

State of Wisconsin



Labor and Industry Review Commission

<p>Angela Wichman, Complainant</p> <p>Apple Medical Clinics, S.C., Respondent</p> <p>ERD Case No. CR202001303</p>	<p>Fair Employment Decision¹</p> <p>Dated and Mailed:</p> <p>July 31, 2024</p> <hr/> <p>wichmanan_err1.doc:101</p>
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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

/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 retaliated against her for engaging in conduct protected by the Health Care Worker Protection Act under Wis. Stat. § 146.997. An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision. The respondent filed a timely petition for commission review.

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 is owned by a licensed chiropractor, Michael Johnson, D.C., and it provides chiropractic services and a variety of other health related services.
2. Dr. Johnson performs chiropractic treatment on patients. However, he cannot prescribe medication or do surgery. He is not an infectious disease specialist.
3. In addition to chiropractic treatment provided directly by Dr. Johnson, the respondent provides vitamin injections and sells supplements to its patients. Its employees also use a Sanexas machine to provide care to patients. A Sanexas machine provides palliative pain treatment by electrical therapy. The state does not require a license or certification to use a Sanexas machine on a patient. The manufacturer offers a certification in the use of the machine, but no employee of the respondent has obtained the manufacturer's certification.
4. No prescription from a medical doctor is required for a Sanexas treatment. However, the employees providing the treatment were supervised by a nurse practitioner, Jessica Friday, and Dr. Johnson himself occasionally was present while the treatment was administered.
5. The complainant began working for the respondent's predecessor, Optimal Health, as a licensed practical nurse in March 2020. The complainant worked eight hours per day, four days per week, and she was paid \$21.00 per hour. She was supervised throughout her employment by nurse practitioner Friday.
6. The complainant's duties included checking vitamin mixtures administered to the clinic's patients by injection as part of the Sanexas treatment. She would also double check patients' blood pressures and heart sounds while they received treatment on Sanexas machines.
7. In February 2020, the Center Disease Control (CDC) issued "interim guidance" to employers in response to COVID-19. The guidance recommended that employers

tell their employees to stay home if they felt ill. The guidance also recommended that employers create an “infectious disease outbreak response plan.”

8. In March 2020, the Occupational Health and Safety Administration issued a document entitled “Guidance on Preparing Workplaces for COVID-19.” It classified jobs, and the precautions needed with respect to preventing COVID-19 infection, by risk, categorizing the risks as low, medium, high, and very high. Notably, however, the guidance specifically stated that it was not a regulation or standard, and that it created no new legal obligations. (Exhibit R-2; ERD 507).

9. On March 12 and 13, 2020, Wisconsin state government and the federal government, respectively, proclaimed public health emergencies due to COVID-19.

10. On March 15, 2020, Dr. Johnson made a video that he posted on the respondent’s website about “COVID-19 hysteria and how to prevent it.” Dr. Johnson held the opinion that if someone contracted the COVID-19 virus, his or her body would overcome it. He believed, and he had stated aloud, that the government did not know what it was doing with respect to the COVID-19 pandemic.

11. On March 16, 2020, the federal government issued guidance which stated that older persons should stay home and away from other people, that people should stay home if they felt sick, and that if someone in a household tested positive for the coronavirus, the entire household should stay home.

12. Also on March 16, 2020, the Wisconsin Department of Health Services issued an order that prohibited mass gatherings, which, by revision dated March 17, 2020, was defined as 10 individuals or more. The mass gathering order also required that all gatherings of fewer than 10 people preserve social distancing of 6 feet and follow other public health recommendations by the state Department of Health Services or the CDC. However, the initial mass gathering order specifically exempted “all healthcare facilities...” The revised mass gathering ban again exempted “health care facilities and related facilities, including ... chiropractors,...” (Exhibit C-2; ERD 008).

13. On March 18, 2020, during a staff meeting, another of the respondent’s employees, Hope Geissler, told Dr. Johnson that she had asthma and was worried about COVID-19. He suggested that she take personal time “and we’ll figure it out.”

14. During that same March 18, 2020 staff meeting, Dr. Johnson coughed as a joke, and then recounted an incident where he had done the same thing at a Starbucks coffee shop.

15. On March 19, 2020, Geissler again expressed her concerns to Dr. Johnson regarding her health and that of clinic patients due to the COVID-19 health

emergency. In response, Dr. Johnson told her not to be concerned and to take vitamins.

