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LABOR AND INDUSTRIAL RELATIONS

*General Provisions: Provide Immunity to Health Care
and Child Care Institutions for Good Faith
Disclosure of Job Performance Information*

CODE SECTION: O.C.G.A. § 34-1-4 (new)
BILL NUMBER: SB 175
ACT NUMBER: 510
SUMMARY: The Act allows selected current and former employers—health care institutions, schools, and child care institutions—to disclose negative job performance information to prospective employers, without fear of civil liability to an employee unless the employee can prove bad faith.
EFFECTIVE DATE: July 1, 1993

History

Robert W. Faver, a counselor at a Cobb County high school, pleaded guilty in 1989 to sexual molestation of a male student.¹ Prior to his Cobb County position, Faver had been fired by the Fayette County School System for providing beer to a high school student, and for providing a hotel room to two other high school students.² Public concern was raised because despite his Fayette experience, Faver had been able to secure employment at another nearby school system.³ It turned out that Faver had concealed his Fayette experience when applying for the job at Marietta High.⁴ Nonetheless, the incident sparked concern about whether or not the information would have been disclosed frankly if it had been sought as an employment reference from Fayette County.⁵

1. Jill Vejnaska, *Abused by Counselor, Man Seeks Damages; School Board Partly Blamed*, ATLANTA CONST., Apr. 27, 1993, at E4.

2. *Id.*

3. Telephone Interview with Sen. Charles "Chuck" Clay, Senate District No. 37 (Apr. 27, 1993) [hereinafter Clay Interview]. Sen. Clay was one of two sponsors of SB 175. *Id.*

4. *Cobb County: Deliberations to Begin in Abuse Suit*, ATLANTA J. & CONST., May 1, 1993, at B2.

5. Clay Interview, *supra* note 3. In response to publicity about a civil suit filed against the Fayette County School System, an attorney representing the system explained that Faver's behavior was not reported to the state licensing agency because "[a]ll they had was students' statements about two infractions totally unrelated to what happened to [the Cobb County student]." Vejnaska, *supra* note 1.

Joseph Dewey Akin, sometimes referred to as the "Code Blue Nurse"⁶ was convicted of murder in Alabama for injecting a lethal dose of lidocaine into a patient in 1991.⁷ The term "code blue" is hospital jargon for sudden coronary distress requiring emergency response by hospital personnel.⁸ By the time Akin was convicted in Alabama, he was suspected of creating "dozens of mysterious code blue medical emergencies at least five metro Atlanta hospitals."⁹ Some of the metro hospitals were contacted by Akin's Alabama employer, but they refused to disclose their suspicions.¹⁰ Yet Akin's fellow nurses at one hospital harbored suspicions strong enough that they decided to alert Roswell police, who later turned their investigation over to the Georgia Bureau of Investigations.¹¹ Absent a criminal conviction, former employers of Akin had feared civil liability to Akin for revealing suspicions they could not prove; instead, they faced civil liability to Akin's victims for failure to reveal their suspicions.¹²

In the 1992 Georgia House of Representatives, the "code blue nurse" incident prompted introduction of a bill to limit liability for good faith references.¹³ In 1993, the "code blue" concerns prompted reintroduction of the house bill.¹⁴ The abusive high school counselor case and other

6. Sandra McIntosh, *Code Blue Nurse Akin Respected and Resented; In Crises, He Kept Cool But Not Quiet*, ATLANTA CONST., Aug. 18, 1991, at A1.

7. Sandra McIntosh, *D.A. Hopes to Make Case Against Akin: Fulton Will Continue Investigation of Emergencies at Metro Hospitals*, ATLANTA CONST., Sept. 18, 1992, at G1.

8. Sandra McIntosh, *Nurses Link Co-Worker to Sudden Heart Failures at Fulton Hospital: GBI, Alabama Authorities Probe Mysterious Deaths*, ATLANTA CONST., Aug. 14, 1991, at A1.

9. McIntosh, *supra* note 7.

10. North Fulton Hospital Administrator, Frederick Bailey, was quoted as saying Akin "was not terminated for [causing code blues], because we have no proof of that. . . . As far as I know he was an excellent employee and we had no problem with him. There is no evidence that someone was harmed or died as a result of something he did or didn't do." McIntosh, *supra* note 8.

11. *Id.* During Akin's six months at North Fulton Hospital, four nurses noted an unusually high rate of "code blues" (thirty-two "code blues" rather than the hospital average of twelve), and thefts of medications that could be used to increase heart rates. *Id.* They also noted that Akin appeared to enjoy handling "code blues." *Id.* Despite a GBI investigation, Fulton County authorities did not acquire sufficient evidence for criminal charges. McIntosh, *supra* note 7.

