Plaintiff's common law claims were duplicative of her statutory claims. As such, the Motion to Dismiss was denied without prejudice to renew the arguments for dismissal at the summary judgment stage of this litigation. ECF Nos. 13, 16.

Subsequently, Plaintiff filed a Motion to Amend/Correct her Complaint, ECF No. 27, which was granted on October 15, 2014. ECF No. 28. Plaintiff filed her First Amended Complaint on October 31, 2014, which purported to add four claims (Counts VI through IX). ECF No. 32. Defendants subsequently filed a second Motion to Dismiss, seeking to dismiss each of

the additional claims based upon Plaintiff's failure to timely file her MCARE Act claims. ECF No. 34. In addition, Defendants sought the dismissal of all retaliation claims on the basis that Plaintiff's claims arise out of complaints lodged within the scope of her employment, which Defendants argued could not constitute "protected activity." Id. On April 21, 2015, this Court granted the Motion to Dismiss in part, dismissing Counts VI through IX. ECF Nos. 50, 52. This Court denied the Motion to Dismiss insofar as it was predicated on the First Amendment. Id.

Following the completion of discovery, Defendants filed the instant Motion for Summary Judgment on November 13, 2015. ECF No. 97. Defendants also filed a Brief in Support of the Motion for Summary Judgment, a Concise Statement of Material Facts and an Appendix to the Motion. ECF Nos. 98-100. On December 3, 2015, Plaintiff filed a response to the Motion for Summary Judgment, a response to the Concise Statement of Material Facts and two Appendices. ECF Nos. 101-104. On December 7, 2015, Plaintiff filed a brief in opposition to the Motion for Summary Judgment. ECF No. 107. On December 16, 2015, Defendants filed a reply brief. ECF No. 110. The Motion for Summary Judgment is now ripe for review.

B. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A disputed fact is "material" if proof of its existence or nonexistence

would affect the outcome of the case under applicable substantive law. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir. 1992). An issue of material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 257; Brenner v. Local 514, United Brotherhood of Carpenters and Joiners of America, 927 F.2d 1283, 1287-88 (3d Cir. 1991). When determining whether there is a genuine issue of material fact, the court must view the facts and all reasonable inferences in favor of the nonmoving party. EEOC v. Allstate Ins., 778 F.3d 444, 448 (3d Cir. 2015).

In order to avoid summary judgment, a party must produce evidence to show the existence of every element essential to the case that it bears the burden of proving at trial; "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the nonmoving party fails to make a sufficient showing on any essential element of its case, the moving party is entitled to judgment as a matter of law. Id.

C. DISCUSSION

1. Count I: Unlawful Firing in Violation of EMTALA

In Count I of the Amended Complaint, Plaintiff alleges that her termination from employment at SWRMC was an unlawful retaliatory firing in violation

of EMTALA; specifically, Plaintiff alleges a violation of 42 U.S.C. § 1395dd(i). ECF No. 32 at 4. The cited statute provides, in pertinent part, as follows:

> (i) Whistleblower protections. A participating hospital may not penalize or take adverse action . . . against any hospital employee because the employee reports a violation of a requirement of this section.

Defendants assert that Count I fails as a matter of law because Plaintiff has failed to set forth evidence of: (1) a patient-related EMTALA violation or (2) Plaintiff's protest of Defendants' decision concerning EMTALA.[1]

a. Patient-related EMTALA violation

EMTALA prohibits, *inter alia*, the transfer of individuals who have not been stabilized unless certain conditions are met. 42 U.S.C. § 1395dd(c). Plaintiff, in the Amended Complaint, alleges that the initial violation of EMTALA occurred when a pregnant female ("E.R.") presented to the SWRMC Emergency Room Department and was referred to Uniontown Hospital for treatment without: (1) contacting a physician and Uniontown Hospital to accept E.R.; (2) contacting and giving a verbal report to a nurse at Uniontown Hospital; and (3) arranging transportation to

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[1] Defendants also assert that even if Plaintiff has established a *prima facie* case, her claim nonetheless fails because she has failed to establish that Defendants' reason for terminating her was pretextual. It is unnecessary to address this assertion; however, because Plaintiff has failed to establish a *prima facie* case.

