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HOUSE BILL 313

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

Rick Miera

AN ACT

RELATING TO EMPLOYMENT; ENCOURAGING NOTIFICATION OF SUSPECTED  
IMPROPER QUALITY OF PATIENT CARE; PROHIBITING EMPLOYER  
RETALIATORY ACTION IN CERTAIN CIRCUMSTANCES; PROVIDING  
GRIEVANCE PROCEDURES AND PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. -- This act may be cited as the  
"Conscientious Health Care Employee Protection Act".

Section 2. PURPOSE. -- It is the purpose of the  
Conscientious Health Care Employee Protection Act to maintain  
and improve a high level of health care throughout New Mexico  
by encouraging health care employees to notify appropriate  
public bodies of suspected improper quality of patient care.  
The notification is encouraged in order to protect patients and  
employees and to assist public bodies charged with ensuring

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1 that health care is safe and adequate.

2 Section 3. DEFINITIONS. -- As used in the Conscientious  
3 Health Care Employee Protection Act:

4 A. "commission" means the human rights commission;

5 B. "director" means the director of the division;

6 C. "division" means the human rights division of  
7 the labor department;

8 D. "employee" means a health care professional who  
9 performs services for and under the control and direction of an  
10 employer for wages or other remuneration;

11 E. "employer" means a person who has four or more  
12 employees and includes an agent of an employer and a public  
13 employer;

14 F. "health care professional" means a person  
15 licensed pursuant to Chapter 61, Article 2, 3, 4, 5A, 6, 7A, 8,  
16 9, 9A, 10, 10A, 11, 12, 12A, 12B, 12C, 13, 14B, 14C, 14D, 14E  
17 or 31 NMSA 1978;

18 G. "improper quality of patient care" means a  
19 practice, procedure, action or failure to act on the part of an  
20 employer that violates a law or a rule promulgated pursuant to  
21 law;

22 H. "public body" means a state government  
23 department or agency or a political subdivision of the state;

24 I. "retaliatory action" means the discharge,  
25 suspension, demotion, disciplining or any discriminatory or

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1 adverse employment action against an employee in the terms and  
2 conditions of employment; and

3 J. "secretary" means the secretary of labor.

4 Section 4. EMPLOYER RETALIATORY ACTION PROHIBITED. -- An  
5 employer shall not take retaliatory action against an employee  
6 because the employee does any of the following:

7 A. discloses, or threatens to disclose, to an  
8 employer or to a public body an activity, policy or practice of  
9 the employer that constitutes improper quality of patient care;

10 B. provides information to, or testifies before,  
11 any public body as part of an investigation, hearing or inquiry  
12 into improper quality of patient care, or a violation of law or  
13 a rule promulgated pursuant to law; or

14 C. objects to or refuses to participate in an  
15 activity, policy or practice that:

16 (1) is in violation of a law or a rule  
17 promulgated pursuant to law;

18 (2) constitutes improper quality of patient  
19 care; or

20 (3) is fraudulent or criminal.

21 Section 5. GRIEVANCE PROCEDURE. --

22 A. An employee claiming to be subject to a  
23 retaliatory action prohibited by the Conscientious Health Care  
24 Employee Protection Act, after exhausting all other  
25 administrative grievance procedures, may file with the division

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1 a written complaint that states the name and address of the  
2 person alleged to have engaged in the retaliatory action, all  
3 information relating to the retaliatory action and any other  
4 information that may be required by the commission. All  
5 complaints shall be filed with the division within sixty days  
6 after the alleged retaliatory action was committed.

7 B. The director shall advise the respondent that a  
8 complaint has been filed and shall furnish the respondent with  
9 a copy of the complaint. The director shall promptly  
10 investigate the alleged retaliatory action. If the director  
11 determines that the complaint lacks probable cause, the  
12 director shall dismiss the complaint and notify the complainant  
13 and respondent of the dismissal. The complaint shall be  
14 dismissed subject to appeal as in the case of other orders of  
15 the commission.

16 C. If the director determines that probable cause  
17 does exist for the complaint, the director shall attempt to  
18 achieve a satisfactory resolution of the complaint through  
19 persuasion and conciliation. The director and staff shall not  
20 disclose what transpired during an attempted conciliation and  
21 shall not divulge information obtained during a hearing before  
22 the commission or a commissioner prior to taking final action  
23 on the complaint. An officer or employee of the labor  
24 department who makes public in any manner whatever any  
25 information in violation of this subsection is guilty of a

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1 misdemeanor and upon conviction shall be sentenced pursuant to  
2 the provisions of Section 31-19-1 NMSA 1978.