12. *Id.*

13. Telephone Interview with Rep. Tom Campbell, House District No. 42 (Apr. 16, 1993) [hereinafter Campbell Interview]. Rep. Campbell sponsored a 1992 bill which never left committee, and sponsored a 1993 bill, HB 210, which was identical to SB 175. *Id.* Before substantive debate on HB 210 had begun, SB 175 had passed in the Senate and was forwarded to the House for consideration. *Id.* Rep. Campbell was also a member of the House Judiciary Committee, which evaluated SB 175. *Id.*

14. *Id.*

concerns about the safety of children prompted introduction of an identical senate bill, SB 175.¹⁵

SB 175

The overall purpose of the Act is "to send a message to employers, that [the Georgia General Assembly] want[s] you to be candid."¹⁶ For selected employers, the bill provides statutory resolution of the dilemma of being sued when unprovable references are given or being sued when harm results from failure to give those references.¹⁷

The Act carefully limits which employers and other persons are entitled to immunity from civil liability.¹⁸ An employer must be "a hospital, health care institution, school, public health facility, day care center, or other child care center."¹⁹ As introduced, the bill would have extended immunity to any employer.²⁰ It was intended to address a problem all types of employers face where the workforce is highly mobile—difficulty in securing accurate information on previous work history.²¹ The focus of the bill was narrowed primarily due to opposition from organized labor groups, who were concerned that immunity might be abused by some employers, serving as a means to retaliate against certain employees.²² The Senate Judiciary Committee, and later the House Judiciary Committee, agreed to limit immunity to settings where the danger of harm from employees outweighed these labor concerns.²³ By providing immunity to health care and child care institutions, the Act seeks to protect the health, safety, and welfare of those most easily harmed by employee incompetence or misconduct.²⁴

In addition to limiting immunity to employers providing specific types of service, the Act focuses on institutional employers. For example, a private physician's office or a family employing a child care provider would not have immunity.²⁵ Although the issue was never

15. Clay Interview, *supra* note 3. According to Sen. Clay, constituents reported concerns about a number of publicized instances of child abuse in institutional settings. *Id.*

16. *Id.*

17. *Id.*

18. O.C.G.A. § 31-1-4(a)(2) (Supp. 1993).

19. *Id.*

20. SB 175, as introduced, 1993 Ga. Gen. Assem.

21. Clay Interview, *supra* note 3. Sen. Clay reported that constituent employers, especially hospitals, were concerned that they could secure no reference information other than dates of employment. *Id.*

22. *Id.*

23. *Id.*; Campbell Interview, *supra* note 13.

24. Clay Interview, *supra* note 3.

25. O.C.G.A. § 34-1-4(a)(2) (Supp. 1993). The only specified health care employers are "a hospital, health care institution, . . . [or a] public health facility." *Id.* The only

specifically discussed by the legislators, according to sponsor Senator Charles "Chuck" Clay, their focus was on "places where the public has no choice but to walk in" such as hospitals, nursing homes, and schools.²⁶ The express language of the Act thus fails to provide immunity to smaller employers who would be able to provide reference information of value to institutional employers.²⁷

In addition to employers, the Act grants immunity to "any person employed by an employer."²⁸ This phrase seems to allow any coworker to comment on performance, not just those with a colorable claim as representatives of their employer. The General Assembly did not discuss the possibility that unfounded rumors might be protected.²⁹ However, in keeping with the Act's overall purpose of encouraging disclosure,³⁰ the extension of immunity to coworkers might discourage the tendency of some organizations to provide no references or only references from centralized and largely sanitized records.³¹

The Act does not expressly state whether the "prospective employer" to whom reference information is furnished must meet its definition of employer.³² The definition is tied to the employer who provides the information.³³ Given the Act's overall purpose of protecting patients and children, it seems logical that the employer receiving information would also have to be a defined institution. However, since other terms in the Act are carefully defined, the failure to define prospective employer could be interpreted as allowing information to be disseminated to any prospective employer.

