

State of Wisconsin



Labor and Industry Review Commission

Amy Uphill, Complainant

Fair Employment Decision¹

Sun Valley Homes II, LLC, Respondent

Dated and Mailed:

ERD Case No. CR201700611

January 31, 2022

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The decision of the administrative law judge is **reversed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/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

This case is before the commission to consider the complainant's allegation that the respondent discharged her because she engaged in conduct that was protected under the Wisconsin Healthcare Workers' Protection Act. An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding that the complainant was discriminated against in the manner alleged. The respondent has filed a timely petition for commission review of that decision.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact

1. The respondent, Sun Valley Homes II, LLC (hereinafter "respondent"), is a healthcare provider that operates six community-based residential facilities in Wisconsin, including three in Oconto, two in Marinette, and one in Pulaski.
2. The complainant, Amy Uphill (hereinafter "complainant"), began working for the respondent on October 23, 2015, as a medical technician at one of its facilities in Oconto. The complainant's primary duties were to administer medications to residents and help them with their personal cares, as well as some cooking and cleaning.
3. The complainant's supervisor was the respondent's assistant administrator, Karen Buckman. Buckman answered to the executive administrator, Shannon Schilawski.
4. The complainant and Buckman had a personality conflict and did not work well together. Buckman considered the complainant disrespectful and insubordinate and was dissatisfied with the complainant's attendance. The complainant believed that Buckman bullied and harassed her. Schilawski made efforts to separate Buckman and the complainant at work in order to minimize their contact with another.
5. On February 23, 2016, the complainant was issued a written warning for a variety of rule violations, including missing work without following the respondent's call-in policy, unsatisfactory charting, and displaying a poor attitude. However, a few weeks later, on March 18, 2016, the complainant received a performance evaluation that indicated she was meeting expectations overall.
6. On April 15, 2016, the respondent issued the complainant a written warning for failing to attend a mandatory continuing education class, and on June 22, the complainant was suspended for three days for attendance issues and for missing a mandatory in-service.

7. On August 24, 2016, the complainant was issued a verbal warning for leaving a resident unattended on the toilet, resulting in a fall. The next day, the complainant received a written warning about maintaining professional boundaries after a resident complained that the complainant had engaged in inappropriate conduct.

8. On August 30, 2016, Tami Arnold, the administrator for the respondent's Marinette facility, reported to Schilawski that earlier in the day the complainant had walked up behind her and slapped her on the butt. The respondent questioned the complainant about the incident, but the complainant denied the conduct and was not disciplined.

9. On September 5, 2016, Schilawski and Buckman talked to the complainant about failing to come in for a shift on September 2. During that meeting, the complainant informed Schilawski and Buckman that the facility was understaffed. The complainant also requested that the respondent contact her by telephone rather than by text, and the respondent agreed to do so. The next day the complainant told Schilawski that she felt Buckman was bullying and harassing her. The complainant contended that after the September 5 meeting Buckman had sent a group text to all the employees, which the complainant considered retaliation for her earlier request that she be contacted by telephone and not by text.

10. On September 27, 2016, the complainant complained to Schilawski that Buckman was refusing to allow her to take two hours off work for a mandatory court appearance, even though the complainant had found someone willing to cover her shift. Schilawski arranged to have someone cover while the complainant went to court. On September 29, 2016, the complainant complained to Schilawski that Buckman had refused to help cover the last 45 minutes of her shift and this made her late for a second court appearance.

11. At some point during the month of September 2016, the complainant reported to Schilawski that a family member of one of the residents had expressed concern that her mother's hygiene was being neglected, that her room was messy, and that her meals were unappealing. The complainant stated the resident's family member also complained that Ms. Buckman was disrespectful to doctors and nurses. Schilawski thanked the complainant for letting her know.

12. Towards the end of September Schilawski transferred the complainant to a different building in order to remove her from the building where Buckman's office was and reduce contact between the two. Around the same time, the complainant was transferred from her first shift schedule to a third shift schedule. The complainant complained to Schilawski that Buckman was trying to make her quit. She indicated that she was not hired for third shift and could not work third shift.

13. On October 2, 2016, the complainant sent Schilawski a text message indicating that she would be reporting her ongoing concerns and complaints to the state. The complainant also stated that she was unable to cover the third shift to which she was assigned. Later that afternoon the complainant received a text message from Schilawski directing the complainant to meet with her and Buckman the next day in her office.

