

Kevin J. Mirch, Esq.

February 15, 2002

Page 12

200. Your contention that "[t]he retaliatory actions are in violation of public policy of the State of California, including *Health & Safety Code* §1278.5 and *Business & Professions Code* § 2056, aimed at protecting the health and safety of the general public by providing members of the public and health care providers protection from retaliation for engaging in reporting violations of statutes" is flat out wrong. The statutes referred to -- *Health and Safety Code* § 1278.5 and *Business and Professions Code* § 2056 -- do not provide a statutory basis for a whistle-blower claim. *Health and Safety Code* § 1278.5 provides, in pertinent part that:

"No health facility shall discriminate or retaliate in any manner against any patient or employee of the health facility because that patient or employee, or any other person, has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity relating to the care, services, or conditions of that facility." [Emphasis added]

Since Dr. Mileikowsky was or is neither a patient nor an employee of ETRMC, he is not part of the class protected by this statute. Accordingly, this code section cannot form the basis for a whistle blower claim.

Your reliance on *Business and Professions Code* § 2056 is similarly misplaced. That code section provides in pertinent part that:

"It is the public policy of the State of California that a physician and surgeon be encouraged to advocate for medically appropriate health care for his or her patients. For purposes of this section "to advocate for medically appropriate health care" means to appeal a payor's decision to deny payment . . . or to protest a decision, policy, or practice that the physician . . . reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients." [Emphasis added]

As expressly stated in the statute, the policy seeks to codify the holding of *Wickline v. State of California* 192 Cal.App.2d 1630. Thus, the statute seeks to protect physicians whose employment or contract is terminated in retaliation for the advocacy of appropriate medical care of his or her patients. The classic example is a doctor who is terminated for performing tests and procedures which he or she deems medically necessary, but which the payor deems too costly.

There has never been an allegation -- nor can you concoct one at this late date -- that Dr. Mileikowsky was retaliated against for advocating for medically appropriate health care for his patients or protesting a decision, policy or practice that impaired his ability to provide appropriate care to his patients. Rather, Dr. Mileikowsky has previously argued that he was retaliated against for raising quality of care concerns regarding other physicians on staff at ETRMC. Accordingly, Dr.