Uniontown Hospital for E.R.[2] ECF No. 32 ¶¶ 17-21. Implicit in Plaintiff's allegations is the fact that E.R. was not stable when she was referred to Uniontown Hospital.

Defendants do not assert that they met EMTALA's conditions for transfer of an unstable patient; rather, Defendants assert that E.R. was in stable condition prior to her discharge. See, e.g., ECF No. 99 ¶¶ 27, 29.

It appears that there is a genuine dispute as to E.R.'s condition upon her departure from SWRMC. Defendants cite, *inter alia*, to a medical record in which E.R.'s condition is described as stable. ECF No. 99 ¶ 27 (citing ECF No. 100-4 at 10). However, the same medical record indicates that E.R. "needed" to be seen by a gynecologist and that she was offered an ambulance transport to Uniontown Hospital to do so. ECF No. 100-4 at 10. It is further indicated therein that SWRMC personnel made two attempts to contact the Uniontown Hospital Emergency Room. Id. Additionally, Plaintiff points to the "Patient Visit Information" document in which, under "Activity Restrictions or Additional Instructions," E.R. is directed to "Go directly to Uniontown Hospital." ECF No. 102 ¶ 25 (citing ECF No. 103 at 7). The latter indications raise a question as to the E.R.'s stability at

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[2] Plaintiff does not specifically identify the subsections of EMTALA that correspond to these alleged violations, nor are the same obvious from a reading of EMTALA. In particular, the nurse-to-nurse report repeatedly referred to by Plaintiff is not a requirement in 42 U.S.C. § 1395dd(c)(2) (setting forth requirements for an appropriate patient transfer).

the time she left SWRMC.[3] Therefore, summary judgment is not appropriate on this basis.

b. Plaintiff's protest of EMTALA decision

Defendants also argue that Plaintiff's claim must fail where there is no evidence that Plaintiff protested Defendants' EMTALA-related decision. Although Defendants' terminology is imprecise, it is clear from the statute under which Plaintiff seeks relief that she must have been terminated for "report[ing] a violation of a requirement" of EMTALA in order to obtain relief. 42 U.S.C. § 1395dd(i). Plaintiff claims that she "reported" the EMTALA violation to Cindy Cowie, her supervisor. ECF No. 102 ¶ 53 (citing ECF No. 103 at 50-63; ECF No. 104).

As discussed in O'Connor v. Jordan Hospital, 2013 WL 3105647, *5 (D. Mass. 2013):

> Where the term "report" is not defined within EMTALA it is appropriate to turn to its ordinary meaning. See Schindler Elevator Corp. v. U.S. ex. Rel. Kirk, —— U.S. ——, ——, 131 S.Ct. 1885, 1891, 179 L.Ed.2d 825 (2011); accord U.S. ex. rel. Conrad v. Abbott Laboratories, Inc., 2013 WL 682740, *5 (D.Mass. Feb.25, 2013). "A 'report' is 'something that gives information' or

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[3] It is noted that Defendants also point to documents concerning third-party investigations which Defendants claim exonerate them of any wrongdoing. ECF No. 98 at 5 (citing ECF No. 99 ¶¶ 151, 154). As provided, the cited documents are incomplete and unclear in scope and conclusion.

> a 'notification' ... or 'an official or formal statement of facts or proceedings.' " Schindler Elevator Corp. v. U.S. ex. Rel. Kirk, 131 S.Ct. at 1891 (quoting Webster's Third International Dictionary, p.1925 (1986) and Black's Law Dictionary, p. 1300 (1990)).

