

55 N.J.R. 550(a)

VOLUME 55, ISSUE 6, MARCH 20, 2023

RULE ADOPTIONS

Reporter

55 N.J.R. 550(a)

NJ - New Jersey Register > 2023 > MARCH > MARCH 20, 2023 > RULE ADOPTIONS > LAW AND PUBLIC SAFETY -- DIVISION OF CONSUMER AFFAIRS

Agency

LAW AND PUBLIC SAFETY > DIVISION OF CONSUMER AFFAIRS

Administrative Code Citation

Adopted New Rules: N.J.A.C. 13:45C-4.1, 4.2, and 4.3

Text

Uniform Rules on Discrimination in Licensed Professions

Proposed: March 7, 2022, at 54 N.J.R. 408(a).

Adopted: January 23, 2023, by Matthew J. Platkin, Attorney General.

Filed: February 9, 2023, as R.2023 d.036, **without change**.

Authority: N.J.S.A. 45:1-17(b).

Effective Date: March 20, 2023.

Expiration Date: November 21, 2024.

Summary of Public Comments and Agency Responses:

The official comment period ended May 6, 2022. The New Jersey Division of Consumer Affairs (Division) received comments from:

1. Martha Howlett
2. Elise M. Barry, MS, CFRE, Chief Executive Officer, New Jersey Pharmacists Association

3. Jeffrey Kaszerman, Vice President of Government Relations, New Jersey Society of Certified Public Accountants

4. Nursing Leadership Coalition of New Jersey

5. Domenick Carmagnola, Esq., President-Elect, New Jersey State Bar Association

6. Debra L. Wentz, Ph.D., President and CEO, New Jersey Association of Mental Health and Addiction Agencies, Inc.

7. Susan Cholewka, Executive Director, Organization of Nurse Leaders of New Jersey

8. Edna Camus, PhD, RN, NEA-BC, FAAN, Executive Director, The New Jersey Collaborating Center for Nursing

9. Todd Gershenow, OD, President, New Jersey Society of Optometric Physicians.

10. George R. Kelder Jr., CFSP, CEO/Executive Director, New Jersey State Funeral Directors Association

11. Chrissy Buteas, Chief Government Affairs Officer, New Jersey Business and Industry Association (NJBIA), joined by:

Joseph A. Fiordaliso, President, American Council of Engineering Companies of New Jersey

John Cwikla, President, American Institute of Architects/NJ Chapter

Daniel Klim, Executive Director, American Physical Therapy Association of New Jersey

Anthony Parziale, President, American Society of Landscape Architects/NJ Chapter

Amy Boright Porchetta, Executive Director, Association of New Jersey Chiropractors

Brian Oliviera, Executive Director, Garden State Pharmacy Owners

Andy Aronson, President & CEO, Health Care Association of New Jersey

Nancy Fitterer, President & CEO, Home Care and Hospice Association of New Jersey

Anthony Reznik, Director of Government Affairs, Independent Pharmacy Alliance

James W. McCracken, President & CEO, LeadingAge NJ & DE

Tajma Kotoric, Chief Executive Officer, New Jersey Association of Osteopathic Physicians and Surgeons

Dr. Maria del Carmen Rodriguez, President, New Jersey Counseling Association

James Schulz, Director of Governmental and Public Affairs, New Jersey Dental Association

Lorraine Fenenic, Acting Executive Director, New Jersey Podiatric Medical Society

Dr. Andrew Kaufman, CEO, New Jersey Society of Interventional Pain Physicians

Jeffrey Kaszerman, Government Relations Vice President, New Jersey Society of Certified Public Accountants.

Dr. Andrew Kaufman, CEO, New Jersey Society of Interventional Pain Physicians

Judith Schmidt, CEO, New Jersey State Nurses Association

Anthony Reznik, Director of Government Affairs, Omega Pharmacy Group

1. COMMENT: One commenter supports adopting the proposed rules because the commenter believes that all professional and occupational boards should have anti-discrimination regulations in place. The commenter emphasizes that it is important for consumers to trust that licensed professionals will treat them fairly and respectfully, regardless of race or any other protected characteristic. The commenter also recommends that applicants for licensure, certification, or registration should be required to affirm that they will perform their services without bias or discrimination toward any protected class.

RESPONSE: The Attorney General thanks the commenter for their support. With respect to the commenter's recommendation that applicants for licensure, certification, or registration should be required to affirm that they will perform their services without bias or discrimination toward any protected class, the Attorney General contends that the possibility that a disciplinary action could be taken will deter license-holders, certificate-holders, and registration-holders from engaging in prohibited discrimination. An individual who applies for a professional or occupational license, certificate, or registration implicitly commits to upholding the standards of the profession or occupation--including a commitment to provide services without bias or discrimination.