16. The complainant herself did not discuss COVID-19 with Dr. Johnson until Monday, March 23, 2020.

17. As of March 23, 2020, Dr. Johnson did not ask patients if they had symptoms of, had been tested for, or had been diagnosed with COVID-19. He was not requiring social distancing at the workplace, nor did not provide personal protective equipment.

18. At some point in the morning of Monday, March 23, 2020, Dr. Johnson and the complainant met about her job performance. Dr. Johnson told the complainant that “someone had said something” about her talking with patients too much. The complainant explained to the doctor that a lot of the chatter was just to put patients at ease during treatment—some of which involved using needles—and that it did not impede her work. Dr. Johnson responded that he understood the complainant’s explanation, and that he had been receiving good reports regarding her performance from her direct supervisor, nurse practitioner Friday.

19. On March 23, 2020, Dr. Johnson and most of the respondent’s staff learned that Governor Evers intended to issue a Safer at Home Order the following day. The complainant and some coworkers, including the respondent’s office manager, Emily Neils, discussed the Safer at Home Order throughout the day. The complainant understood that the Safer at Home Order would allow essential businesses to remain open, so people could still get drug prescriptions, groceries, and medical care “if you really need it...” She also testified that there would be a social distancing order trying to get people to stay six feet apart. This concerned her because she believed that the respondent was short on personal protection equipment, had very few masks, and was running out of gloves.

20. About lunchtime on March 23, 2020, Dr. Johnson came into the complainant’s treatment room, very upset, and asked the complainant to take his blood pressure. He told the complainant that he had heard that the governor was going to issue the Safer at Home Order. He also told the complainant that he would never close, and that “they would have to drag him out of the clinic.”

21. Later on May 23, 2020, about 4:15 p.m., as the complainant was getting ready to leave work for the day, a coworker asked the complainant to stay for a meeting in the nurse practitioner’s office to “see if everyone is on the same page about some concerns we have.” Shortly thereafter, the respondent’s staff met, without Dr. Johnson, to discuss meeting with the doctor later in the afternoon. Present at this meeting were Jessica Friday, a registered nurse named Jenny, Diane Janke, Jens (Dr. Johnson’s son), Terrie Ohlfs, and the complainant. The complainant understood from this meeting that the consensus among the staff was that the clinic should close.

Even though she was a relatively new employee, the complainant felt thrust into the position of voicing staff concerns about whether the respondent was actually an essential business.

22. Thereafter, about 4:30 p.m. on March 23, 2020, several members of the respondent's staff went to Dr. Johnson's office for another meeting, this time with Dr. Johnson. Present at this meeting were Dr. Johnson, Jessica Friday, Diane Jahnke, Terrie Ohlfs, Emily Neils, and the complainant.

23. The complainant spoke at the meeting with Dr. Johnson. She told the doctor that she was aware that the governor was going to issue the Safer at Home Order the following day. She added that she did not think the respondent was an essential business. The complainant felt that as the clinic's patients were self-referred, it was questionable whether the clinic could truly be considered essential. The complainant also believed that the age and other conditions of the patients treated by the respondent made those patients higher risk, adding that it was going to be difficult to get the necessary supplies, PPE, etc. Coworker Ohlfs voiced similar concerns.

24. Dr. Johnson responded that that the respondent was an essential business and needed to take care of its patients. He also became upset and angry. He said the respondent would close for the remainder of the week, adding "this is not over yet."

25. At some point after his 4:30 meeting with the staff, apparently still on March 23, 2020, Dr. Johnson met privately with office manager Neils at Dr. Johnson's request. Dr. Johnson told Neils that certain employees were going to be discharged. He asked who the "ringleaders" were. Neils responded that there were no ringleaders, adding that the staff all had concerns.

26. Later on March 23, 2020, Dr. Johnson posted on a private electronic message board (on which he communicated with other medical providers) that his staff felt that his business was not essential even though liquor stores were considered essential, and that "there will be changes I can promise you that." Another person with access to the private message board responded that this was "a good lesson on the captain runs the ship." Johnson responded "You got that straight! The initial round of firings begin in the morning!" (Exhibit C-4; ERD 027-028).

