

Law gives hospital panels wide powers over doctors  
Wednesday, October 29, 2003  
By Steve Twedt, Post-Gazette Staff Writer

John Beale/Post-Gazette  
Attorneys Alan Ullberg, left, and Paul S. Blumenthal in Annapolis.

WASHINGTON, D.C. -- It may take an act of Congress. That's the conclusion of attorneys Alan Ullberg and Paul Blumenthal after their client, Dr. Linda Freilich, unsuccessfully challenged the constitutionality of the Health Care Quality Improvement Act last year.

They had hoped to convince the court that the federal law unfairly allows hospitals to silence whistleblower physicians by giving the hospitals broad protection against lawsuits. They believe their client represents a prime example of just that.

Freilich, a board-certified internist and kidney specialist, lost her privileges at a Maryland hospital after she complained about changes she believed had lowered the quality of care. When the hospital decided not to reappoint her, she sued -- and lost.

The 4th U.S. Circuit Court of Appeals, upholding an earlier trial court ruling, said the law made it clear that it wasn't the judiciary's job to interfere with hospital decisions on how to spend money or on which physicians to employ.

"The medical community is best equipped to conduct the balancing that medical resource allocations inevitably require," the court ruled in December.

"It is not the job of a federal court ... to referee disagreements between a hospital and staff physician over what constitutes the appropriate funding or manner of such care."

On Freilich's contention that the hospital was retaliating against her by denying her reappointment, the court said: "Hospitals have historically had wide discretion to make decisions regarding their medical staff," including "the consideration of factors beyond technical medical skills."

Now, the two lawyers believe nothing short of congressional intervention will protect physicians such as Freilich who are trying to protect their patients.

"There is no recourse without further legislation" Blumenthal said.

"They don't have to undo [the act]. All they have to do is go back to the original intent," said Ullberg. "I don't think the original intent was to protect bad faith credentialing."

As it stands now, he added, "[The Health Care Quality Improvement Act] prevents doctors from actually trying to improve the medical system in which they work, even though they are the best people to improve the system."

The Freilich case marked the first direct attack on the law in federal court. The problem with the law, from their perspective, is that it presumes that hospital review panels will make good-faith decisions based on a fair and reasonable process.

But too often, Ullberg said, the 1986 law is being used to silence physicians who complain about poor quality care by labeling them "disruptive" and subjecting them to career-crippling sanctions.

The immunity clauses were included in the law because physicians had been reluctant to serve on review panels for fear of being sued if, for instance, they tried to dismiss a doctor who was harming patients. The unintended effect, Ullberg said, is that the hospital-appointed panels now can unfairly target physicians without being held accountable.

That turns the intent of the law on its head, he said. "The whole system is set up and is operating to discourage complaints about quality of care."

Freilich, 52, treated patients at Harford Memorial Hospital in Maryland's Upper Chesapeake area from 1982 until 2000.

After Harford decided to contract out its quality assurance services, Freilich became alarmed at the growing instances of poor care, including the use of uncertified nurse assistants. In one case, a patient's cervical fracture went undetected. Another time, one of Freilich's patients was given dialysis without her knowledge and the patient nearly died, Freilich said.

She was particularly vocal about uninsured and disabled patients receiving less care than other patients.

But her advocacy did not sit well with Harford administrators.

When Freilich applied for the standard two-year renewal of her credentials in 1998, the hospital balked, agreeing only to a one-year renewal.

In April 2000, the hospital board, even though it did not question her clinical competence, said it would not reappoint her. The denial of privileges "was based upon your failure to demonstrate ethical and cooperative behavior with regard to your position in the hospital and patient care," according to a letter Freilich later received from the Maryland Department of Health and Mental Hygiene.

The state launched its own investigation of Freilich. Four months later, she was cleared.

But by then, the hospital had submitted a report on her to the National Practitioner Data Bank, a list that is kept to identify doctors with malpractice judgments or who have lost their hospital privileges because of misconduct. Freilich's listing flagged her as a problem physician to any future employer. She has not worked in her home county since and has struggled to keep her practice alive.

After Freilich filed suit in December 2000, the hospital's attorneys countered that if she were successful, "all disruptive, yet clinically competent, physicians would have been insulated from peer review in Maryland hospitals."

"What grabbed my attention," said Ullberg, 70, "was that she is a good practitioner and yet the system was beating up on her."

Although Freilich is still pursuing a lawsuit in state court, Ullberg believes the chances of any successful legal challenge to the law "are probably low." That's bad news for Freilich and other physicians like her, Ullberg said, but it's also bad news for patients.

With reimbursements falling short of costs, hospitals will continue to face financial pressure to lower expenses, he believes, and eventually that will mean lowering the acceptable minimum standard of care.

If a doctor notices this, he might not speak up under the present law, Ullberg said, because if he is threatened with the loss of his credentials "he can't afford to care if a patient lives or dies."