2. COMMENT: The New Jersey Business and Industry Association (NJBIA) recognizes the importance of ensuring that licensed

professionals do not engage in unlawful discrimination or harassment or retaliate against those who report such discrimination or harassment. However, the NJBIA argues that legal remedies for unlawful discrimination and harassment already exist, and it expresses the following concerns, questions, and recommendations regarding the rulemaking.

First, the NJBIA asserts that board members do not have the training or knowledge necessary to adjudicate allegations of discrimination. According to the NJBIA, since board members lack the requisite training and knowledge to adjudicate alleged violations of the New Jersey Law Against Discrimination (NJLAD) and other antidiscrimination and civil rights laws, disciplinary actions taken by the boards will lead to frivolous and costly litigation by professionals seeking to restore their licenses or privileges after having them wrongly suspended or revoked. The NJBIA requests to know what relevant training is currently required for board members and how many hours board members devote to studying and understanding the NJLAD.

Second, the NJBIA recommends creating training programs to ensure that board members are equipped to address claims of discrimination, harassment, and retaliation. If the boards were to implement this recommendation, the NJBIA requests to know whether the training would be mandatory and the number of hours that would be allocated to the training.

Third, the NJBIA states that, due to monetary constraints, the boards do not have enough Deputy Attorney Generals (DAGs) to represent them in discrimination, harassment, and retaliation cases. The NJBIA, therefore, recommends that the Division provide the boards with legal counsel who have specific expertise in anti-discrimination law. The NJBIA also asks whether there are any plans to hire additional DAGs. Finally, the NJBIA requests that the boards be adequately staffed, [page=551] maintained, and funded to ensure that they have the resources to handle claims of discrimination.

Fourth, the NJBIA is concerned that the professional boards lack transparency and that the public is in the dark as to how often claims of discrimination are brought before the boards. The NJBIA recommends that, on a quarterly basis, the Division require each board to provide information regarding the number of discrimination complaints the board has received; a brief summary of each claim; and the disciplinary actions the board has taken over the previous quarterly period. The NJBIA argues that such transparency will inform the public as to the pervasiveness of discrimination in the licensed professions and help professional associations train their members more effectively and combat discrimination in their professions. The

NJBIA also requests to know what measures can be taken to ensure transparency.

Fifth, to protect professional licensees from false claims of discrimination, harassment, and retaliation, the NJBIA recommends including a provision in the proposed rule that would make it professional misconduct for a licensed professional to knowingly make a false claim against another licensed professional that results in a disciplinary action. The NJBIA also recommends barring first-time applicants for licensure who knowingly make a false claim against a licensed professional from taking the licensing exam for one year.

Finally, the NJBIA recommends adding a provision to the proposed rule that would make a court finding that a licensed professional did not engage in discrimination, harassment, or retaliation binding on the professional boards. The NJBIA also proposes adding a provision that would allow the boards to dismiss, without prejudice, allegations of discrimination, harassment, or retaliation pending the outcome of any civil or criminal lawsuit arising out of the same conduct. The NJBIA argues that such a provision would ensure that claimants would not be able to use the threat of professional misconduct charges as leverage against a licensed professional in a pending civil or criminal proceeding.

RESPONSE: The Attorney General thanks the NJBIA for its comment. The Attorney General views this rulemaking as similar to other rulemakings governing the professional and occupational licensing boards and agencies within the Division. The rules provide that unlawful discrimination, harassment, and retaliatory conduct constitute a basis for professional discipline. Complaints alleging violations of these rules will be handled in the same manner as any other complaint. Any contested cases may be adjudicated by the boards themselves or sent to the Office of Administrative Law (OAL) for hearing. Moreover, it is unlikely that these rules will lead to "frivolous and costly litigation" as the NJBIA suggests. Discriminatory conduct is already impliedly professional or occupational misconduct, and three licensing boards already have explicit anti-discrimination regulations in place, yet there is no evidence that any licensees have been subject to "frivolous and costly litigation" as a result.

With respect to the NJBIA's specific concerns and recommendations regarding the training and expertise of board members, the Attorney General notes that board members are presented with complaints alleging many different types of misconduct, and are often called upon to interpret and apply statutes and rules beyond their applicable practice act. Board members are competent to review complaints regarding

discrimination, harassment, and retaliation, and will seek legal counsel from their assigned DAGs, who are also called upon to provide advice to boards on a variety of issues beyond the board-specific practice act and rules. If the Division determines that specific training is needed, then it will work with the Division of Law (DOL) and the Division on Civil Rights to provide such training.