In O'Connor, the plaintiff received a call from another hospital regarding a possible EMTALA violation at the hospital at which she worked. O'Connor, 2013 WL 3105647 at * 8. The plaintiff "took the lead in the investigation" of the incident, brought the EMTALA violation to the attention of senior management and prepared a reporting letter to be sent to a regulatory authority. Id. Based on these facts, the O'Connor court found that the plaintiff had "reported" the violation. Id.

Here, in response to Defendants' argument on this point, Plaintiff advances the following evidence: (1) Plaintiff's deposition testimony concerning her statements at a meeting; and (2) a letter that Plaintiff submitted to Ms. Cowie immediately prior to Plaintiff's termination describing her statements at said meeting. ECF No. 107 at 9.

The referenced meeting was the second in a series of two meetings convened at the direction of Ms. Cowie for the purpose of investigating whether an EMTALA violation occurred in the care of E.R. ECF No. 103 at 50-56. At the referenced meeting, it was decided that an EMTALA violation would not be reported. Id. at 56. Plaintiff states that she "did say, I think it's better to be on the side of safety and report it because they're gonna find out anyway . . .." Id. She explains, "I protested with [Ms. Cowie] several times, or protested

with the group several times that, you know, we probably better, you know, we better let them know because it would come out." Id. at 57.

Plaintiff neither discovered an EMTALA violation nor reported an EMTALA violation to any regulatory authority. Even when viewed in the light most favorable to Plaintiff, the evidence she has produced reveals that her sole act was to voice her equivocal opinion in a meeting convened by others for the purpose of investigating the possibility of an EMTALA violation. Unlike the plaintiff in O'Connor, Plaintiff undertook no initiating, resolute or official action to report an EMTALA violation. Accordingly, Plaintiff has failed to establish a *prima facie* case on her related claim. Defendants are thus entitled to judgment as a matter of law on Count I.

2. Counts II-V: Violations of Public Policy Exception to Pennsylvania's At-Will Employment Doctrine

In Counts II through V of the Amended Complaint, Plaintiff alleges that her termination from employment at SWRMC was in violation of the public policy exception to Pennsylvania's at-will employment doctrine.

Defendants assert that Counts II through V fail as a matter of law because they are essentially MCARE-based claims for which a statutory remedy exists. As explained in this Court's Report and Recommendation concerning the Motion to Dismiss Counts II through V:

> Defendants argue that [Plaintiff's] claims are preempted by an existing statutory remedy

provided by the Pennsylvania Medical Care Availability and Reduction of Error ("MCARE") Act, 40 P.S. § 1303.101 et seq., which expressly incorporates the provisions of the Pennsylvania Whistleblower Law.

The MCARE Act protects health care professionals from retaliatory action for reporting "incidents" or "serious events" to the appropriate safety officer. It provides in pertinent part:

> A health care worker who reasonably believes that a serious event or incident has occurred shall report the serious event or incident according to the patient safety plan of the medical facility.... The report shall be made immediately or as soon thereafter as reasonably practicable, but in no event later than 24 hours after the occurrence or discovery of a serious event or incident.... A health care worker who reports the occurrence of a serious event or incident in accordance with subsection (a) or (b) shall not be subject to any retaliatory action for reporting the serious event or incident and shall have the protections and remedies set forth in ... the Whistleblower Law.

40 P.S. § 1303.308. An "incident" is defined as "[a]n 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." Id. at § 1303.302. A "serious event" is defined as "[a]n 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." Id.
>
> . . .
>
> The Court agrees that to the extent [Plaintiff] sets forth claims that fall within the anti-retaliation provision of the MCARE Act, her common law wrongful discharge claims are preempted.

ECF No. 13 at 12, 13.

