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## PROFESSION

### Doctor stands up for patient care, wins case

In the Courts. By AMY LYNN SORREL, amednews staff. Posted Feb. 2, 2009.

The fear of retaliation often looms large for physicians wanting to speak out about subpar patient care. California radiologist Michael Martinucci, MD, said that fear was realized when he was fired from a Kaiser Permanente group after trying to make improvements at one of its radiology facilities.

He knew that proving his case would be no easy task. But his legal battle paid off when a jury in December 2008 levied an \$11.4 million verdict against Kaiser, \$7.5 million of which came in punitive damages.

"When you see people constantly disregarding good quality patient care, you get to a level where it's just no longer acceptable," Dr. Martinucci said. "I could have let the retribution go, but then you say to yourself, that's not what I got into medicine for."

Kaiser is appealing the verdicts.

Regardless, Dr. Martinucci said his case sends a message he hopes other physicians will hear: "It's important for doctors to stand up for patients and proper care and to know, if they have to fight back, they can fight back successfully."

#### Advocating for change

When Dr. Martinucci joined Southern California Permanente Medical Group in 2003, he said he found that the radiology department was deficient in standard protocols for ultrasound, computerized tomography and gastrointestinal screenings to the point that he believed patient care was at risk if doctors could not properly interpret images taken.

In 2004, with approval from Kaiser administrators, he worked to revise, implement and supervise new procedures in line with standards at other prestigious Southern California medical centers, such as the University of California at Los Angeles, where Dr. Martinucci trained. He also conducted clinics to train the radiology technicians.

Though the changes were welcomed by some of his colleagues, Dr. Martinucci's efforts were met with resistance from the technicians, who failed to follow the new protocols, according to his complaint. Worried again that patients were being endangered by substandard patient care, Dr. Martinucci in June 2005 wrote up several technicians for unsatisfactory performance, court documents show.

Meanwhile, in the face of staffing shortages, Kaiser asked that Dr. Martinucci screen mammograms and other images he wasn't properly trained to do. The doctor declined to perform the tasks until he completed the necessary continuing education requirements because his training was not current in those areas.

Shortly after, complaints that Dr. Martinucci made racial comments and sexually harassed a male technician surfaced from technology staff members. Dr. Martinucci said he got little support from the department chief, who turned over complaints against Dr. Martinucci to Kaiser's human resources department.

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In December 2005, Kaiser administrators met with Dr. Martinucci as part of a purported investigation into the complaints, according to court records.

But a valid investigation never took place, said Dr. Martinucci's lawyer, Charles T. Mathews. Kaiser denied Dr. Martinucci's requests for information about his supposed accusers, never interviewed them and never gave him a chance to respond to the allegations, Mathews said.

Instead, Kaiser sent Dr. Martinucci a letter in February 2006 demanding that he resign or be fired. Dr. Martinucci resigned. That August he filed a complaint with California's Dept. of Fair Employment and Housing against Kaiser for retaliation and discrimination. He then received a letter from the department informing him of his right to sue.

Dr. Martinucci, who has since relocated to Northern California, followed up on the letter and sued Kaiser for defamation, retaliation and breach of contract.

A Los Angeles County jury rejected the allegations of sexual harassment and racial comments and found that Kaiser failed to use reasonable care in its investigation of the complaints. Jurors also concluded that Dr. Martinucci's advocacy efforts were a "motivating factor" in Kaiser's decision to terminate him and that hospital leaders acted with "ill will."

Kaiser denied any wrongdoing. Dr. Martinucci's work "was welcomed and implemented. ... There simply was no connection between those efforts embraced ... and his separation from the medical group," spokesman Jim Anderson said.

### **Fighting back**

Depending on their circumstances, physicians have recourse to protect themselves from retaliation when advocating for patient care, and it's important to know what state and federal laws may apply, legal experts said.

Mathews said a key to Dr. Martinucci's case was a California law that expressly prohibits retaliation against a physician who advocates for medically appropriate health care for patients. It allows doctors to seek damages for employment termination or other forms of retaliation by a hospital entity or health plan.

"It's a very powerful tool to encourage physicians to stand up," Mathews said. Physicians have not only an ethical duty to report patient care issues, but also a legal duty and "could become personally liable if they know of dangerous conditions and don't do anything about it," he added.

While not all states have such whistle-blower statutes specific to health care, doctors can seek similar recourse using traditional defamation and retaliation claims.

Physicians employed at public institutions may have other avenues using First Amendment claims to allege that a retaliatory action violated their free speech rights when it comes to matters of public concern, said Thomas S. Neuberger, a Delaware lawyer specializing in constitutional and whistle-blower issues.

But a U.S. Supreme Court ruling may have narrowed that path, he said. In a 2006 decision, *Garcetti v. Ceballos*, the high court ruled that the First Amendment does not prevent employers from disciplining public employees for statements made as a part of their official duties.

Verdicts like that reached in Dr. Martinucci's state-based retaliation claim "may be even more important in light of the retrenchment by the Supreme Court for the protection of public employees speaking out," Neuberger said.

State and federal whistle-blower statutes may be invoked if public money is involved or if a physician files a formal complaint with a governmental entity, experts said. That could include, for example, a state medical board or the Occupational Safety and Health Administration.

"Another starting point might be to look at patient safety statutes," said Barry R. Furrow, a professor and director of health law at Drexel University's Earle Mack School of Law in Pennsylvania. That state, for instance, established a Patient Safety Authority that offers whistle-blower protections to physicians and others who report quality issues.

But retaliation also can come in the form of a lawsuit itself, warned Paul Clifford, an attorney with the California Anti-SLAPP Project. The project supports so-called anti-SLAPP laws, designed to prevent abuses of the legal system to chill criticism on issues of public interest, or what are known as Strategic Lawsuits Against Public Participation.

At least 20 states have such statutes. In 2006, a California appeals court in *IHHI v. Fitzgibbons* dismissed a defamation lawsuit that a hospital corporation filed against a physician who spoke out about the company's questionable financial state. The doctor filed an anti-SLAPP motion, which forces plaintiffs to show, early on, that they are likely to win their case. If not, they must pay the defendant's attorneys fees.

Such laws "don't increase your rights, but give you a way to get rid of a lawsuit that doesn't have a basis and is used as a means of punishment for what you said," Clifford said.

#### **A strong defense**

Taking legal action against retaliation is one thing. But proving it is another, and the bar is not easily overcome, experts said. Nevertheless, doctors thinking about speaking out can take steps to ensure a strong defense and protect themselves from retaliation.

Gregory M. Abrams, a California medical staff lawyer, recommends that physicians enlist the help of other staff whenever possible. "You really need to work with your colleagues so you're not sitting out there away from the flock."

Mathews said some of the most important testimony in Dr. Martinucci's case came from fellow staff who also tried to make changes in the radiology department but were thwarted in their efforts. Dr. Martinucci also kept copies of his correspondence with hospital officials and radiology staff, all of which later proved key at trial.

"Document, document, document," Mathews said. And where appropriate, report to government entities.

"That's not to say bypass internal procedures," he said. But when that fails, "a doctor owes a duty to a patient that transcends any duty to an employer."

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*Sorrel is a former staff writer who continues to cover legal issues. E-mail comments on this column to Professional Issues Editor Damon Adams ([damon.adams@ama-assn.org](mailto:damon.adams@ama-assn.org)).*

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