In response to NJBIA's concern that the boards do not have enough DAGs to represent them in discrimination, harassment, and retaliation cases, the Attorney General believes that adequate resources will be available and that the potential need for additional staffing can be reassessed from time to time.

In response to the NJBIA's concern about a lack of transparency, although the rule imposes no specific requirements for reporting, complaints are generally government records, and, thus, may be requested under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), after investigations are concluded, unless deemed confidential under applicable law. See N.J.S.A. 45:1-36. Although the Division and the boards it oversees are committed to transparency and to fulfilling their legal obligations, a quarterly reporting requirement would unduly strain the Division's and the boards' resources. However, the Division and the boards it oversees will track discrimination, harassment, and retaliation cases and consider making data available that would be of interest to the public. With respect to the NJBIA's recommendation that the proposed rule be amended to include a provision making it professional, or occupational misconduct for a licensee to knowingly make a false claim against another licensee, the Attorney General does not believe that such a provision is either necessary or advisable. The Uniform Enforcement Act already authorizes the boards to deny an application or discipline a licensee for engaging in "the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense ..." N.J.S.A. 45:1-21b. Furthermore, the Attorney General is concerned that adding such a provision to the proposed rule may deter some victims of discrimination from filing meritorious complaints, which would be counter to the rule's goal of rooting out discrimination in the licensed professions. For the same reasons, the Attorney General does not believe that it is necessary or advisable to add a provision to the proposed rule that would bar initial applicants who make false claims from taking the licensure examination for one year.

Lastly, the Attorney General does not believe that it is necessary or advisable to adopt the NJBIA's recommendation that the rule be amended to include a provision that would make a court finding that a licensee did not engage in discrimination, harassment, or retaliation binding on the boards. As in all

cases of professional or occupational misconduct, the boards will give due weight to court findings. However, the Attorney General does not believe it would be appropriate to limit the boards' discretion in this fashion, particularly when the precise legal issues and standards of proof may differ between court cases and cases before the board. For instance, the fact that a licensee was acquitted in a criminal proceeding in which the prosecution failed to show "beyond a reasonable doubt" that the licensee engaged in the alleged criminal conduct should not be dispositive in an administrative disciplinary proceeding in which the standard of proof is a preponderance of the evidence. Furthermore, the Attorney General contends that it is not necessary to add a provision to the proposed rule that would allow the boards to dismiss complaints without prejudice, pending the outcome of another proceeding. The boards already have the authority to delay adjudication of a complaint pending the outcome of a separate civil or criminal proceeding when doing so is deemed appropriate.

3. COMMENT: The New Jersey Society of Optometric Physicians (NJSOP) states that it recognizes the importance of a Statewide focus on equity, diversity, and inclusion. It further notes that the Optometric Oath proclaims a commitment to provide professional and compassionate care for diverse populations, to expand access to quality care, and to improve health equity for all communities. However, the NJSOP seeks clarity with respect to: (1) whether the Attorney General can share data documenting the number of reported cases of discrimination by New Jersey licensees, broken down by profession, and the disposition of such cases; (2) the reporting mechanism for violations of the anti-discrimination regulations; and (3) what type of risk management guidance, if any, the Attorney General or the Division intends to provide to the professional boards.

4. COMMENT: The New Jersey Association of Mental Health and Addiction Agencies (NJAMHAA) recognizes the importance of ensuring that licensed professionals do not engage in unlawful harassment or discrimination or retaliate against those who report such harassment or discrimination. While the NJAMHAA generally supports the objectives of the proposed rule, it echoes the concerns, questions, and recommendations raised by the NJBIA and summarized in a prior comment.

RESPONSE TO COMMENTS 3 AND 4: The Attorney General thanks the NJSOP and the NJAMHAA for their comments. First, with respect to the NJSOP's question about whether the Attorney General can share the data described above, the Attorney General does not believe that it is necessary to include such a requirement in the rule. As noted in the response to prior comments, the Division and the professional and occupational boards it

oversees may release complaints and other information after the completion of an investigation, subject to applicable law.

[page=552] Second, with respect to the NJSOP's inquiry concerning the reporting mechanism for violations of the rule, complaints alleging discrimination, harassment, or retaliation should be filed using the Division's and the boards' existing complaint submission mechanisms. Complaint forms are available on the Division's website, and many boards make their complaint forms available in both English and Spanish. See <http://www.njconsumeraffairs.gov/Pages/Board-Committee-Complaint-Forms.aspx>. Board and staff members are available by phone to assist consumers who need assistance with filing a complaint.

