State of Wisconsin

Labor and Industry Review Commission

Jessica Suhr Complainant **Milwaukee School of Engineering** Respondent ERD Case No. CR201802443	**Fair Employment Decision**[1] **Dated and Mailed:** January 30, 2020 suhrjes_rsd.doc:107

The decision of the administrative law judge is **affirmed**. Accordingly, the complaint is dismissed.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
David B. Falstad, Commissioner

/s/
Georgia E. Maxwell, Commissioner

[1] **Appeal Rights**: See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

Procedural Posture

Jessica Suhr (Suhr) was employed by the Milwaukee School of Engineering (MSOE) as a clinical social worker in MSOE's Wellness Center. In a complaint filed with the Wisconsin Equal Rights Division (ERD) Suhr alleged that MSOE violated the Wisconsin Health Care Worker Protection Act (HCWPA) by subjecting her to disciplinary actions, including the constructive discharge of her employment, in retaliation for reporting concerns about clinical and ethical standards in the Wellness Center to certain officers and directors of MSOE. The complaint was assigned to an investigator in the ERD, who issued an Initial Determination finding probable cause to believe that a violation of the HCWPA occurred. In the Initial Determination the investigator noted that MSOE maintained that it was not a health care facility or health care provider under the HCWPA and therefore not subject to the Act. The investigator treated MSOE as subject to the HCWPA for purposes of the Initial Determination but recognized that this was an issue MSOE could raise at the next step in the administrative process, a hearing before an administrative law judge.

Before the administrative law judge, MSOE moved to dismiss the complaint prior to hearing for lack of jurisdiction. The administrative law judge allowed the parties to conduct limited discovery and brief the issue. On September 23, 2019 the administrative law judge granted MSOE's motion to dismiss. Suhr filed a timely petition for review by the commission.

The commission has considered the petition and the positions of the parties, and it has reviewed the arguments and exhibits submitted to the administrative law judge. Based on its review, the commission agrees with the decision of the administrative law judge.

Memorandum Opinion

The HCWPA creates a remedy for employees of a "health care facility" or a "health care provider" who were subjected to disciplinary action for having reported information questioning the facility's or provider's adherence to ethical or health-care standards. Wis. Stat. § 146.997; *Masri v. LIRC,* 2014 WI 81, ¶ 3, 356 Wis. 2d 405, 411, 850 N.W.2d 298. The Act protects only employees of one of those two entities. *Jasmin v. County of Douglas*, ERD Case No. CR200202481 (LIRC Mar. 15, 2004).

The HCWPA defines the terms health care facility and health care provider. Suhr does not claim that MSOE was a health care facility, and a reading of the definition of health care facility makes it clear that it is not.[2] She argues that MSOE was

[2] "'Health Care Facility' means a facility, as defined in s. 647.01(4), or any hospital, nursing home, community-based residential facility, county home, county infirmary, county hospital, county mental health complex or other place licensed or approved by the department of health series under s. 49.70, 49.71, 49.72, 50.03, 50.35, 51.08 or 51.09 or a facility under s. 45.50, 51.05, 51.06, 233.40, 233.41,

subject to Act as a health care provider. The term health care provider is defined in Wis. Stat § 146.997(1) (d) to include the following:

1. A nurse licensed under ch. 441.
2. A chiropractor licensed under ch. 446.
3. A dentist licensed under ch. 447.
4. A physician, podiatrist, perfusionist, physical therapist, or physical therapist assistant licensed under ch. 448.
5. An occupational therapist, occupational therapy assistant, physician assistant or respiratory care practitioner certified under ch. 448.
6. A dietician certified under subch. V of ch. 448.
7. An optometrist licensed under ch. 449.
8. A pharmacist licensed under ch. 450.
9. An acupuncturist certified under ch. 451.
10. A psychologist licensed under ch. 455.
11. A social worker, marriage and family therapist or professional counselor certified under ch. 457.
12. A speech-language pathologist or audiologist licensed under subch II of ch. 459 or a speech and language pathologist licensed by the department of public instruction.
13. A massage therapist or bodywork therapist licensed under ch. 460.
14. An emergency medical technician licensed under s. 256.15(5) or a first responder.
15. A partnership of any providers specified under subds. 1. to 14.
16. A corporation or limited liability company of any providers specified under subds. 1. to 14. that provides health care services.
17. A cooperative health care association organized under s. 185.981 that directly provides services through salaried employees in its own facility.
18. A hospice licensed under subch. IV of ch. 50.
19. A rural medical center, as defined in s. 50.50(11).
20. A home health agency, as defined in s. 50.49(1)(a).

