

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO**

PATRICIA HULSMEYER,

Appellant,

Appeal No. C-1200822

v.

Trial No. A-1201578

HOSPICE OF SOUTHWEST OHIO INC., *et al.*

Appellees.

Appeal from the Hamilton County Court of Common Pleas

**BRIEF OF AARP AND OHIO DISABILITY RIGHTS LAW
AND POLICY CENTER, INC. AS AMICI CURIAE
IN SUPPORT OF APPELLANT**

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STATEMENTS OF INTEREST

THE OHIO DISABILITY RIGHTS LAW AND POLICY CENTER, INC.

The Ohio Disability Rights Law and Policy Center, Inc. (d.b.a. Disability Rights Ohio) is the system to protect and advocate for the rights of people with disabilities in Ohio, and the Client Assistance Program under the Rehabilitation Act. R.C. 5123.60; *see* 42 U.S.C. 10541 et seq.; 29 U.S.C. 732. Disability Rights Ohio is a 501(c)(3) not for profit corporation chartered under the laws of Ohio. Under both state and federal law, Disability Rights Ohio investigates abuse, neglect, and rights violations affecting people with disabilities, and pursues administrative, legal, and policy remedies to those violations. As the Protection and Advocacy (P&A) system for Ohio, Disability Rights Ohio attorneys have represented hundreds of people with disabilities before administrative bodies and in the courts, *e.g.* *Parents' League for Effective Autism Services v. Jones-Kelley*, 339 Fed.Appx. 542 (6th Cir.2009); *Doe v. Salvation Army in U.S.*, 685 F.3d 564 (6th Cir.2012); *Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516, 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007)(amicus); *Popovich v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div.*, 227 F.3d 627, 2000 WL 1335555 (6th Cir.2000)(en banc)(amicus), 276 F.3d 808 (6th Cir.2002) *cert. denied* 537 U.S. 812 and *sub nom. Court of Common Pleas of Ohio, Cuyahoga Cty., Domestic Relations Div. v. Popovich*, 537 U.S. 812, 123 S.Ct. 72, 154 L.Ed.2d 15 (2002); *Doe v. Hogan*, 421 F.Supp.2d 1051 (S.D.Ohio 2006); *Martin v. Taft*, 222 F. Supp. 2d 940 (S.D. Ohio 2002). The organization's investigators and advocates conduct hundreds of investigations into alleged abuse and neglect of individuals with disabilities, and have awareness into allegations of serious abuse or neglect by service providers, and see daily the impact that underreporting of abuse and neglect on the lives of Ohioans with disabilities. Disability Rights Ohio's interest in this matter is also based on the premise that the majority of individuals who reside in long term care facilities are also people who have a disability as that term is defined in federal law, in that they have "a

physical or mental impairment that substantially limits one or more major life activities of such individual.” 42 U.S.C. 12102(1)(A).

AARP

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial, physical and emotional abuse. AARP supports enactment and enforcement of laws that ensure that long term care facility residents are protected from neglect or abuse. The AARP Foundation is an affiliated charity that provides security, protection, and empowerment to older persons in need with support from thousands of volunteers, donors, and sponsors. AARP has staffed offices in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

SUMMARY OF ARGUMENT

Elder abuse is a serious problem in America. Residents of long-term care facilities are all too frequently the victims of abuse. They are at risk for emotional trauma, physical ailments, and even early death. Reporting incidences of elder abuse and shielding the reporters from retaliation is one of the most vital ways to protect these victims, and to prevent more individuals from suffering.

Elder abuse is profoundly underreported. To better protect vulnerable older people, it is imperative that elder abuse is reported whenever it occurs. The employees in long-term care facilities are uniquely positioned to report concerns about elder abuse in the facilities in which they work. Victims of abuse are often too scared of retaliation, or fearful of being ignored to report the abuse themselves. Workers in long-term care facilities regularly interact with residents, and do not face the same barriers as victims in reporting elder abuse. The barrier these employees do face to reporting elder abuse is fear of retaliation by their employers. The Court here is asked to determine

whether to provide the full spectrum of protection to employees who report their worries about possible abuse to their employer and the potential victim's family but not to the state licensing body.

An effective system to address and prevent abuse depends on timely and effective reporting. Employees in long-term care facilities will be unlikely to report their suspicions of abuse if they worry that they will lose their jobs by raising their concerns. If caregivers fail to make these much needed reports, the victims who could otherwise have been protected will be left to suffer in silence. Abuse will continue unchecked because abusers will remain in their jobs with the opportunity to harm many other vulnerable people.