Third, with respect to the NJSOP's inquiry regarding the risk management guidance that the Attorney General or the Division intends to provide to the boards, the boards are represented by DAGs who provide them with legal counsel. In determining whether it is appropriate to take disciplinary action against a license-holder, certificate-holder, or registration-holder who is alleged to have engaged in prohibited discrimination, the boards will consult the DAGs who represent them.

5. COMMENT: The Organization of Nurse Leaders of New Jersey (ONLNJ) writes to address its concerns and to request a delay in adopting the rules. While the ONLNJ supports the objectives of the rule proposal, it is concerned that the rule would create confusion and lead to "unintended consequences." According to the ONLNJ, many health care facilities and institutions have already adopted practices to address allegations of discrimination, harassment, and retaliation against registered nurses. Furthermore, many health care facilities and institutions have already instituted Diversity, Equity, and Inclusion (DEI) programs aimed at educating stakeholders. The ONLNJ also states that the New Jersey Board of Nursing (BON) is already overburdened and operating with limited resources, and, thus, it requests that, prior to the adoption of the rule, the Division should assess whether BON has the capacity to handle complaints under the new rule.

RESPONSE: The Attorney General applauds health care facilities' efforts to address allegations of discrimination, harassment, and retaliation and to implement DEI programs. Far from rendering the proposed rule unnecessary, these efforts should complement and reinforce the shared goal of deterring licensees from engaging in discriminatory conduct. Indeed, while an individual facility may take disciplinary action against a practitioner for engaging in discrimination, harassment, or retaliation, far too often the practitioner will find employment elsewhere and repeat the same behavior. Only the boards have the

power to take disciplinary action against a practitioner's license, certificate, or registration and to ensure that the same behavior does not recur with another employer.

With respect to the ONLNJ's concerns about the BON's limited resources, the Attorney General recognizes that the BON operates under resource constraints. However, the Division, the BON, and the DOL will work to ensure that board members, board staff, and the DAGs who represent the BON are fully equipped to handle allegations of discrimination, harassment, and retaliation. Accordingly, the Attorney General does not believe that it is necessary to delay the adoption of the proposed rule to assess the BON's capacity to adjudicate discrimination, harassment, and retaliation complaints.

6. COMMENT: The New Jersey State Funeral Directors Association (NJSFDA) is concerned about "the capability and bandwidth" of the boards and their staff to adjudicate claims of discrimination, while continuing to attend to their existing and backlogged workloads. The NJSFDA notes that board members must have a thorough understanding of the New Jersey Law Against Discrimination (NJLAD) and other applicable Federal and State antidiscrimination and civil rights laws to adjudicate discrimination cases effectively and impartially. Otherwise, the NJSFDA argues, the boards will face serious liability if they do not handle discrimination cases correctly.

In addition, the NJSFDA maintains that contrary to the rule proposal's assessment that the proposed rule is not expected to have any financial impact on licensees, the licensed community will end up bearing the costs through increased licensure fees if there is no mechanism in place for funding the training necessary to implement the rule.

The NJSFDA, therefore, requests that, rather than adopt the proposed rule, the Division should instead direct its attention and resources to addressing existing deficiencies. It recommends that the Division: (1) use licensing fee revenue to support the professional and occupational licensing boards, the Division's operations, and customer service for licensees, instead of allocating the revenue to the State's general fund; (2) invest in upgrading the Division's information technology to allow for greater capacity and efficiency for licensed professionals and State employees, and to make online applications more user-friendly; and (3) provide customer service training and profession-specific subject matter training to Division employees to ensure that they can address public inquiries in a timely, effective, and respectful manner.

Finally, the NJSFDA asserts that the goal of this rule proposal would be more effectively achieved by establishing a new board within the Division whose members would be specifically trained

to review and adjudicate complaints of prohibited discrimination received by the professional boards. The NJSFDA believes that creating this new board would centralize operations and promote the effective use of resources.

RESPONSE: The Attorney General thanks the NJSFDA for its comment. In response to the NJSFDA's concern about the capacity of the boards and their staff to handle discrimination cases, the Attorney General reiterates the responses to similar comments above.

With respect to the NJSFDA's recommendation that licensing fees be allocated to the boards, the Division, and customer service for licensees, rather than to the State's general fund, the allocation of licensing fee revenues falls outside the scope of this rulemaking.

In response to the NJSFDA's recommendation that the Division invest in upgrading its information technology, making online applications more user-friendly, and providing customer service and profession-specific subject-matter training to Division employees, the Division is committed to improving its information technology and to providing a user-friendly application process. The Division is also committed to ensuring that its employees have the training necessary to respond effectively to consumer inquiries. The efforts of the Division and the boards it oversees to combat discrimination in the licensed professions will not undermine these important objectives.