3 D. A person who has filed a complaint with the  
4 division may request and shall receive an order of  
5 nondetermination from the director one hundred eighty days  
6 after the division's receipt of the complaint. The order of  
7 nondetermination may be appealed pursuant to the provisions of  
8 Section 39-3-1.1 NMSA 1978.

9 E. In the case of a complaint filed by or on behalf  
10 of a person who has an urgent medical condition and has  
11 notified the director in writing of the test results, the  
12 director shall make the determination whether probable cause  
13 exists for the complaint and shall attempt conciliation efforts  
14 within ninety days of the filing of the written complaint or  
15 notification, whichever occurs later.

16 F. If conciliation fails or if, in the opinion of  
17 the director, an informal conference cannot result in  
18 conciliation and the complainant has not requested a waiver of  
19 right to hearing pursuant to the provisions of Subsection I of  
20 this section, the commission shall issue a written complaint in  
21 its own name against the respondent, except that in the case of  
22 a complaint filed by or on behalf of a person who has an urgent  
23 medical condition, who has notified the director in writing of  
24 the test results and who so elects, the director shall issue an  
25 order of nondetermination, which may be appealed pursuant to

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1 the provisions of Section 39-3-1.1 NMSA 1978. The complaint  
2 shall set forth the alleged retaliatory action, the secretary's  
3 rule or the section of the Conscientious Health Care Employee  
4 Protection Act alleged to have been violated and the relief  
5 requested. The complaint shall require the respondent to  
6 answer the allegations of the complaint at a hearing before the  
7 commission or hearing officer and shall specify the date, time  
8 and place of the hearing. The hearing date shall not be more  
9 than fifteen nor less than ten days after service of the  
10 complaint. The complaint shall be served on the respondent  
11 personally or by registered mail, return receipt requested.  
12 The hearing shall be held in the county where the respondent is  
13 doing business or the alleged retaliatory action occurred.

14 G. Within one year of the filing of a complaint by  
15 a person aggrieved, the commission or the director shall:

16 (1) dismiss the complaint for lack of probable  
17 cause;

18 (2) achieve satisfactory resolution of the  
19 complaint as evidenced by an order of the commission; or

20 (3) file a formal complaint on behalf of the  
21 commission.

22 H. Upon the commission's petition, the district  
23 court of the county where the respondent is doing business or  
24 the alleged retaliatory action occurred may grant injunctive  
25 relief, pending hearing by the commission or pending judicial

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1 review of an order of the commission, so as to preserve the  
2 status quo or to ensure that the commission's order as issued  
3 will be effective. The commission shall not be required to  
4 post a bond.

5 I. The complainant may seek a trial de novo in the  
6 district court in lieu of a hearing before the commission,  
7 provided that the complainant requests from the director, in  
8 writing, a waiver of the complainant's right to hearing within  
9 sixty days of service of written notice of a probable cause  
10 determination by the director. The director shall approve the  
11 waiver request and shall serve notice of the waiver upon the  
12 complainant and the respondent. The complainant may request a  
13 trial de novo pursuant to Section 39-3-1 NMSA 1978 within  
14 thirty days from the date of service of the waiver. Issuance  
15 of the notice shall be deemed a final order of the commission  
16 for the purpose of appeal pursuant to Section 39-3-1.1 NMSA  
17 1978.

18 J. For purposes of this section, "urgent medical  
19 condition" means a medical condition defined by an appropriate  
20 medical authority through documentation or by direct witness of  
21 a clearly visible disability that poses a serious threat to the  
22 life of a person.

23 Section 6. HEARING PROCEDURES. --

24 A. The respondent to a complaint made pursuant to  
25 Section 5 of the Conscientious Health Care Employee Protection  
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1 Act may file a written answer to the complaint, appear at the  
2 hearing, give testimony and be represented by counsel. The  
3 respondent may obtain from the commission subpoenas for any  
4 person or for the production of any evidence pertinent to the  
5 proceeding. The complainant shall be present at the hearing  
6 and may be represented by counsel. Each party shall have the  
7 right to amend his complaint or answer.