The first 14 subdivisions above all refer to individual health care providers, and therefore cannot apply to the corporate entity MSOE. The remaining six

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233.42 or 252.10." Wis. Stat. § 146.997(1)(c)." Under Wis. Stat. § 647.01(4), "facility" means "one or more places in which a provider undertakes to provide a person with nursing services, medical services or personal care services, in addition to maintenance services, under a continuing care contract."

subdivisions, 15 through 20, are associations or institutions of some kind. On three occasions the commission, considering whether an entity other than an individual was a health care provider under subdivisions 15 through 20, has held that there were no grounds to expand the unambiguous and specific definitions in the statute. *Hance v. State of Wisconsin DOC*, ERD Case No. CR201101129 (LIRC Sep. 16, 2013); *Rademacher v. Allesee Orthodontic Appliances, Inc.*, ERD Case No. 201103804 (LIRC June 7, 2013); *Jasmin v. County of Douglas*, ERD Case No. CR200202481 (LIRC Mar. 15, 2004).

Suhr contends that the statute plainly and unambiguously makes MSOE a health care provider under subdivision 16: **"A corporation or limited liability company of any providers specified under subds. 1. to 14. that provides health care services."** MSOE argues the opposite – that the statute plainly and unambiguously excludes MSOE from being a health care provider.

The question, then, is one of statutory interpretation. In Wisconsin,

> …statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." [citations omitted]. Statutory language is given its common, ordinary, and accepted meaning…
>
> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole, in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. [citations omitted]. Statutory language is read where possible to give effect to every word, in order to avoid surplusage. [citation omitted]. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of is meaning." [citation omitted]. Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. [citation omitted].

State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110.

Suhr asserts that MSOE meets each of the three parts of subdivision 16 – that MSOE is a corporation, that it is a corporation "of any providers specified under subds. 1 to 14," and that through its Wellness Center it "provides health care services."

There is no dispute that MSOE is a corporation. It is a nonstock corporation pursuant to Wis. Stat. ch. 181. There is also no dispute that one of the activities undertaken at MSOE is the provision of health care services for its students, although MSOE points out that it identifies itself, and is incorporated as, an institution of higher education that offers a variety of services to its students, only one of which is basic health and wellness services.

The contested issue is whether MSOE is a corporation "of" any individual health care providers listed in subdivision 1 through 14 of the definition. Suhr argues that it is, under a plain reading of the statute, because within the corporation is a Wellness Center that: 1) employed several licensed social workers or counselors, including Suhr, who were health care providers under subdivision 11 above; 2) contracted with a psychiatrist (see subdivision 14 above) and a psychologist (see subdivision 10 above) for occasional services; and 3) made referrals to nurse practitioners (see subdivision 1 above) in MSOE's Health Services Department.

In order to reach this conclusion, Suhr sifts through the many dictionary definitions[3] of the word "of," and argues that the most reasonable definition in this case is that "of" is "a function word to indicate the component material, parts or elements or the contents" of something. The dictionary offered examples "throne of gold" and "cup of water" for this definition. Suhr's argument is that because MSOE, the corporation, is composed in part of covered health care providers who perform health care services, it is reasonable to describe it as a corporation "of" health care providers.

Suhr's interpretation is not the common, ordinary and accepted meaning of the phrase "____ of ____," where the first blank is some object and the second blank is the object's "component material, parts or elements or contents." Adopting Suhr's interpretation, it would be common and ordinary to refer to a bowl containing mixed fruit as a "bowl of cherries." The most common understanding of phrases such as "throne of gold", "cup of water", "house of cards", "alliance of nations", "gang of thieves", "bowl of cherries," "corporation of providers," etc., is that the first object is fully, or at least principally, composed of the second object or objects. It is not the case that MSOE is composed principally of health care providers.