Finally, the Attorney General does not have the authority to adopt the NJSFDA's suggestion that a new board be created exclusively to handle discrimination, harassment, and retaliation complaints. The creation of new licensing boards is the province of the Legislature. Moreover, the Attorney General does not believe it is necessary to create such a board. As explained in the response to prior comments, the Division and the boards it oversees will handle discrimination, harassment, and retaliation complaints similarly to how all other complaints are handled.

7. COMMENT: The New Jersey State Bar Association (NJSBA) joins in the comment submitted by the NJBIA. The NJSBA notes that its members are subject to the Rules of Professional Conduct contained in the Rules Governing the Courts of New Jersey, which prohibit attorneys from engaging in discrimination in their professional capacity. However, the NJSBA raises concerns about the proposed rule's consequences for other licensed professionals. Similar to the NJBIA, the NJSBA is concerned that board members lack the necessary training and knowledge to evaluate the complex legal issues presented by discrimination cases. It is concerned, therefore, that this regulation will

lead to unnecessary litigation and costly damages for professionals who seek to restore their licenses after having them suspended or revoked. If the rule is adopted, the NJSBA contends that "substantial resources" should be devoted to ensuring that board members are equipped to adjudicate discrimination cases. It notes that allegations of unlawful discrimination can end careers in some cases.

Similar to the NJBIA, the NJSBA asserts that there are "numerous avenues in place to provide sanctions" if licensed professionals engage in prohibited discrimination. The NJSBA maintains that these avenues provide remedies for victims, and that deference should be given to these existing mechanisms and, in particular, to judicial proceedings. Accordingly, the NJSBA contends that board actions should be suspended pending the outcome of any parallel lawsuits. Finally, the NJSBA advocates for a provision in the proposed rule that would protect license-holders from false allegations.

RESPONSE: The Attorney General thanks the NJSBA for its comment. The NJSBA's concerns and recommendations have already been addressed in responses to similar comments. First, board members will consider claims of discrimination, harassment, and retaliation as they do all other matters. Contested cases may be referred to the OAL for hearing in the first instance, subject to review and entry of the final order [page=553] by the board. Second, the existence of alternative avenues for disciplining professionals who engage in discrimination, harassment, or retaliation does not render the proposed rule unnecessary. To the contrary, the proposed rule complements and reinforces those alternative forms of discipline. Third, the boards will give due weight to parallel civil or criminal proceedings, and will exercise their existing authority, when necessary and appropriate, to defer the adjudication of a complaint pending the outcome of a separate civil or criminal proceeding. Lastly, for the reasons stated above, the Attorney General does not believe that it is necessary or advisable to add a provision to the proposed rulemaking of professional or occupational misconduct for a licensee to level false allegations of discrimination.

8. COMMENT: The New Jersey Collaborating Center for Nursing (NJCCN) notes that it collects data from licensed practical nurses, registered nurses, and homemaker home-health aides. Citing existing national-level steps to combat racism taken by the nursing community, the NJCCN offers several comments and recommendations. First, it argues that the Division should ensure that its efforts to address discrimination in the licensed professions are in alignment with the work of the National Commission to Address Racism in Nursing (Commission), which the American Nurses Association (ANA) launched in January

2021. It notes that the Commission is "in the process of creating a scope of practice statement for nurses in addressing racism in nursing and the implications for the profession, patient care and the healthcare system." It also notes that the Commission has defined "racism" in its report. Second, the NJCCN notes that the Nursing Code of Ethics requires nurses to speak up against racism, discrimination, and injustice.

Third, the NJCCN recommends that the Division offer nurses educational sessions in both practice and academic settings on how the rule will be implemented. Fourth, the NJCCN encourages the Division to delineate a process for the BON to tackle discrimination cases with "clear definition." As an example, NJCCN suggests that the Division and the BON allow the institution where the nurse is employed to assess the validity of a discrimination claim before it is brought before the BON. Fifth, the NJCCN recommends that the Division educate members of the BON on how to review discrimination cases before the rule is adopted, and that it ensure that the BON is sufficiently diverse to handle discrimination, harassment, and retaliation complaints. Sixth, the NJCCN requests that the Division ensure that cases brought before the BON are heard in a timely manner. Finally, the NJCCN requests that the Division ensure that the proposed rule does not add to the high level of stress experienced by nurses during the past two years due to the COVID-19 pandemic.

RESPONSE: The Attorney General thanks the NJCCN for its comment. First, the Division and the boards it oversees intend to work with stakeholders--including the Commission and the ANA--to ensure that their efforts to combat discrimination in the licensed professions align with those of professional associations and advocacy groups, to the extent consistent with New Jersey law. Second, the Attorney General embraces the principles embodied in the Nursing Code of Ethics and believes that the proposed rule advances those principles. Third, the Division and the boards it oversees will provide licensees with information about the new rule, whether that be through educational sessions or other methods of distribution.