The above-quoted Report and Recommendation was adopted as the Opinion of this Court, as supplemented by, *inter alia*, the following:

> The Defendants are quite right that Pennsylvania common law wrongful discharge case law makes it plain that where there is a statutory remedy, particularly where there is a comprehensive remedial scheme made part of the statutory remedy, state common law will not recognize an action for "wrongful discharge." *See Murray v. Commercial Union Ins. Co. (Commercial*), 782 F. 2d 432, 437 (3d Cir. 1986). This is not so much an application of more "supreme" federal law via the preemption doctrine as it is a principle of substantive Pennsylvania state law. The thought behind this

> is the idea that where the legislature has spoken clearly, and outlined the parameters of a right of action and the "rules of the road" for a potential recovery, the common law has no remedial "gap" to fill in, and all claims must come through that statutory sieve. *See Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 920-22 (Pa. 1989).
>
> . . .
>
> The Magistrate Judge directly and correctly stated that the claims asserted . . . cannot survive to the extent that they are coterminous with M-CARE-based claims.

ECF No. 16 at 2.

The above-quoted decisions held in abeyance the question of whether Plaintiff's claims were coterminous with MCARE-based claims. It is now ripe for review.

a. Count II

(1) Qualification under MCARE Act

Count II of the Amended Complaint has the same factual basis as Count I. ECF No. 32 at 7-9. Plaintiff denies that this claim could qualify as a claim under the anti-retaliation provision of the MCARE Act on the basis that E.R.'s situation was neither an "incident" nor a "serious event" as defined in the MCARE Act. ECF No. 107 at 13. Defendants assert that the situation constituted an "incident." ECF No. 98 at 13. The narrow question before the Court is whether Plaintiff

has produced evidence to show E.R.'s situation was something other than "[a]n 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." 40 P.S. § 1303.302.

Plaintiff baldly asserts that E.R.'s care at SWRMC did not constitute an "incident" because "the situation **did** require the delivery of additional health care services to patient E.R." ECF No. 107 at 13 (emphasis in original). Plaintiff does not cite to any evidence to support her assertion and a review of the Amended Complaint, Defendants' Concise Statement of Material Facts and Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts fails to reveal any evidence that E.R. required additional health care services caused by an event, occurrence or situation involving her care at SWRMC. Accordingly, Plaintiff has not made a sufficient showing that her claim at Count II is not coterminous with an MCARE-based claim.

(2) Adequate remedy under Whistleblower Law

Plaintiff also asserts that she should be permitted to pursue her claim under common law because the Whistleblower Law provides limited remedies. ECF No. 107 at 14. This argument was already decided by this Court:

> [T]o the extent the full panoply of remedies available at common law may not be available

> under the provisions of the Whistleblower Law, it is apparent that the Pennsylvania legislature has deemed the remedies available to be sufficient and it is not for this Court to say otherwise.

ECF No. 13 at 13 (citation and quotation marks omitted) (adopted by ECF No. 16). Therefore, Plaintiff cannot obtain relief on this argument.

Accordingly, Defendants are entitled to judgment as a matter of law on Count II.

b. Counts III and IV

(1) Adequate remedy under Whistleblower Law

Count III of the Amended Complaint concerns a patient with the initials G.M. ECF No. 32 at 9-12. Count IV of the Amended Complaint concerns a patient with the initials M.E. Id. at 13-16. Plaintiff's sole argument to defend against Defendants' Motion for Summary Judgment on these counts is the inadequate-remedy one discussed above. The argument was previously rejected by this Court. ECF No. 13 at 13; ECF No. 16. Accordingly, Defendants are entitled to judgment as a matter of law on Counts III and IV.

c. Count V

(1) Qualification under MCARE Act

Count V concerns the treatment of a patient with the initials L.S. ECF No. 32 at 16-19. Plaintiff denies that this claim could qualify as a claim under the anti-

retaliation provision of the MCARE Act on the sole basis that L.S.'s situation was neither an "incident" nor a "serious event" as defined in the MCARE Act. ECF No. 107 at 13-14. Defendants assert that the claim constitutes an "incident." ECF No. 98 at 16. The narrow question before the Court is whether Plaintiff has produced evidence to show L.S.'s situation was something other than "[a]n 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." 40 P.S. § 1303.302.