It also is not reasonable, in the context of this statute, to interpret the word "of" to require that *every* participant in a company be a health care provider in order for the company to be considered a health care provider. It cannot be the intent of the statute, for example, to exclude from the definition of health care provider a corporation in which all the owners are physicians who perform health care services, simply because the corporation also employs a non-physician administrative staff. A company, no matter what its primary function is, will have a

[3] Its source was Merriam-Webster's online dictionary: https://www.merriam-webster.com/dictionary/of?src=search-dict-box (September 12, 2019).

variety of employees who do not personally carry out the company's primary function, but that fact does not prevent the company from commonly being identified by its primary function (a law firm or an accounting firm, for example). This is best illustrated by looking at the other subdivision in Wis. Stat. § 146.997(1)(d) that uses the construction "_____ of _____", subdivision15, which includes as a health care provider "[a] partnership of any providers specified under subds. 1. to 14." The clear intent of this subdivision is to define a partnership in which the partners are individual health care providers as a health care provider in its own right. The functions of any employees of the partnership are not relevant to the definition. In the same way, a corporation in which those in control are health care providers should be considered a health care provider under subdivision 16. MSOE argues that the most appropriate dictionary definition of "of" in subdivision 16 is "a function word to indicate belonging or a possessive relationship." Examples would be "property of the trustees" or "inventory of the store." This use of the word "of" is reasonable in the context of the statute, and is compatible with subdivision 15, as is the use of the word "of" to indicate the primary content of something.

In support of its interpretation, MSOE cites *Hart v. Bennet,* 2003 WI App 231, 267 Wis. 2d 919, 672 N.W.2d 306. *Hart* involved the question of whether the release by a men's abuse program of a document about the plaintiff, Hart, was an improper release of a "patient health care record," defined by the applicable statute to include "a record related to the health of a patient prepared by or under the supervision of a health care provider…" Wis. Stat. § 146.81(4). "Health care provider" in turn, is defined in Wis. Stat. § 146.81(1) in almost exactly the same terms as it is defined in the statute at issue here. The main difference between the two definitions is that the definition in § 146.81(1) lists more providers than does § 146.997(1)(d). Among the listed providers is: "A corporation or limited liability company of any providers specified under pars. (a) to (hp) that provides health care services." Wis. Stat. § 146.81(1)(j). Except for the statutory references the definitions in § 146.997(1)(d)16. and § 146.81(1)(j) are identical. For purposes of statutory interpretation the commission considers § 146.81(1)(j) and § 146.997(1)(d)16. to be closely-related statutes. *State ex rel. Kalal, supra.*

Hart, like the complainant here, argued that the definition applied to a corporation that *employs* health care providers. The court rejected that argument. The following language from *Hart* is persuasive:

> Although "of any providers" is an unusual way to say "that employs any providers," we will assume for purposes of argument that Hart's construction is a reasonable one. However, we conclude it is not the meaning the legislature intended. Rather, for the following reasons, we are persuaded that the more reasonable reading is that the corporation's shareholders are providers specified in paras. (a) to (hp).

> First, many corporations employ licensed health care providers to provide health care services even though the business of the corporation has nothing to do with health – a factory might employ a nurse, for example, to provide health care services to its employees. Considering all such corporations as health care providers makes little sense in the context of this statute…Second, Hart's reading creates a category of "health care providers," a factory, for instance, that is not tied to any licensing, certification, or regulation by the state, unlike every other category…

The commission agrees with MSOE that to interpret § 146.997(1)(d)16. to include a corporate entity as a health care provider solely because it employs individual providers, while interpreting exactly the same language in § 146.81(1)(j) not to include such an entity, would cause confusion.

The commission interprets § 146.997(1)(d)16. to refer to a corporation that is either principally composed of individual health care providers under subdivisions 1 through 14, or is owned or controlled by individual health care providers under subdivisions 1 through 14, that provides health care services.[4]

In response, Suhr repeats her allegations that a bad-acting supervisor unfairly disciplined her for making a protected report of sub-standard health care, and that the corporate employer ought to be answerable for the supervisor's conduct under the HCWPA. She argues that exempting corporations that *employ* individual health care providers (but are not principally composed of, owned by, or controlled by individual health care providers) would undermine the concept of *respondeat superior,* under which an employer is liable for acts or omissions of a subordinate that cause harm.

This argument puts the cart before the horse. It presumes that the bad-acting supervisor is an employee of a health care provider (as required by statute) and that the complainant's report has to do with the standards of a health care provider (as required by statute), without coming to grips with the fact that the entity for which the complainant works does not come within the definition of a health care provider. The HCWPA is a statutory tort in which the duty is imposed on a specific set of defined parties that does not include MSOE. The doctrine of *respondeat superior* does not expand that statutory definition.

cc: Nicholas M. McLeod
Denise Greathouse

[4] The parties argued about the effect of the fact that MSOE, as a non-profit, non-stock corporation, does not have shareholders or owners. It does not matter. MSOE is not principally composed of individual health care providers, nor are its controlling members individual health care providers.