Fourth, the boards will generally follow the same process in investigating and adjudicating discrimination, harassment, and retaliation complaints that they follow for professional or occupational misconduct complaints more generally. The Attorney General does not believe it would be appropriate to adopt the NJCCN's recommendation that the BON delay adjudicating a complaint until the employer has assessed its validity. The BON has an obligation to protect the public health, safety, and welfare by investigating and adjudicating allegations of discrimination, harassment, and retaliation, regardless of any action an employer might take. Waiting for an employer to assess

a complaint would unnecessarily delay the BON's consideration of a complaint.

Fifth, the Division will work to ensure that board members and staff have the knowledge and ability to handle discrimination, harassment, and retaliation complaints effectively. Moreover, the Attorney General recognizes that this rulemaking adds urgency to ongoing efforts to ensure that board membership includes representative cross-sections of the professions the boards represent. Sixth, the Attorney General recognizes the need for the boards to address allegations of discrimination, harassment, and retaliation as expeditiously as possible, and the Division and the boards it oversees are committed to achieving that goal. Lastly, the Attorney General does not believe that the proposed rule will add to the stress that nurses have experienced throughout the COVID-19 pandemic. To the contrary, holding licensees accountable for engaging in discrimination, harassment, and retaliation should make nursing a more appealing and less stressful profession.

9. COMMENT: The Nursing Leadership Coalition (NLC) argues that, given both the challenges that the nursing profession is already facing--for example, the nursing shortage, faculty shortage, and difficulties in recruiting and graduating nursing students from diverse backgrounds--and the mechanisms that are already in place to combat discrimination in the nursing profession, the rulemaking might impose "undue restriction and duress" on the development of a highly educated and effective nursing workforce.

The NLC notes that the Code of Ethics for Nursing, published by the ANA, obligates all nurses to provide care and to interact with colleagues in a non-discriminatory manner. The NLC also states that in addition to the hours of anti-discrimination training required of all employees who work in healthcare facilities pursuant to the "Violence Prevention in Health Care Facilities Act," in 2001, the ANA launched a collaborative effort to increase diversity in the nursing field and established a National Commission on Racism in Nursing, with a focus on examining the impact of racism on the nursing profession and motivating nurses to combat systemic racism.

Furthermore, the NLC notes that many healthcare facilities have instituted DEI programs, and that nursing schools are required to have procedures in place to address student complaints regarding discrimination. In addition, the NLC observes that national nursing organizations are actively addressing and advocating for DEI within academia and the nursing profession, and that the key to developing a diverse workforce is to increase the diversity of the student body. Finally, the NLC notes that both the Office of the New Jersey Secretary of Higher

Education (OSHE) and the Office for Civil Rights (OCR) are resources for nursing students who have been victims of discrimination. According to the NLC, the proposed rule is unnecessary in light of these existing avenues for addressing discrimination in healthcare settings.

The NLC also expresses doubt that the BON, which the NLC asserts is not known for its diversity, will be impartial in adjudicating discrimination complaints under the proposed rule. The NLC is further concerned that the BON is not trained or equipped to handle discrimination cases and that such cases, if processed through the Registered Nurses License to Recovery and Monitoring Program (RAMP), will overwhelm the RAMP staff. The NLC also fears that a discrimination complaint against a nurse may leave a blemish on a nurse's record and make it more difficult to obtain employment, even if the allegations are unfounded or result in only a minor disciplinary action.

RESPONSE: The Attorney General thanks the NLC for its comment. Several of the NLC's concerns have already been addressed in the responses to prior comments. First, the Attorney General commends the ANA and other nursing organizations that have undertaken to increase diversity and combat racism in the nursing profession. The Attorney General also applauds healthcare facilities that have instituted DEI programs. As explained in the responses to prior comments, the Attorney General does not believe that these efforts render the proposed rule unnecessary. While nursing organizations and healthcare facilities can play a major role in curbing racism in the nursing profession, only the BON is authorized to take disciplinary action against a nurse's license. Thus, the proposed rule will complement and reinforce the efforts of nursing organizations and healthcare facilities to combat racism in the nursing profession. As noted above, moreover, the proposed rule comports with the principles embodied in the Nursing Code of Ethics. Furthermore, the Attorney General believes that the proposed rule will augment--rather than duplicate--the resources that OSHE and OCR offer victims of discrimination, harassment, and retaliation.