27. Dr. Johnson did not wait until morning. He discharged the complainant, along with coworkers Hope Geissler and Terrie Ohlfs, via text and email during the evening of March 23, 2020. In his text discharging the complainant, Dr. Johnson informed her that "things are not working out."

28. The complainant was fired for raising concerns about the respondent remaining open during the COVID-19 pandemic. Dr. Johnson regarded the view that his clinic should close, or even curtail its operations, not only as an affront to the

importance of the services provided by the clinic, but to his status as “captain” of that clinic, and to his financial wellbeing.

29. After sending the emails and texts discharging the complainant and her two coworkers, Dr. Johnson sent an email to the rest of the respondent’s staff announcing the firings. The email stated that he had discharged half of the staff, and that “if the other half don’t get who is the captain, more will follow.”

30. On March 24, 2020, Wisconsin’s secretary of health services, at the direction of the governor, issued “Emergency Order # 12 Safer at Home Order.”

31. Section 1 of the Safer at Home Order directed all Wisconsin residents “... to stay home or at their place of residence, with exceptions outlined below...” Among the exceptions outlined in Section 1 are “b. Essential Businesses and Operations (defined in section 13)” and “c. Special Situations (defined in section 8...)”

32. Section 2 of the Safer at Home Order directed that: “Nonessential business and operations must cease. All for-profit and non-profit businesses with a facility in Wisconsin, except Essential Businesses and Operations as defined below are required to cease all activities at facilities located in Wisconsin...”

33. Section 8 of the Safer at Home Order, which deals with “Special Situations,” states that “a person may leave his or her residence to work or obtain services at any Healthcare and Public Health Operations” including “chiropractors.”

34. Section 13 of the Safer at Home Order states that “Essential Businesses and Operations” includes “Health Care and Public Health Operations” which, as stated immediately above, includes chiropractors.

Conclusions of Law

1. The respondent is a health care provider within the meaning of Wis. Stat. § 146.997(1)(d)2. and 16.

2. The complainant’s conversations with Dr. Johnson on March 23, 2020, were not a report of information that would lead a reasonable person to believe that the respondent had violated any state law or rule or federal law or regulation.

3. The complainant’s conversations with Dr. Johnson on March 23, 2020, were not a report of information that would lead a reasonable person to believe there existed any situation in which the quality of any health care service provided by the respondent violated 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.

4. The complainant did not establish by a preponderance of the evidence that the respondent disciplined her or terminated her employment because she engaged in a protected activity, within the meaning of the Wisconsin Fair Employment Act.

Memorandum Opinion

In her complaint, the complainant alleged that she was subject to employment discrimination under Wis. Stat. § 111.322(2m) because she attempted to enforce a right under Wis. Stat. § 146.997. Specifically, the complainant alleged that she reported to the respondent on March 23, 2020:

that under the Wisconsin's "Safer at Home" order, she believed the office was a "non-essential" service and should be closed. Complainant also noted that the office has clients traveling from multiple states, and this was unsafe. She was terminated.

The complainant's complaint went on to state that she reported these concerns to the respondent's owner, Dr. Johnson.

Wisconsin Stat. § 146.997 protects employees of health care facilities or providers (including chiropractic offices or chiropractors) who report information to a supervisor that would lead a reasonable person to believe:

1. That 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 ... 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.

The statute provides that a health care facility may not take disciplinary action (including discharge) against an employee because the employee reports such information in good faith to a supervisor.

The administrative law judge found that the respondent discharged the complainant because of the concerns she raised at the March 23, 2020 staff meeting. The administrative law judge further found that the respondent was "aware of information that would lead a reasonable person to believe that there existed a situation where the quality of health care service provided by [the respondent] violated recognized standards of care and posed a potential risk to health or safety." *See*, Wis. Stat. § 146.997(2)(a)2.

The administrative law judge based his conclusion on Wis. Stat. § 446.03(5) and (6), which provides for disciplinary action including license revocation if a chiropractor:

- (5) Is guilty of unprofessional conduct.
- (6) Has continued practice, knowingly having an infectious or contagious disease.

Wisconsin Stat. § 446.04(1) further defines unprofessional conduct to include “conduct of a character likely to deceive or defraud the public.” The administrative law judge concluded that Dr. Johnson’s disdain for the health guidance provided by the government led the complainant to reasonably believe that he would violate Wis. Stat. § 446.03(5) and (6) by deceiving the public regarding COVID-19 and by creating a serious risk by exposing the public to an infectious disease.

