

Can your employer stop you from taking a new job? Here's what national experts say about ThedaCare's 'deeply unusual' labor lawsuit



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As a nurse-turned-attorney, Hahnah Williams says she always has an ear to the ground for discussions about the rights of people who work in health care.

When she began to see social media buzz about a situation in Wisconsin in which a health care system filed a lawsuit to try to stop its employees from starting new jobs with a competitor, it took her down a rabbit hole.

There was no shortage of Instagram and Facebook posts, Twitter threads and Reddit discussions to look through. The case had blown up, prompting stories by national outlets like the [New York Times](#), the [Washington Post](#) and [Vox](#). As a lawyer who represents health care workers at [her Atlanta law firm](#), Williams started to receive messages from friends about it, too.

Those she heard from were worried their last line of defense in their workplace — resigning and moving on — was at risk.

"Health care workers aren't legal professionals, so they don't use legal terminology. But they do know when they believe their rights are being infringed upon," Williams said. "They want to feel like they can quit their jobs."

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The court battle that put ThedaCare and Ascension Wisconsin under a national microscope emerged amid a perfect storm in health care.

The coronavirus pandemic is straining health care workers, some of whom were already chafing from poor pay and burnout. A survey last fall from [Morning Consult](#) found nearly one in five health care workers had quit their jobs since March 2020.

Health care companies are struggling to keep their hospitals staffed and now routinely turning to expensive travel agencies to fill slots.

ThedaCare's complaint called Ascension's hiring of its employees "shocking" during a time of "unprecedented strain."

The legal dispute began and concluded in little more than a week.

ThedaCare accused Ascension of improperly hiring away the majority of a specialized interventional radiology and cardiovascular team from its Neenah hospital to work at Ascension St. Elizabeth Hospital in Appleton, a move that ThedaCare lawyers argued would jeopardize high-level stroke and trauma care in the region.

Outagamie County Circuit Court Judge Mark McGinnis signed a temporary restraining order Jan. 21 blocking the workers from starting their new jobs.

McGinnis overturned that restraining order Jan. 24 after a formal hearing in which he concluded ThedaCare could fix their staffing problem in other ways. Last Friday, ThedaCare dropped the lawsuit entirely.

Williams said she wasn't surprised that the news caught fire in the health care community. Nurses and others in the field have been begging for help since the pandemic started, she said, citing lack of personal protective equipment, long hours and working conditions that don't support their mental health.

It was only natural for them to fear that a lawsuit like this could be replicated.

"They're smart enough to know, 'If a hospital can do that in Wisconsin, then a hospital may be able to do that in my state,'" Williams said.

Others took notice too. A popular blog about workplace dilemmas, "Ask A Manager," tweeted, "This is seriously f'd up." A former labor reporter at the New York Times called the situation "CRAZY." It also made rounds on Reddit, where commenters expressed fury at ThedaCare and the news that McGinnis had dropped the injunction garnered more than 50,000 upvotes.

Legal experts across the country found the case hair-raising, as well.

Sachin Pandya, who researches employment law at the University of Connecticut, said it wasn't the broader lawsuit that caught his eye but rather the terms of the temporary restraining order McGinnis signed.

In its initial request for a temporary hold, attorneys for ThedaCare wrote that Ascension should either send one technologist and one nurse from the group that quit back to ThedaCare or cease the hiring of all seven people until ThedaCare could find replacements.

The former provision was eventually struck from the restraining order after McGinnis initially signed it. McGinnis said he signed the order because the situation seemed serious and he wanted to get a hearing on his calendar quickly — and Wisconsin statute directs the court to give extra weight to public safety in such instances.

But even the second provision, to delay the hiring, runs afoul of the idea that at-will employees should be able to change their employment, Pandya said.

"Work law types like me caught wind of this and immediately thought, 'What's going on here?'" he said. "It seemed deeply unusual and in conflict with a lot of typical legal protections."

If health care providers agreed not to hire each other's employees, experts say that could land them in trouble.

Labor mobility has gotten increased attention from the federal government in light of COVID-19. In March 2020, the Department of Justice's Antitrust Division and the Federal Trade Commission issued a joint statement warning employers not to "exploit the pandemic" to start making anti-competition agreements that would ultimately hurt workers.

Orly Lobel is a law professor at the University of San Diego whose research on non-compete restrictions was used in a 2016 push from the Obama White House to discourage such actions, including agreements not to poach employees. Those agreements can result in wage suppression for workers, she explained, and can harm economic development more broadly.

The idea that labor market competition is vital to protecting employee rights is becoming more accepted, Lobel said, and even though health care is different from other businesses in that it involves patients' lives, the principle still holds true.

"A hospital should aim for retention rather than, through the courts, preventing employees from leaving," she said. "If hospitals are competing over the best resources, they're also more likely to elevate their services and do better ... that's better for consumers."

What ThedaCare requested in its push for the temporary restraining order inched close enough to such an agreement that Ascension's lawyers brought up the federal antitrust division's position in the initial hearing for the case.

A court signing off on a request to make workers return to their former employer or blocking them from starting at a new one, even just briefly, also raises concerns about involuntary servitude, which is prohibited in both the U.S. and Wisconsin constitutions, Pandya added.

What's next?

Locally, the saga is over. ThedaCare dropped the broader lawsuit alleging Ascension had wrongfully stepped in and hired the workers knowing it would derail the former hospital's operations, and its president said they've found solutions to fill the staffing holes while they look for permanent replacements.

But what effect, if any, it will have on other hospitals and their workers across the country remains to be seen.

Williams, who was interviewed prior to the suit being withdrawn, said if it was effective, it might have caused health care employers to take a closer look at their recruitment strategies and

decide whether they need to adopt a staggered approach to hiring or pay more attention to how the competitor staffs its company.

"Who does that impact? The employees," she said.

Pandya, who was also interviewed prior to the conclusion of the case, said the underlying dispute wasn't surprising, as such issues are fairly typical with interactions between businesses.

But the cautionary tale is about whether a judge is right to prevent workers from starting new employment, even temporarily, he said.

More broadly, the challenge of staff shortages in health care isn't likely to be resolved soon. Experts and advocates say it could be better improved by creating better working conditions for employees, rather than by court actions.

"The typical course of action is if you value a worker and some other employer has given them a better offer, the choice on the table is: Make it worth their while to stay, or expect them to leave," Pandya said. "The typical story doesn't involve getting a court to order their prospective new employer to put the kibosh on them starting their new job."

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