14. On October 3, 2016, the complainant met with Schilawski, Buckman and, Tami Arnold, the administrator of the Marinette facility. The complainant was presented with four written warnings, addressing rule violations occurring on September 12, 23, 26, and October 2. With respect to the October 2 incident, the respondent classified the complainant's rule violation as "insubordination" and "harassment of management," and provided the following details:

On Sunday 10/2 management received several text messages from you, claiming you would be unable to fulfill the NOCS shift you are most recently assigned. Additionally, you threatened in writing that you will be contacting state reporting agent with complaints of Sun Valley Homes management. Sun Valley Homes has never received any form of written complaints from you, employee, with regard to managerial procedure or policy, and furthermore SVH will not tolerate bullying or threats made against any faction, and considers this is blatant insubordination.

You have been counseled countless times, given written and verbal warnings, and yet you have continued to be insubordinate. Sun Valley Homes is no longer able to offer you employment, and it is formally required you not return to SVH property.

15. During the meeting Schilawski asked the complainant about the rumor that she was going to call DHS about a resident. Schilawski pointed out that the complainant was the primary caregiver for the resident so her complaint did not make sense.

16. Also, during the same meeting, the complainant submitted a three-page handwritten note to the respondent detailing her various grievances and complaints. The note focused on her conflict with Karen Buckman and referenced complaints the complainant had received from family members of residents about the quality of care. The complainant's note made no mention of the previous threat to file a complaint or report with the state and did not indicate that the complainant had done so or was planning to do so.

17. At the end of the meeting, the respondent notified the complainant that her employment was being terminated.

18. Shannon Schilawski was the sole decision-maker in the complainant's discharge. At the time Schilawski decided to discharge the complainant she knew that the complainant had threatened to report information to the state. However, it was not shown that Schilawski believed the complainant had already done so.

Based on the above Findings of Fact the commission makes the following:

Conclusions of Law

1. The complainant failed to demonstrate that she was discharged because she reported in good faith any information within the meaning of Wis. Stat. § 146.997(2)(a) or because the respondent believed that she reported in good faith such information, within the meaning of Wis. Stat. § 146.997(3)(a).

Memorandum Opinion

The complainant alleged that the respondent terminated her employment in violation of the Health Care Worker Protection Act (HCWPA). The administrative law judge applied the statute and found that unlawful retaliation occurred.

In its petition for commission review the respondent points out that the HCWPA only prohibits discharging an employee in retaliation for having actually filed a complaint or because the employer believes she has done so, and not because the employer thinks she may do so in the future. The respondent argues that the evidence does not establish that the complainant filed a complaint or that the respondent believed she had done so. Based upon its independent review of the record, the commission agrees.

The HCWPA provides, in relevant part:

146.997 (2) REPORTING PROTECTED.

(a) Any employee of a health care facility or of a health care provider who is aware of any information. . . that would lead a reasonable person to believe any of the following may report that information to any agency, as defined in s. 111.32(6)(a), of the state; to any professionally recognized accrediting or standard-setting body that has accredited, certified or otherwise approved the health care facility or health care provider; to any officer or director of the health care facility or health care provider; or to any employee of the health care facility or health care provider who is in a supervisory capacity or in a position to take corrective action:

1. That the health care facility or health care provider or any employee of the health care facility or health care provider has violated any state law or rule or federal law or regulation.

2. That there exists any situation in which the quality of any health care service provided by the health care facility or health care provider or by any employee of the health care facility or health care provider violates any standard established by any state law or rule or federal law or regulation or any clinical or ethical standard established by a professionally recognized accrediting or standard-setting body and poses a potential risk to public health or safety.

146.997(3) DISCIPLINARY ACTION PROHIBITED.

(a) No health care facility or health care provider and no employee of a health care facility or health care provider may take disciplinary action against, or threaten to take disciplinary action against, any person because the person reported in good faith any information under sub. (2)(a), . . . or because the health care facility, health care provider or employee believes that the person reported in good faith any information under sub. (2)(a), . . .

The administrative law judge who held the hearing found that the respondent believed the complainant had reported concerns about neglect of a resident and understaffing to the state and concluded that the respondent terminated her employment for that reason. However, the administrative law judge did not explain the evidentiary basis for her finding that the respondent believed a report had been filed and, after carefully reviewing the record, the commission is unable to locate support for such conclusion.