Like the administrative law judge, the commission does not credit the reasons that Dr. Johnson gave for firing the complainant—that she “gabbed” or talked to patients excessively while providing treatment. The commission agrees that the complainant was actually fired for raising concerns about the respondent remaining open during the COVID-19 pandemic. Dr. Johnson regarded the view that his clinic should close, or even curtail its operations, not only as an affront to the importance of the services provided by the clinic, but to his status as “captain” of that clinic, and to his financial wellbeing.

However, the burden of proof remains with the complainant, and she must prove more than that the reason that Dr. Johnson gave for her discharge was a pretext. *See, Puetz Motor Sale*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (1985) and *Sacred Heart Sch. Bd. v. LIRC*, 157 Wis. 2d 638, 643, 460 N.W.2d 430 (Ct. App. 1990). In other words, the complainant must show not only that the respondent’s asserted reasons for terminating her employment were false, but that unlawful discrimination was the real reason. *Burt v. Skaleski Moving & Storage Inc.*, ERD Case No. CR200901633 (LIRC Apr. 8, 2013). She must prove that the respondent discharged her because she reported in good faith information that would lead a reasonable person to believe that Dr. Johnson or the respondent violated a standard set by law or rule, or created an existing situation in which the service they provided violated a standard set by law or rule or a clinical standard or ethical standard.² The commission cannot conclude that she has made that showing in this case.

A strong argument may be made that the Safer at Home Order was a rule as of its issuance on March 24, 2020, until it was struck down by the Supreme Court on May 13, 2020. In its decision, the Court held that the Safer at Home Order was a rule, but that it was unenforceable because it was adopted without following the required rule-making procedures, *Wis. Legislature v. Palm*, 20 WI 42, ¶3, 391 Wis.

² No clinical or ethical standards were raised by the complainant or referred to in the hearing testimony or the respondent’s brief.

2d 497, 942 N.W.2d 900. That is, the Court itself referred to the Safer at Home Order as a “rule,” albeit an invalid one. Before it was invalidated by the Court, a reasonable person could in good faith conclude the Safer at Home Order had to be followed once it went into effect.

Still, the Safer at Home Order itself does not provide a basis for finding of discrimination under Wis. Stat. §§ 111.322(2m) and 146.997 in this case. The Safer at Home Order was issued on March 24, 2020, and it closed nonessential business the following day. Both the reporting of information by the complainant to Dr. Johnson and his subsequent decision to discharge the complainants occurred earlier, on March 23, 2020. To obtain protection under Wis. Stat. § 146.997(2)(a), the protected employee must report information that would lead a reasonable person to believe that a violation of a law or regulation *has* occurred, or that a situation *exists* in which the quality of care *violates* a standard established by law or regulation. By its terms, the statute does not apply to a belief that a violation *may* occur, or even *will* occur, at some future point.

The Wisconsin Fair Employment Act is to be liberally construed. *See*, Wis. Stat. § 111.31(3) and *Braatz v. LIRC*, 174 Wis. 2d 286, 291, 496 N.W.2d 597 (1993). However, the most reasonable construction of the plain meaning of Wis. Stat. § 146.997 is that it applies to information leading to a reasonable belief about past, present, or existing violations, as the statute itself refers to violations that have occurred or are existing. The commission concludes that the Legislature’s deliberate use of the present and past perfect tenses in drafting the statute discloses its intent to protect reports of information regarding past or ongoing violations, not generalized concerns or beliefs that a violation might or will occur in the future.

On that basis, the commission cannot conclude that the complainant reported information on March 23, 2020, that would lead a reasonable person to believe that a violation of the Safer at Home Order had occurred. The witnesses agreed that the Safer at Home Order would not be issued until the next day and that they were discussing closing the clinic in the future. The order itself did not actually close any businesses until March 25, 2020. Radio or other media reporting about the order’s anticipated content cannot serve as the basis for a reasonable belief that, as of March 23, 2020, Dr. Johnson had violated any standard set by law or rule.

Further, the Safer at Home Order, once it actually became effective, exempted treatment with chiropractors. The order applied to “services at” Healthcare and Public Health Operations, including chiropractors. It was not limited to hands-on services provided by a chiropractor directly. The Sanexas treatment was a service provided at a clinic operated by a chiropractor. The respondent was a Public Health Operation and therefore an essential business permitted to operate under the order. The earlier orders that required that gatherings of fewer than 10 people to preserve

social distancing of 6 feet and follow other public health recommendations also exempted chiropractors.