8 B. A panel of three members of the commission  
9 designated by the chairman shall sit, and a decision agreed  
10 upon by two members of the panel shall be the decision of the  
11 commission. A commissioner who has filed a complaint shall not  
12 sit on the panel hearing his complaint. Hearings also may be  
13 conducted by a hearing officer employed by the division or, if  
14 the hearing officer is unavailable, one member of the  
15 commission may be designated by the chairman to act as a  
16 hearing officer. A hearing officer shall have the same powers  
17 and duties as the commission.

18 C. The complainant or his representative shall  
19 present to the commission or the hearing officer the case  
20 supporting the complaint. Evidence concerning prior attempts  
21 at conciliation shall not be heard by the commission. The  
22 director shall not participate in the hearing, except as a  
23 witness.

24 D. The panel or a hearing officer shall not be  
25 bound by the formal rules of evidence governing courts of law



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1 or equity, but shall permit reasonable direct examination and  
2 cross-examination and the submission of briefs. Testimony at  
3 the hearing shall be taken under oath and recorded by tape or  
4 otherwise. Upon the request of any party, testimony shall be  
5 transcribed. All costs of transcribing shall be paid by the  
6 party who requested it. Each commissioner and hearing officer  
7 may administer oaths.

8 E. Upon the conclusion of a hearing conducted by a  
9 hearing officer, the hearing officer shall prepare a written  
10 report setting forth proposed findings of fact and conclusions  
11 of law and recommending the action to be taken by the  
12 commission. The hearing officer shall submit the report to a  
13 panel consisting of no more than three members of the  
14 commission designated by the chairman. A commissioner shall  
15 not sit on a panel that reviews a hearing officer's report  
16 issued in connection with a complaint filed by the  
17 commissioner. A decision by a majority of the members of the  
18 review panel shall be the decision of the commission. If the  
19 panel finds from the evidence presented at a hearing that the  
20 respondent engaged in a retaliatory action, it shall make  
21 written findings of fact and conclusions of law. The panel may  
22 adopt, modify or reject the proposed findings of fact and  
23 conclusions of law recommended by the hearing officer. Within  
24 five days after an order is completed by the commission  
25 following a hearing, the commission shall serve upon each party

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1 of record and his attorney, if any, a written copy of the order  
2 by certified mail. The written order shall be mailed to the  
3 party's address of record. All parties shall be deemed to have  
4 been served on the tenth day following the mailing. As part of  
5 its order, the commission may require the respondent to pay  
6 actual damages to the complainant and to pay reasonable  
7 attorney fees, if the complainant was represented by private  
8 counsel. The commission may also take such affirmative action  
9 as it considers necessary, including a requirement for reports  
10 of the respondent's compliance with the commission's order.

11 F. If the commission finds from the evidence that  
12 the respondent has not engaged in a retaliatory action, it  
13 shall make written findings of fact and serve the complainant  
14 and the respondent with a copy of the findings of fact and with  
15 an order dismissing the complaint.

16 Section 7. ENFORCEMENT.--If a respondent to a complaint  
17 filed pursuant to the Conscientious Health Care Employee  
18 Protection Act does not comply with an order of the commission,  
19 the attorney general or district attorney, at the request of  
20 the secretary, shall secure enforcement of the commission's  
21 order by a district court. The proceeding shall be initiated  
22 by the filing of a petition in the district court where the  
23 respondent is doing business or the alleged retaliatory action  
24 occurred. A copy of the petition shall be served on the  
25 respondent personally or by registered mail, return receipt

1 requested. The court may make and enter upon the proceedings  
2 an order to decree enforcement of the order of the commission.

3 Section 8. APPEAL. -- A party may appeal the final decision  
4 of the commission pursuant to the provisions of Section  
5 39-3-1.1 NMSA 1978.

6 Section 9. POSTING OF LAW AND INFORMATION. -- An employer  
7 subject to the Conscientious Health Care Employee Protection  
8 Act shall keep posted in a conspicuous place on his premises  
9 notices prepared by the division that set forth excerpts of  
10 that act and other relevant information as determined by the  
11 secretary.

12 Section 10. EFFECTIVE DATE. -- The effective date of the  
13 provisions of this act is July 1, 2003.

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