The complainant testified that she told the respondent on Sunday, October 2, 2016, by text message, that she wanted to let it know she would be reporting her concerns about ongoing complaints, harassment and retaliation to the state. The complainant did not elaborate on this statement. She did not specify when she intended to contact the state and provided no additional information that would have led the respondent to believe that a report or complaint would be filed within any particular time frame. Therefore, when the respondent discharged the complainant on Monday afternoon, just a day after the complainant had threatened to file her complaint, it had no reason to presume that she had already acted on that threat. Nor did the respondent's witnesses testify that they believed this to be the case. To the contrary, Shannon Schilawski's testimony was that the complainant had "threatened" to file a complaint with the state. Schilawski indicated that she had heard a rumor that the complainant was going to call DHS, but insisted that the discharge decision had nothing to do with the fact that the complainant threatened to report the respondent to the state. While Schilawski's testimony may warrant a conclusion that she was concerned the

complainant was planning to file a complaint against the respondent at some future point, there is nothing to indicate that Schilawski believed she had already done so.

Given the absence of evidence in the record to establish either that the complainant reported information to the state or that the respondent believed she had done so, the commission finds no support for the administrative law judge's conclusion that the complainant was discriminated against on that basis. Nor does the commission find that the complainant's discharge was based upon any other conduct protected by the statute—while on more than one occasion the complainant notified the respondent's administrator of concerns regarding understaffing and the quality of patient care, no evidence was presented to suggest that she was subject to retaliation for having brought those concerns to the respondent's attention. Consequently, the commission reverses the administrative law judge's decision and dismisses the complaint.

NOTE: The commission conferred with the administrative law judge who held the hearing prior to reversing. However, the administrative law judge had no demeanor impressions to impart. The commission's reversal is not based upon a differing assessment of witness credibility but is because the majority believes the record contains no evidence to support a conclusion that the respondent believed the complainant had filed a report with the state.

MARILYN TOWNSEND, Commissioner (dissenting):

1. I would affirm the decision of the Administrative Law Judge because the record reflects that complainant engaged in protected conduct and was discharged in retaliation for that protected conduct. Neither the administrative law judge, nor the majority address the part of Wis. Stat. 146.997(2)(a) which prohibits retaliation for reporting possible neglect “*to any employee of the health care facility . . . who is in a supervisory capacity or in a position to take corrective action,*” which was the protected conduct of the complainant in this case. In *Operton v LIRC*, 2017 Wi 46, 375 Wis. 2d, the Supreme Court, instructed the commission that it must address the entire statutory provision at issue in the decision and articulate its reasoning for applying or failing to apply each part of the statute.

Protected Reporting

2. The Health Care Worker Protection Act is designed to protect health care workers from retaliation for reporting, among other things, concerns about “the quality of any health care service provided by a health care facility” Wis. Stat. 146.997 (2) (a) (1).

3. The Commission has found that the complainant made such reports to Shannon Schilawski, the executive administrator of the facility where she worked, on three days during the month of September in 2016. Findings of Fact ## 3, 9, 11 and 12.

4. The Commission has also found that, on October 2, 2016, the complainant sent Ms. Schilawski “a text message indicating that she would be reporting her ongoing concerns and complaints to the state.” Finding of Fact # 13.

5. In its petition for review, the respondent claims that the applicable statute only prohibits discharging an employee in retaliation for having actually filed a complaint [with the state] or because the employer believes she has done so. See Wis. Stat. 146.997 (3) (a).

6. However, Section (2) (a) protects health care workers who make reports about “the quality of any health care service,” not only to a state agency, but also “*to any employee of the health care facility . . . who is in a supervisory capacity or in a position to take corrective action.*” (emphasis added).

7. Moreover, Wis. Stat. 146.997 (3) (a) prohibits disciplinary action against “any person because the person reported in good faith any information under sub. (2) (a).

8. Under these circumstances, the appeal of the respondent is plainly without merit.

9. Based on the plain language of the applicable statute, and the Commission's finding that the complainant did in fact report concerns about the quality of health care services provided by her employer to the executive administrator, it does not matter whether the complainant actually filed a complaint with the state, or whether the employer believed that she had done so. It is undisputed that the complainant reported her concerns to the executive administrator of the health care facility who was in a position to take corrective action as the statute states.

Prohibited Retaliation

10. The timing of the discharge just one day after the complainant texted to the executive administrator "indicating that she would be reporting her ongoing concerns and complaints to the state" (Finding of Fact #13) and the termination letter's characterization of her text message as "insubordination" (Finding of Fact #14) is sufficient support in the record to infer that the discharge was in retaliation for the reports she had already made to the executive administrator and her stated intent to report her concerns to the state.

11. In this context, the Commission has ruled, in accord with rulings of the Wisconsin Supreme Court that "an employee may not be fired when one of the reasons for the firing is unlawful, no matter how many other valid reasons exist for the firing." *Horton v Hopkins Chemical Co. ERD Case No. 8822828 (June 8, 1992).*

/s/

Marilyn Townsend, Commissioner

cc: Attorney Daniel J. Finerty