If this Court affirms the Court of Common Pleas, its precedent will have devastating consequences on current victims of abuse and potential future victims. Instead, this court should reverse the lower court and find that Ms. Hulsmeyer and others who make good faith reports of suspected abuse to their employers should be protected from retaliation.

ARGUMENT

I. ELDER ABUSE IS COMMON AND HAS DEVASTATING CONSEQUENCES, YET IS GREATLY UNDERREPORTED.

Elder abuse, though ubiquitous and damaging, is seriously underreported. *Elder Justice and Protection: Stopping the Abuse: Hearing Before the Subcomm. on Aging of the Comm. on Health, Educ., Labor, and Pensions*, 108th Cong. 2 (Aug. 20, 2003) (statement of Sen. Christopher S. Bond, Chairman, Subcomm. On Aging) [hereinafter *Elder Justice and Protection: Stopping the Abuse*, Aug. 20, 2003]. In a nationally representative study, "one in ten older Americans reported being abused or neglected in the past year." *Elder Rights and the Older Americans Act: Statement Before the S. S. Comm. on Aging*, 112th Cong. (testimony of Kathy Greenlee, Assistant Secretary, Administration on Aging, U.S. Department of Health and Human Services) (2011) [hereinafter *Elder Rights and the Older Americans Act*]. The over sixty-five population in the United States is

growing at a rapid pace; the Administration on Aging predicts that the population of persons aged sixty-five and older will increase from around forty million in 2010, to over seventy-two million by 2030.¹ The ever increasing population of elderly people is particularly vulnerable to abuse because of their “age, health, disabilities, and limited resources.” Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 *Hastings L.J.* 431, 434 (2008) Even as this staggering growth of older people with vulnerabilities is occurring, inadequate attention has been given to protecting them from abuse.

Congress defined elder abuse as “the willful (A) infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm or pain or mental anguish; or (B) deprivation by a caretaker of goods or services which are necessary to avoid physical harm, mental anguish, or mental illness” of older individuals. Older Americans Act Amendments of 1987, PL 100–175 (HR 1451), PL 100–175, November 29, 1987, 101 Stat 926. In long-term care facilities,² abuse “manifests in the form of physical assault, sexual abuse, threats and harassment, [and] inadequate maintenance of personal hygiene.” Chen, Comment, *Eradicating Elder Abuse in California Nursing Homes*, 52 *Santa Clara L. Rev.* 213, 214-216 (2012). Some instances of elder abuse are horrific enough to garner national attention,³ but the majority of cases

¹ See Admin. on Aging, *Projected Future Growth of the Older Population: By Age: 1900 - 2050: Persons 65 and Older*, http://www.aoa.gov/aoaroot/aging_statistics/future_growth/future_growth.aspx (follow “65 and over” hyperlink under “By Age and Gender: 1900 – 2050” to download data table) (last modified June 23, 2010, 3:27:55 PM).

² The term long-term care facilities includes assisted-living facilities and nursing facilities. Department of Health and Human Services, National Clearinghouse for Long Term Care Information, *Traditional Model Services*, http://www.longtermcare.gov/LTC/Main_Site/Understanding/Service_Delivery/Traditional_Model.aspx (last visited March 22, 2013).

³ For example, during a year-long investigation of Florida’s assisted-living facilities by the Miami Herald and one of NPR’s member radio stations, WLRN, the investigators “discovered systematic abuse and neglect in Florida’s assisted-living facilities over 2,800 homes established to provide shelter and to protect the elderly and those living with cognitive disabilities.” The study found many incidences of “[p]atients denied food and water, denied medicine or given overdoses.

continue unexposed. *Elder Justice and Protection: Stopping the Abuse*, Aug. 20, 2003, *supra*, at 2. “However . . . unthinkable these crimes against vulnerable seniors are, they really do occur. And we cannot pretend that they do not exist.” *Elder Justice and Protection: Stopping the Abuse*, Aug. 20, 2003, *supra*, at 1.