Plaintiff asserts that L.S.'s care at SWRMC did not constitute an "incident" because it "could not have caused him injury." ECF No. 107 at 14. She cites no evidence to support her assertion. The issues with L.S.'s care are summarized in the following agreed-upon fact:

> Ms. Cowie spoke with L.S.'s family, who informed Ms. Cowie that L.S. was given all of his medications at once, despite having a stricture,[[4]] which made it difficult for him to take all of his medications at once. They also informed her that there had been two evenings during which L.S. did not receive his eye drops.

ECF No. 99 ¶ 95 (citations omitted).

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[4] The medical definition of "stricture" is "an abnormal narrowing of a bodily passage (as from inflammation, cancer, or the formation of scar tissue) <esophageal *stricture*>; *also*: the narrowed part." http://www.merriam-webster.com/medical/stricture.

As stated above, Plaintiff has not made any evidentiary showing that the deficits in L.S.'s care could not have injured him or required the delivery of additional health care services to him. Without such a showing, this Court has little difficulty finding that a hospital patient receiving medication in an manner ill-suited for his physiology as well as failing to receive required medication as needed could have resulted in an injury to him and/or required that he receive additional health care services. Accordingly, Plaintiff has not made a sufficient showing that her claim at Count V is not coterminous with an MCARE-based claim.

(2) Adequate remedy under Whistleblower Law

Plaintiff also raises the inadequate-remedy argument as to this claim. The argument was previously rejected by this Court. ECF No. 13 at 13; ECF No. 16.

Accordingly, Defendants are entitled to judgment as a matter of law on Count V.

D. CONCLUSION

For the foregoing reasons, it is respectfully recommended that Defendants' Motion for Summary Judgment, ECF No. 97, be granted.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and

Recommendation. Objections are to be submitted to the Clerk of Court, United States District Court, 700 Grant Street, Room 3110, Pittsburgh, PA 15219. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

Respectfully submitted,

/s/ Maureen P. Kelly
MAUREEN P. KELLY
CHIEF UNITED STATES MAGISTRATE JUDGE

Dated: February 23, 2016

cc: The Honorable Mark R. Hornak
United States District Judge

All Counsel of Record Via CM-ECF

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-4307

[Filed August 1, 2018]

MARIE GILLISPIE,)
Appellant)
)
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)
)

(D.C. Civ. No. 2-13-cv-01534)

SUR PETITION FOR PANEL REHEARING

Present: SMITH, Chief Judge, MCKEE & RESTREPO, Circuit Judges

The petition for rehearing filed by a**ppellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it

is hereby O R D E R E D that the petition for rehearing by the panel is denied.

BY THE COURT,

s/ Theodore McKee
Circuit Judge

Dated: August 1, 2018
PDB/cc: All Counsel of Record

APPENDIX E

42 U.S.C. §1395dd. Examination and treatment for emergency medical conditions and women in labor

(a) Medical screening requirement

In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1)) exists.

(b) Necessary stabilizing treatment for emergency medical conditions and labor

(1) In general If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c).

(2) Refusal to consent to treatment

A hospital is deemed to meet the requirement of paragraph (1)(A) with respect to an individual if the hospital offers the individual the further medical examination and treatment described in that paragraph and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such examination and treatment, but the individual (or a person acting on the individual's behalf) refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such examination and treatment.

(3) Refusal to consent to transfer

A hospital is deemed to meet the requirement of paragraph (1) with respect to an individual if the hospital offers to transfer the individual to another medical facility in accordance with subsection (c) and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such transfer, but the individual (or a person acting on the individual's behalf) refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such transfer.

(c) Restricting transfers until individual stabilized

(1) RuleIf an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(B)), the hospital may not transfer the individual unless—

(A)

(i) the individual (or a legally responsible person acting on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer, in writing requests transfer to another medical facility,

(ii) a physician (within the meaning of section 1395x(r)(1) of this title) has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer, or

(iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as defined by the Secretary in regulations) has signed a certification described in clause (ii) after a physician (as defined in section 1395x(r)(1) of this title), in consultation with the person, has made the determination described in such clause, and subsequently countersigns the certification; and

(B) the transfer is an appropriate transfer (within the meaning of paragraph (2)) to that facility.