Second, with respect to the NLC's concerns about the BON's capacity to handle discrimination, harassment, and retaliation complaints, the Attorney General reiterates that the Division and the BON will work to [page=554] ensure that board members and staff receive the necessary support. As noted above, moreover, the Attorney General recognizes the need for diversity on the professional boards. The Attorney General is confident that the boards are capable of adjudicating discrimination, harassment, and retaliation complaints impartially.

Third, the Attorney General notes that the BON and RAMP are separate entities. RAMP does not investigate or adjudicate complaints against nurses. Rather, it offers a recovery program to nurses with substance abuse problems.

Finally, the Attorney General does not believe that the NLC's concern about unsubstantiated allegations tarnishing nurses' reputations is well-founded. Under the Health Care Professional Responsibility and Reporting Enhancement Act, N.J.S.A. 45:1-33 et seq., information provided to a board or the Division regarding the conduct of a health care professional "shall be treated as confidential pending final disposition of the inquiry or investigation, except for that information required to be shared with the Attorney General, Department of Health and Senior Services or any other government agency." N.J.S.A. 45:1-36. Furthermore, "[i]f the result of the inquiry or investigation is a finding of no basis for disciplinary action, the information shall remain confidential, except that the board or division, as applicable, may release the information to a government agency to facilitate the discharge of its public responsibilities." *Id.* These protections should be sufficient to ensure that nurses accused of discrimination, harassment, or retaliation will not suffer reputational damage unless a board has determined that the allegations are meritorious.

10. COMMENT: The New Jersey Society of Certified Public Accountants (NJCPA) expresses several concerns about the rule proposal. First, it is concerned that board members do not have the qualifications, training, or legal or human resources to handle discrimination complaints, and that this will lead to frivolous and costly litigation as professionals seek to restore their licenses after having them suspended or revoked. Second, the NJCPA maintains that the boards do not have adequate funding to hire more DAGs. Third, the NJCPA is concerned that claimants who are already involved in a lawsuit alleging discrimination, harassment, or retaliation will use the threat of a disciplinary action as leverage if the boards do not dismiss complaints, with prejudice, pending the outcome of the lawsuit, or if a judicial determination that the licensee did not engage in discrimination, harassment, or retaliation is not binding on the boards.

To address these concerns, the NJCPA makes the following recommendations. First, it recommends that the boards offer training programs to ensure that board members are equipped to address discrimination, harassment, and retaliation complaints. Second, it stresses the importance of adequately funding the boards to ensure that they can handle this additional responsibility. Third, it recommends that the boards treat as binding, a judicial determination that a licensee did not engage in discrimination, harassment, or retaliation. Finally, NJCPA

recommends that the boards delay adjudicating discrimination complaints when the underlying conduct is the subject of pending litigation until the litigation has been resolved.

RESPONSE: The Attorney General thanks the NJCPA for its comment. The Attorney General has already addressed the NJCPA's concerns in the responses to similar prior comments. First, the Division and the boards it oversees will work to ensure that board members and staff have the resources they need to handle discrimination, harassment, and retaliation complaints, and will work to offer training, if needed. Second, as noted above, the ability to increase the boards' funding and hire additional DAGs is outside the scope of this rulemaking. Third, as explained in the responses to prior comments, while the boards will give due weight to judicial findings, the Attorney General does not find it appropriate to require boards to treat a judicial determination as binding. Moreover, as noted above, the boards currently have the ability, in appropriate cases, to defer adjudication of a complaint pending the outcome of a civil or criminal proceeding. The Attorney General does not believe it is necessary or advisable to amend the proposed rule to grant such authority or to require boards to dismiss complaints without prejudice when the underlying conduct is the subject of pending litigation.

11. COMMENT: The New Jersey Pharmacists Association (NJPhA) expresses support for the objectives of the proposed rule and proposes the following amendments. First, the NJPhA proposes including the following provision in the proposed rule: "Knowingly making a false claim against a licensed professional will constitute misconduct. An individual engaging in such an activity will be subject to appropriate penalties." Second, the NJPhA requests that the Division provide pharmacists with clearly delineated procedural steps relating to the rule proposal. Third, the NJPhA requests that each board be subject to an annual reporting requirement with the number of all actionable incidents and the types of claims heard by the board. The goal of this reporting requirement would be to raise awareness about harassment, discrimination, and retaliation and to lay the foundation for future corrective actions plans and training.

RESPONSE: The Attorney General thanks NJPhA for its comment. The Attorney General has already addressed most of the NJPhA's recommendations in the responses to similar comments. First, as explained above, the Attorney General does not believe that it is necessary or advisable to add a provision to the proposed rule that would punish individuals who knowingly make false claims of discrimination, harassment, or retaliation. The Uniform Enforcement Act already authorizes the boards to deny an application or suspend or revoke a license when the applicant or

licensee has "engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense ..." N.J.S.A. 45:1-21b. The Attorney General is concerned, moreover, that adopting the NJPhA's proposed amendment would deter some victims of discrimination, harassment, and retaliation from filing meritorious claims.