Elder abuse, like all kinds of abuse of vulnerable people, causes serious harm. *Justice for All: Ending Elder Abuse, Neglect and Financial Exploitation: Hearing Before the S. S. Comm. on Aging*, 112th Cong. app. at 7 (testimony of Marie-Therese Connolly, Senior Scholar, Woodrow Wilson International Center for Scholars and Director, Life Long Justice) (2011). Abuse causes the elderly to die earlier and suffer from poorer health than their contemporaries who have not been abused. *Id.* “Victims of even mild elder abuse, neglect or financial exploitation are at 300% increased risk of dying, compared to non-abused elders, within three years after mistreatment.” *Id.* The physical effects of elder abuse include “increased bone or joint problems, digestive problems, depression or anxiety, chronic pain, high blood pressure, and heart problems.” *Elder Rights and the Older Americans Act, supra*. Victims of elder abuse have much higher levels of psychological distress than older adults who have not been abused. *Id.* Victims accrue higher health care expenses from their injuries,⁴ and elder abuse “cost[s] Americans tens of billions of dollars annually in health care, social services, investigative and legal costs, and lost income and assets.” National Committee for the Prevention of Elder Abuse, *Welcome to NCPEA*, <http://www.preventelderabuse.org> (accessed Mar.28, 2013). To help end these deplorable effects,

Patients tied up, doped up, locked in dark closets, almost no one held accountable.” They found “that there were people who clearly died at the hands of their caretakers. There were people who [were] bound so tightly they got blood clots in their bodies. They died.” *Talk of the Nation: Assisted Living Regulations Fall Short in Florida*, NPR (May 12, 2011), <http://www.npr.org/2011/05/12/136247003/assisted-living-regulations-fall-short-in-florida>.

⁴ National Adult Protective Services Association, *Elder Abuse: Common - Lethal - Expensive*, <http://www.apsnetwork.org/Training/CitationsfromElderAbuseResearch.pdf> (last visited March 18, 2013).

this Court must recognize the importance of incentivizing rather than penalizing reporting so that incidences of elder abuse can be addressed promptly and fully.

Elder abuse is underreported in the United States: an estimated eighty-four percent of all elder abuse cases are never reported. *Elder Justice and Protection: Stopping the Abuse*, Aug. 20, 2003, *supra*, at 2.⁵ Due to this underreporting, the available studies of the frequency of elder abuse in the United States vary in their results:

There are studies that report that 4 to 6 percent of America's seniors may at some time become victims of some form of abuse or neglect. Others estimate there are anywhere from 500,000 to 5 million potential victims each year. Because the research is inconclusive, we do not know just how many seniors have been victimized, but we do know that this issue has not received the type of attention it deserves.

Elder Justice and Protection: Stopping the Abuse: Hearing Before Subcomm. on Aging of the Comm. on Health, Educ., Labor, and Pensions, 108th Cong. 1-2 (Aug. 19, 2003) (statement of Sen. Christopher S. Bond, Chairman, Subcomm. On Aging). The lower court's decision will exacerbate this epidemic of underreporting in Ohio's long-term care facilities.

II. LAW AND RESEARCH REFLECT THE UNDERSTANDING THAT ELDER ABUSE WILL NOT BE ADEQUATELY ADDRESSED UNLESS EMPLOYEES IN HEALTHCARE FACILITIES REPORT CONCERNS ABOUT ABUSE

A. Employees In Healthcare Facilities Are In The Best Position To Report Elder Abuse.

Healthcare employees must be encouraged to report abuse. "Elder abuse has been able to flourish because witnesses too often fail to step in." Kathleen Sebelius, *Sebelius: Fighting Abuse of Senior Citizens*, USA TODAY, June 13, 2012, *available at* <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-06-13/seniors-elder-abuse-fraud-financial-physical/55581056/1>.

⁵ See also, Lifespan of Greater Rochester, Inc., et al., *Under the Radar: New York State Elder Abuse Prevalence Study Final Report* (May 2011), *available at* <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf> (study conducted in New York found only one in 23.5 cases was reported to any agency).

Reporting abuse directly benefits the immediate victim, Chen, *supra*, at 219, as well as any other current and future victims that may be in a similar situation.⁶ If the abuse remains unreported, the perpetrator is likely to repeat his or her actions, Chen, *supra*, at 219, therefore, “[u]nderreporting [of elder abuse] by nursing homes contributes to the continued abuse of our elderly.” *Id.* at 221.

Because healthcare employees are in the best position to witness abuse, they must report incidences of elder abuse to protect long-term care facility residents.

