

State of Wisconsin



Labor and Industry Review Commission

Charnai Sherry , Complainant	Fair Employment Decision¹
Froedert South Inc. , Respondent	
ERD Case No. CR201802354	
	Dated and Mailed: May 8, 2024 <hr/> sherrch_rsd.doc:149

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

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, 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 (hereinafter "HCWPA"). 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 not discriminated against in the manner alleged. The complainant 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 upon its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own.

Memorandum Opinion

To establish a *prima facie* case of retaliation under the HCWPA, a complainant must prove that (1) she engaged in statutorily protected conduct, (2) the respondent took an adverse action against her, and (3) a causal connection exists between the protected conduct and the adverse action. *Brunette v. Cardinal Ridge Residential Care, LLC*, ERD Case No. CR201403684 (LIRC Feb. 22, 2019) (citing *Acharya v. Carroll*, 152 Wis. 2d 330, 448 N.W.2d 275 (Ct. App. 1989)). The administrative law judge who held the hearing found that the complainant failed to satisfy her burden to prove a *prima facie* case of retaliation by a preponderance of the evidence.

In her petition for commission review and subsequent briefs to the commission, the complainant argues that the administrative law judge erred by failing to consider all the evidence. The complainant contends that she has met her burden to prove that she engaged in statutorily protected conduct, and that the respondent violated the HCWPA by taking several disciplinary actions against her, including terminating her employment, in retaliation for having reported to her supervisors that a physician employed by the respondent, Dr. Mini Sivadasan, posed a risk to public health and safety. The commission has considered the complainant's various arguments and will address them in turn.

Statutorily protected conduct under the HCWPA

The HCWPA provides, in relevant part:

(2) REPORTING PROTECTED.

(a) Any employee of a health care facility or of a health care provider who is aware of any information, the disclosure of which is not expressly prohibited by any state law or rule or any federal law or regulation, that would lead a reasonable person to believe any of the following may report that information [. . .] 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.

Wis. Stat. § 146.997(2).

The administrative law judge concluded that the complainant reported information to the respondent that would lead a reasonable person to believe that the quality of care offered by Dr. Sivadasan violated a state or federal rule or law, or an ethical or clinical standard. Those reports included the complainant's allegations that:

- Dr. Sivadasan ordered a medication (Neo-Synephrine) for a dissection patient three times in one week which caused the patient's blood pressure to increase; and
- Dr. Sivadasan's mortality rate (which the complainant claims should normally be 1%) was close to 15% for the first quarter of 2018 and was already at 15% for the second quarter of 2018.

Although the complainant recognizes that the administrative law judge found she engaged in some protected conduct, she argues that the significance of her allegations against Dr. Sivadasan has been downplayed throughout the administrative law judge's decision. The complainant specifically disagrees with the administrative law judge's finding that several exhibits introduced during the hearing do not support the complainant's statement that she reported certain concerning patient findings to the respondent, but rather that the content of those exhibits consisted of complaints about Dr. Sivadasan's perceived aggression towards staff and patients.

The commission agrees with the administrative law judge that the exhibits referenced by the complainant in her brief do not support a finding that she engaged in statutorily protected conduct. The complainant specifically argues that Exhibits C-13, C-16, C-17, and C-77 consist of complaints she made to the respondent that Dr. Sivadasan engaged in repeated or significant disruptive behavior or interactions with hospital personnel that interfered with patient care or could reasonably be expected to adversely impact the quality of care rendered, in violation of

Wis. Admin. Code § Med 10.03(2)(h). The commission is not persuaded. Notably, in these complaints, the complainant never mentioned (1) concerns about patient care, (2) concerns that a state or federal law, or ethical or quality of care standard was being violated, or (3) concerns that Dr. Sivadasan's behavior posed a risk to public health or safety. The commission agrees with the administrative law judge's conclusion that the complainant's complaints contained in these exhibits appeared to be related to a personality conflict that existed between herself and Dr. Sivadasan.

Finally, the commission notes that, even if it were to find that the complainant engaged in additional actions that were protected under the statute, this would have no impact on the outcome of the case. The volume or quantity of covered complaints has no bearing on the ultimate finding that the respondent did not engage any retaliatory behavior as a result.

Alleged retaliatory conduct by the respondent

The complainant's primary allegation is that the respondent discharged her in retaliation for having engaged in protected conduct under the HCWPA. In her brief to the commission, however, the complainant explains that the respondent took a variety of disciplinary action against her, including:

1. The respondent attempted to transfer the complainant to a different position;
2. The complainant agreed to be transferred to oncology, but the respondent refused to permit the transfer; and
3. The respondent retroactively and unilaterally terminated the complainant's contract.

(Complainant's reply brief, at 7-8). The complainant also argues that the respondent had a duty to either replace or transfer Dr. Sivadasan, and that the respondent's failure to take those steps to correct the situation amounted to a disciplinary action. (Complainant's reply brief, at 5).

The commission is unpersuaded that the respondent's attempts to transfer the complainant to a new position amounted to disciplinary action. It was the complainant who initially refused to work with Dr. Sivadasan and requested a transfer. Given that Dr. Sivadasan was the only cardiothoracic surgeon employed by the respondent at the time, the respondent's only option to retain the complainant was to transfer her to a different department. Further, although the complainant contended that she eventually agreed to transfer to oncology but the respondent refused to allow her to do so, the record is insufficient to support a finding that this occurred.

The commission also agrees with the administrative law judge's finding that the respondent did not force the complainant out of her position by terminating her employment. As stated above, the complainant requested a transfer away from

Dr. Sivadasan. The respondent attempted to retain the complainant by offering her several transfer options, all of which the complainant refused. While the complainant disputes having agreed to terminate her contract with the respondent on July 18, 2018, and argues that the decision to terminate her employment was made unilaterally by the respondent, the record is insufficient to support such a finding. Under all the facts and circumstances, the commission finds that the complainant failed to show by a preponderance of the evidence that the respondent violated the HCWPA by forcing her out of her position, or that it took any other disciplinary action against her.

Finally, the commission is unpersuaded by the complainant's argument that the respondent's failure to discipline Dr. Sivadasan amounts to a disciplinary action against the complainant. The complainant concedes that she requested a transfer away from Dr. Sivadasan but argues that she did so only because the respondent refused to discharge or transfer Dr. Sivadasan. However, the issue presented in this case is whether the respondent took disciplinary action against the complainant for engaging in statutorily protected conduct under the HCWPA. The commission need not decide whether the respondent adequately addressed the underlying conflict raised by the complainant in her protected reports, only that she was not disciplined for having done so.

The commission has considered the remaining arguments raised by the complainant in her petition but finds these arguments unpersuasive. Based upon its review, the commission agrees with the administrative law judge that, while the complainant engaged in conduct that was protected under the HCWPA, she failed to establish by a preponderance of the evidence that the respondent discharged her complainant or engaged in any other disciplinary action against her. The commission, therefore, affirms the administrative law judge's decision.

cc: Atty. Alan C. Olson
Atty. Deborah A. Krukowski

Editor's note: This decision has been appealed to circuit court.