Second, as noted in the responses to prior comments, the boards' procedures for investigating and adjudicating discrimination, harassment, and retaliation complaints will generally be the same as those the boards follow for professional and occupational misconduct more generally. The Attorney General finds it unnecessary to delineate separate procedures for discrimination, harassment, and retaliation cases.

Third, while the Division and the boards it oversees are committed to public transparency, the Attorney General is concerned that instituting an annual reporting requirement would strain the Division's and the boards' resources. However, the Division and the boards it oversees will track discrimination, harassment, and retaliation cases and consider making data available that would be of interest to the public. Accordingly, the Attorney General does not believe it is appropriate to impose such a requirement. The Attorney General reiterates, however, that professional misconduct complaints are generally considered to be government records and, thus, may be requested pursuant to OPRA after the conclusion of an investigation, unless deemed confidential under applicable law. See N.J.S.A. 45:1-36.

Federal Standards Statement

Although violation of Federal anti-discrimination law constitutes professional misconduct pursuant to the adopted new rules, the adopted new rules do not create standards that conflict with Federal law. Therefore, a Federal standards analysis is not required.

Full text of the adopted new rules follows:

SUBCHAPTER 4. ANTI-DISCRIMINATION

13:45C-4.1 Applicability and definitions

(a) This subchapter shall apply to all persons licensed, certified, registered, or otherwise authorized pursuant to Title 45 or Title 52 of the Revised Statutes to practice a profession or occupation.

(b) The following words and terms, when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise:

"Board" means any professional or occupational licensing board, committee, or sub-unit of a board or committee within the Division.

"Director" means the Director of the Division of Consumer Affairs.

"Division" means the Division of Consumer Affairs.

"Engage in a reprisal" means to, in any way that has a direct or substantial relationship to the activity regulated by a board:

1. Take any retaliatory action against a person because that person has, with respect to rights afforded, or practices or acts prohibited, under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (the [page=555] NJLAD), or any other applicable Federal or State civil rights or anti-discrimination law:

- i. Opposed any prohibited practices or acts;
- ii. Sought legal advice;
- iii. Shared relevant information with legal counsel;
- iv. Shared information with a governmental entity; or
- v. Filed a complaint or testified or assisted in any proceeding; or

2. Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of that person's rights under the NJLAD or any other applicable Federal or State civil rights or anti-discrimination law; or

3. Coerce, intimidate, or threaten any person on account of that person's having aided or encouraged any other person in the other person's exercise or enjoyment of rights under the NJLAD or any other applicable Federal or State civil rights or anti-discrimination law.

"Engage in prohibited discrimination" means to engage in conduct that has a direct or substantial relationship to the activity regulated by a board and that violates the NJLAD or any other applicable Federal or State civil rights or anti-discrimination law.

"Licensee" means any licensee, permittee, certificate holder, or registrant of any board.

(c) Any terms used, but not defined, in this subchapter that are defined at N.J.S.A. 10:5-5 shall have the same meanings as delineated within that statute.

13:45C-4.2 Prohibited conduct

(a) A licensee who has been found in an administrative proceeding brought before a board or before the Office of Administrative Law to have engaged in prohibited discrimination against any current or prospective client, patient, student, supervisee, colleague, or employee shall be deemed to have engaged in professional or occupational misconduct within the meaning at N.J.S.A. 45:1-21.e, and may be subject to discipline.

(b) A licensee who has been found by a court or a State or Federal agency of competent jurisdiction to have engaged in prohibited discrimination against any current or prospective client, patient, student, supervisee, colleague, or employee shall be deemed to have engaged in professional or occupational misconduct within the meaning at N.J.S.A. 45:1-21.e, and may be subject to discipline.

13:45C-4.3 Reprisals

(a) A licensee who has been found in an administrative proceeding brought before a board or before the Office of Administrative Law to have engaged in a reprisal against any person shall be deemed to have engaged in professional or occupational misconduct within the meaning at N.J.S.A. 45:1-21.e, and may be subject to discipline.

(b) A licensee who has been found by a court or a State or Federal agency of competent jurisdiction to have engaged in a reprisal against any person shall be deemed to have engaged in professional or occupational misconduct within the meaning at N.J.S.A. 45:1-21.e, and may be subject to discipline.

NEW JERSEY REGISTER

Copyright © 2023 by the New Jersey Office of Administrative Law