Elder abuse victims are generally too traumatized to report being abused, especially when the abuse is delivered by their caregiver. The fear of reporting can be greater still for long-term care facility residents who are commonly isolated from their loved ones and communities. Arlene D. Luu, BSN, JD, PHN & Bryan A. Liang, MD, PhD, JD, *Clinical Case Management: A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse*, 15 Cornell J.L. & Pub. Pol’y 165, 176 (2005) Even when residents have family or friends who know of the abuse, these visitors may be reluctant to report it because they fear that the long-term care facility will retaliate against the resident. *Id.* Victims also may fear retaliation themselves, and be reluctant to report the very people who care for them. *Id.* Victims commonly live in silent fear, thinking that no one will help them – a fear that is borne out when facilities administrators sometimes simply ignore reports of abuse. Chen, *supra*, at 221.

Long-term care residents are afraid to report abuse because they think that others will blame their accusations on the confusion of old age. Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 Hastings L.J. 431, 434 (2008). Many times the elderly do lack the capacity to report abuse themselves, Luu & Liang, *supra*, at 176: six out of ten victims suffer from

⁶ Increased reporting of elder abuse benefits the elderly because when elder abuse organizations and state agencies receive more data about how and where elder abuse is occurring, they can appropriately tailor resources to help the neediest populations. Victim Rights Law Center & National Clearinghouse on Abuse in Later Life, *Mandatory Reporting of Elder Abuse: Exploring the Benefits and Harms* 1 (2011), available at <http://www.ncall.us/sites/ncall.us/files/resources/2020For%20and%20Against.pdf>.

some kind of confusion. Pratt, Comment *Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California*, 40 Cal. W. L. Rev. 195, 203 (2003) (citing Nat'l. Ctr. on Elder Abuse, *The National Elder Abuse Incidence Study* 4-20 (1998), available at http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf (accessed Mar. 28, 2013) (discussing elder abuse in general, not exclusively financial abuse).

Because victims are commonly unable to do so themselves, it is imperative that healthcare professionals and others who spend time with potential victims report their own suspicions about abuse. They “may be the only people who associate with the victims and thus have the opportunity to recognize and report signs of abuse.” Luu & Liang, *supra*, at 169. Unfortunately, healthcare workers often do not report abuse even though they are in the best position to do so. *Id.* at 176. Under federal law, nursing facilities are required to train nurse aides on how to prevent abuse. 42 U.S.C. § 1919(f)(2)(A)(i)(I) [42 U.S.C. 1396r]. Despite these requirements, facilities often fail to properly train employees in how to identify elder abuse, and how to report it to the proper authorities. Luu & Liang, *supra*, at 169-70. Given this potential confusion as to how to correctly report abuse, it is important to offer broad protection to healthcare professionals and other long-term care facility employees to encourage them to make these vital reports.

B. Laws And Regulations Demonstrate The Necessity Of Reporting Abuse To Protect Vulnerable Potential Victims.

Congress, federal agencies and state legislatures understand that the best way to end abuse is to require those who suspect potential abuse to report it. Indeed, all but three states have some version of a mandatory reporting law to protect the elderly,⁷ as does the federal government. 42 U.S.C. 1320b-25. Mandatory reporting laws require certain people who frequently interact with the

⁷ Tim Hoover, *Elder Abuse Mandatory Reporting Bill Clears Colorado Senate Committee*, THE DENVER POST, Feb. 20, 2013, available at http://www.denverpost.com/breakingnews/ci_22631661/elder-abuse-mandatory-reporting-bill-clears-colorado-senate.

elderly, including healthcare professionals and social workers, to report suspicions of abuse. Pratt, Comment, *Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California*, 40 Cal W. L. Rev. 195, 202 (2003); see, e.g., Fla. Stat. 415.1034; Haw.Rev.Stat. 346-224.

The federal government has mandatory reporting laws for long-term care and nursing facilities. The Patient Protection and Affordable Care Act (ACA) mandates that employees of most long-term care facilities report any suspicions of a crime that has taken place in the facility. 42 U.S.C. 1320b-25(a)-(b)(1). The ACA also prohibits long-term care facilities from retaliating against any employee who reports abuse. 42 U.S.C. 1320b-25(d). Long-term care facilities also have additional reporting obligations as a condition of participation in Medicare and Medicaid programs. 42 C.F.R. 483.13(c)(2). The facilities are required to ensure that “all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported. . . to the administrator of the facility and to other officials in accordance with State law.” *Id.* Notably, the burden to report to the State is on the long-term care facility, and not the employee.