A certification described in clause (ii) or (iii) of subparagraph (A) shall include a summary of the risks and benefits upon which the certification is based.

(2) Appropriate transfer An appropriate transfer to a medical facility is a transfer—

(A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child;

(B) in which the receiving facility—

(i) has available space and qualified personnel for the treatment of the individual, and

(ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;

(C) in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented, available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) provided under paragraph (1)(A), and the name and address of any on-call physician (described in subsection (d)(1)(C)) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment;

(D) in which the transfer is effected through qualified personnel and transportation equipment, as required

including the use of necessary and medically appropriate life support measures during the transfer; and

(E) which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

(d) Enforcement

(1) Civil money penalties

(A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than $50,000 (or not more than $25,000 in the case of a hospital with less than 100 beds) for each such violation. The provisions of section 1320a–7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under this subparagraph in the same manner as such provisions apply with respect to a penalty or proceeding under section 1320a–7a(a) of this title.

(B) Subject to subparagraph (C), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section, including a physician who—

(i) signs a certification under subsection (c)(1)(A) that the medical benefits reasonably to be expected from a transfer to another facility outweigh the risks associated with the transfer, if the physician knew or should have known that the benefits did not outweigh the risks, or

(ii) misrepresents an individual's condition or other information, including a hospital's obligations under this section,

is subject to a civil money penalty of not more than $50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this subchapter and State health care programs. The provisions of section 1320a–7a of this title (other than the first and second sentences of subsection (a) and subsection (b)) shall apply to a civil money penalty and exclusion under this subparagraph in the same manner as such provisions apply with respect to a penalty, exclusion, or proceeding under section 1320a–7a(a) of this title.

(C) If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians (required to be maintained under section 1395cc(a)(1)(I) of this title) and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not be subject to a penalty under subparagraph (B). However, the previous sentence shall not apply to the hospital or to the on-call physician who failed or refused to appear.

(2) Civil enforcement

(A) Personal harm

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(B) Financial loss to other medical facility

Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(C) Limitations on actions

No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

(3) Consultation with quality improvement organizations

In considering allegations of violations of the requirements of this section in imposing sanctions under paragraph (1) or in terminating a hospital's participation under this subchapter, the Secretary shall request the appropriate quality improvement organization (with a contract under part B of

subchapter XI) to assess whether the individual involved had an emergency medical condition which had not been stabilized, and provide a report on its findings. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall request such a review before effecting a sanction under paragraph (1) and shall provide a period of at least 60 days for such review. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall also request such a review before making a compliance determination as part of the process of terminating a hospital's participation under this subchapter for violations related to the appropriateness of a medical screening examination, stabilizing treatment, or an appropriate transfer as required by this section, and shall provide a period of 5 days for such review. The Secretary shall provide a copy of the organization's report to the hospital or physician consistent with confidentiality requirements imposed on the organization under such part B.

(4) Notice upon closing an investigation

The Secretary shall establish a procedure to notify hospitals and physicians when an investigation under this section is closed.

(e) Definitions In this section:

(1) The term "emergency medical condition" means—

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant woman who is having contractions—

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(2) The term "participating hospital" means a hospital that has entered into a provider agreement under section 1395cc of this title.

(3)

(A) The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

(B) The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is

likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

(4) The term "transfer" means the movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who (A) has been declared dead, or (B) leaves the facility without the permission of any such person.

(5) The term "hospital" includes a critical access hospital (as defined in section 1395x(mm)(1) of this title).

(f) Preemption

The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

(g) Nondiscrimination

A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or

facilities if the hospital has the capacity to treat the individual.

(h) No delay in examination or treatment

A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) or further medical examination and treatment required under subsection (b) in order to inquire about the individual's method of payment or insurance status.

(i) Whistleblower protections

A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.