The Act specifies occasions upon which disclosure of reference information is protected: when requested by the employee or when requested by the prospective employer.³⁴ This would cover the normal situations in which employee references would be furnished.³⁵

specified child care employers are "a . . . school, . . . day care center, or other child care center." *Id.*

26. Clay Interview, *supra* note 3.

27. O.C.G.A. § 34-1-4(a)(2) (Supp. 1993).

28. O.C.G.A. § 34-1-4(b) (Supp. 1993).

29. Clay Interview, *supra* note 3. The labor groups that prompted other changes in the bill were not worried about fellow employees abusing immunity. *Id.*

30. *Id.*

31. See Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)Rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (1992). Employers tend not to provide meaningful reference information due to fear of defamation suits from employees and former employees. *Id.*

32. O.C.G.A. § 34-1-4(b) (Supp. 1993).

33. *Id.* O.C.G.A. § 34-1-4(b) states that "[a]n employer [is] as defined in subsection (a). . . ." *Id.*

34. *Id.*

35. See generally Paetzold & Willborn, *supra* note 31.

The Act grants immunity for information given about an employee, which it defines as "any person" who works for a covered employer.³⁶ Information allowed to be revealed includes "information concerning . . . job performance, any act committed by such employee which would constitute a violation of the laws . . . , or ability or lack of ability to carry out the duties of such job."³⁷ The House Committee discussed narrowing the bill to employees with direct patient or child care duties, or to acts with consequences on the direct care of patients or children.³⁸ However, the legislators chose to accept free disclosure of all types of job performance information, rather than to risk the possibility of inadvertently excluding some employees and functions that could represent danger to children or to patients.³⁹

Given the incidents which spurred introduction of SB 175, as well as the plain language of the Act,⁴⁰ it is clearly intended to encourage exchange of information about criminal acts committed by employees, even where no charges have been made.⁴¹ The words of the Act also protect "information concerning . . . job performance, . . . or ability or lack of ability to carry out the duties of such job."⁴² Aside from preventing directly harmful acts of employees, the Act is aimed at improving employee effectiveness.⁴³ Employers expressed concern that they were hiring incompetent employees because former employers refused to provide any reference information other than dates of employment.⁴⁴

The Act extends immunity to employers who disclose information in good faith, and creates an express presumption that the employer is acting in good faith.⁴⁵ In order to overcome this presumption, an employee would have to prove "lack of good faith . . . by a preponderance of the evidence."⁴⁶ This was a significant change from the bill as introduced, which required "clear and convincing" evidence to rebut the presumption of good faith.⁴⁷ Labor groups, especially the Georgia Association of Educators, worked with the Senate sponsor and

36. *Id.* § 34-1-4(a)(1) (Supp. 1993).

37. *Id.* § 34-1-4(b) (Supp. 1993).

38. Clay Interview, *supra* note 3.

39. *Id.*

40. The Act provides that "any act committed by such employee which would constitute a violation of the laws of this state if such act occurred in this state." O.C.G.A. § 34-1-4(b) (Supp. 1993).

41. Clay Interview, *supra* note 3.

42. O.C.G.A. § 34-1-4(b) (Supp. 1993).

43. Clay Interview, *supra* note 3.

44. *Id.*

45. O.C.G.A. § 34-1-4(b) (Supp. 1993).

46. *Id.*

47. SB 175, as introduced, 1993 Ga. Gen. Assem.

Committee to change the standard.⁴⁸ Once again, the concern was that some employers might abuse the immunity, using it to “blackball” some employees.⁴⁹ The General Assembly was sensitive to disturbing the “delicate balance between management and labor.”⁵⁰

Finally, the Act defines an exception when immunity does not apply, which is when “the information was disclosed in violation of a nondisclosure agreement or the information disclosed was otherwise considered confidential according to applicable federal, state, or local statute, rule, or regulation.”⁵¹ This phrase was not included in the proposed bill, but was added as a somewhat routine clarification by the Senate Judiciary Committee.⁵²

SB 175 was passed on March 23, 1993. Although the issues that encouraged introduction of SB 175 received widespread media attention, the bill itself passed without any media coverage.⁵³ It is unclear whether SB 175 will have a significant effect on the provision of honest employee references, but it does seem to encourage disclosure when an employer is balancing competing liabilities.

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48. Clay Interview, *supra* note 3.

49. *Id.*

50. *Id.*

51. O.C.G.A. § 34-1-4(b) (Supp. 1993).

52. SB 175, as introduced, 1993 Ga. Gen. Assem.; SB 175 (SCS), 1993 Ga. Gen. Assem.; Clay Interview, *supra* note 3. The House Judiciary Committee substitute excluded the exception phrase, but this oversight was corrected by floor amendment. SB 175 (HCS), 1993 Ga. Gen. Assem.; SB 175 (HCSFA), 1993 Ga. Gen. Assem.; Campbell Interview, *supra* note 13.

53. According to sponsor Sen. Charles Clay, only one reporter even asked about the bill. Clay Interview, *supra* note 3.