Similarly, the majority of states require employees of long-term care facilities to report suspected elder abuse. See, e.g., Mo.Ann.Stat. 198.070; Pa.Stat.Ann. Title 35, 10225.701. Ohio is among those states that do require licensed health professionals to report known or suspected abuse or neglect. R.C. 3721.22(A). Mandatory reporting laws demonstrate the importance of reporting. These laws reflect state legislatures' understanding that the best way to fight abuse in long-term care facilities is to require healthcare employees to report it.

III. PROTECTING REPORTERS ENCOURAGES GREATER REPORTING OF ELDER ABUSE.

There is a common sense public interest rationale for encouraging individuals to report suspected abuse by protecting them from retaliation. If these individuals fear retaliation, they will

naturally be less likely to report suspected elder abuse. To leave reporters without protection from retaliation puts actual and potential victims at greater risk for continued abuse.

The law has generally recognized that it is important to protect employees so that they feel safe making what could be a controversial and unpopular report about their colleagues or employer. On the federal level, the Elder Justice Act, passed as part of the ACA, provides protection to employees of federally funded long-term care facilities. 42 U.S.C. 1320b-25(d). Long-term care facilities:

may not (A) discharge, demote, suspend, threaten, harass, or deny a promotion or other employment-related benefit to an employee, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee; or (B) file a complaint or a report against a nurse or other employee with the appropriate State professional disciplinary agency because of lawful acts done by the nurse or employee, for making a report, causing a report to be made, or for taking steps in furtherance of making a report pursuant to subsection (b)(1).

Id. at (d) (1).

In guidance documents, the Office of Inspector General of the U.S. Department of Health and Human Services (“OIG”) has made it clear that federally funded health care organizations like nursing facilities are required to have procedures in place to make certain that violations are reported to the appropriate authorities in a timely fashion. OIG Supplemental Compliance Program Guidance for Nursing Facilities, 73 Fed. Reg. 56,838-39 (September 30, 2008). According to the OIG, “nursing facilities should make clear to caregivers, facility staff, and residents that the facility is committed to protecting those who make reports from retaliation.” *Id.* at 56,839.

State legislatures also protect individuals who report suspected elder abuse. Phan, Note, *The Graying of America: Protecting Nursing Home Residents by Allowing Regulatory and Criminal Statutes to Establish Standards of Care in Private Negligence Actions*, 2002 Hous. J. Health L. & Pol’y 297, 323-24 (2002) (citing Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect-The Legal Framework*, 31 Conn. L. Rev. 77, 89-97 (1998)). Ohio, like the majority of

states, requires healthcare professionals to report suspected elder abuse. R.C. 3721.22(A). In Ohio, employers are not permitted to retaliate against employees who, in good faith, report suspected abuse in nursing homes and residential care facilities. R.C. § 3721.24. This law does not specifically require whistleblowers to report to the government to be protected from retaliation. Here, Ms. Hulsmeyer did report the abuse to the hospice company for which she worked, the long-term care facility, and the resident's family. But because she did not report it to the Ohio Department of Health, the lower court denied Ms. Hulsmeyer the protections she was entitled to under Ohio law.

A broad interpretation of the protection given to reporters of suspected abuse best serves the public interest. Reporters serve an invaluable role in protecting vulnerable people from abuse, deterring potential abusers, and encouraging long-term care facilities to take precautions to protect their residents. Here, Ms. Hulsmeyer was following federal, state, and company policy when she reported her suspicions. She believed that her patient was in trouble, and she thought that reporting her suspicions was the best way to help somebody who may have been abused. Had Ms. Hulsmeyer known that she would have been terminated for attempting to protect her patient by sharing her concerns with her employer as well as the resident's family, she may have failed to take the swift action she believed was warranted to address a perilous situation facing her patient.

This Court should reverse the lower court's decision to avoid creating a dangerous precedent. The lower court's ruling creates perverse incentives for employees to hold their tongues when witnessing suspicious and abusive behavior in order to keep their jobs. This Court should stand with the potential victims of abuse and those who bravely report suspected abuse allegations by incentivize reporting. People like Ms. Hulsmeyer deserve protection from retaliation because without their willingness to report their concerns, abuse of vulnerable people cannot be stopped.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Common Pleas.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2013, I electronically filed the foregoing Brief of AARP and Ohio Disability Rights Law and Policy Center, Inc. as *Amici Curiae* in Support of Appellant with the Clerk of the Court for the First Appellate District of Ohio. I certify that all participants were served via electronic mail to:

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