As noted above, the administrative law judge based his decision on a violation of a standard set by Wis. Stat. § 446.03(5) and (6). However, the commission concludes that the respondent did not violate a standard set by Wis. Stat. § 446.03(5) and (6), for the purposes of Wis. Stat. § 146.997(2)(a). People held, and still hold, disparate views about social distancing, vaccination, and mask wearing. The commission declines to hold that simply expressing an opinion at odds with the evolving advice or guidance from the CDC or Department of Health Services amounts to fraud or deceit under Wis. Stat. §§ 446.03(5) and 446.04(1), even when that contrary opinion comes from a practicing health professional. Further, the record contains no evidence that Dr. Johnson himself was infectious with COVID-19 on March 23, 2020, or that he treated anyone while infectious, as required to prove a violation of Wis. Stat. § 446.03(6).

The commission did give careful consideration to administrative rules of the Chiropractic Examining Board (Wis. Admin. Code Chir, chs. 1 to 13) that govern chiropractors. They provide in part that:

Chir 6.02 Unprofessional conduct. Unprofessional conduct by a chiropractor includes all of the following:

- (1) Engaging in any practice which constitutes a substantial danger to the health, welfare, or safety of a patient or the public.
- (2) Practicing or attempting to practice when unable to do so with reasonable skill and safety to patients.

These rules were not specifically cited by the complainant in her complaint, her testimony, or her brief. However, a complainant need not identify a specific law, rule, or standard that had been violated by a health care provider as long as the hearing record establishes that that such a law, rule, or standard was violated by the health care provider or its personnel.³ For example, *Dieterich v. Lindengrove, Inc.*, ERD Case No. CR200503499 (LIRC Dec. 29, 2008), dealt with a health care worker who reported that a patient had been injured when a nursing assistant who was ill and not paying attention ran over his foot with a wheelchair. The commission concluded the facts established a report of “information that would lead a reasonable person to believe that there existed a situation in which the quality of a health care service provided by the health care facility ... violated standards established by state law or rule or federal law or regulation or clinical or ethical standards ...,” even absent a citation to a specific law, rule, or standard. However, in *Dieterich*, the complainant reported a situation that caused an actual injury to a patient, not a concern about future patient health based on an anticipated violation of an order or rule that was not yet in effect.

³ See, for example, *Bruneau v. Olas House*, ERD Case No. CR200601600 (LIRC Oct. 9, 2008).

The commission has previously dealt with the requirement of an “exist[ing] situation” under Wis. Stat. § 146.997. In *Siegel v. Marshfield Clinic*, ERD Case No. CR200901873 (LIRC Oct. 13, 2013), the employer alleged that the reports of information in that case were not covered by Wis. Stat. § 146.997 because the complainant was not complaining about an “existing” situation. In *Siegel*, the reports involved procedures performed by a doctor who—at the time of the protected report—no longer worked at the clinic and so posed no ongoing threat to the patients involved. However, the commission disagreed that the reports were not covered, explaining:

... where the evidence indicates that the procedures to which the complainant objected were performed on the complainant’s current patients, some of whom were experiencing ongoing problems related to those procedures, it seems clear that his concerns involved an existing situation.

That is, *Siegel* involved the reporting of past violations that had occurred and were still having an effect on patient health, not possible future violations. The case highlights the statutory requirement of an *existing* situation in which the quality of health care service violates a standard, even when it arises from past conduct in violation of a standard set by law or rule or in violation of an ethical or clinical standard. In this case, again, the complainant’s statements did not report an existing situation that arose from conduct in violation of a statute, or standard that posed a danger to the safety of a patient or the public. Wisconsin Admin. Code § Chir 6.02(1) and (2) thus provide no basis for a finding of discrimination for the purposes of Wis. Stat. § 146.997.

In sum, the complainant has failed to prove that the respondent discharged her because she engaged in conduct covered under the Wisconsin Health Care Worker Protection Act. The decision of the administrative law judge must therefore be reversed and the complaint dismissed.

cc: Attorney Aaron A. Halstead
Attorney Kurt A. Goehre