

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Pathways of the River Valley

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275-E:1 I, employee/employer relationship
RSA 275-E:2 I (a), illegal termination for protected reporting
RSA 275-E:2 I (b), illegal termination for refusal to participate in an
illegal activity
RSA 275-E:2 I (c), illegal termination for participation in an
investigation
RSA 275-E:3, illegal termination for protected refusal to execute
an illegal directive

Employer: Pathways of the River Valley, 654 Main St, Claremont NH 03743

Date of Hearing: September 19, 2017

Case No.: 55427

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant alleges that she was illegally terminated on June 5, 2017, because she reported negligence of the residents at the facility, she refused to participate in covering up the negligence, she participated in an investigation of the facility regarding client rights violations, and she refused to execute the illegal directive to cover up the incidence reports of negligence. She requests, as relief in this action, back wages health insurance, and her human resources file expunged.

The employer denies the claimant's regular internal incident reports regarding preparation of food and hydration of residents, were reported as negligence to the residents. As a result of these reports, there was substantial training for staff following the incidents to ensure they did not occur again. The claimant never alleged any cover up of any reports during her employment. They believed the claimant was satisfied with the way the employer handled these incidents.

They terminated the claimant on June 5, 2017, following a May 26, 2017, incident, in which the claimant "shouted profanities" and "belittled" a co-worker in the presence of five residents. Her behavior violated their Ethics and Conduct, Code of Conduct Policy and coupled with her prior inappropriate behavior, was grounds for termination. Her termination was not the result of any protected activities.

Further, the employer filed a complaint with the Bureau of Developmental Services (BDS) on behalf of the five residents who witnessed the incident on May 26,

2017. The final determination of BDS was that the complaints against the claimant were founded. This determination was made after the claimant had already been terminated.

FINDINGS OF FACT

The claimant began working for the employer in September 2015 on a part time basis. She later became a full time employee. The employer terminated her employment on June 5, 2017.

The claimant's employment was fraught with negative issues regarding her interactions with other staff. The claimant admits she did have some unprofessional outbursts, due to her frustration with the employer.

The facility had a fire drill on December 9, 2016. The claimant took significant issue with certain patients being brought outside due the weather conditions and the patient's health issues. She was unprofessional during the fire drill with other staff.

As a result of the claimant's behavior during this fire drill, the employer called a meeting with her on December 28, 2016.

On January 25, 2017, the claimant reported negligence of residents to the employer through their internal incident report system. She reported that resident's food was not cut to the proper size for their intake requirements. The claimant did not check the box on the incident form to indicate she felt this issue was a violation of client rights.

The employer addressed this issue in the following staff meeting that it is imperative that resident's food be the appropriate size to avoid a choking hazard. This issue was repeatedly reinforced in subsequent staff meetings. The claimant provided no indication she did not find this solution acceptable.

Unbeknownst to the employer, the claimant filed an anonymous claim with the State regarding this issue on June 2, 2017. She later met with State investigator Paul Woodmansee on June 22, 2017.

On April 14, 2017, the claimant reported negligence of residents to the employer through their internal incident report system. She reported that a resident did not have their oxygen as ordered by the physician. The claimant did not check the box on the incident form to indicate she felt this issue was a violation of client rights.

The employer corrected the issue by providing the oxygen tank to the resident. It was noted that the claimant did not correct the issue by providing the oxygen apparatus to the resident. They discussed the issue as a training matter, advising that if there are orders for oxygen, to treat the apparatus as part of the patient, and move with them accordingly. Further, additional signs were hung in the resident's room to additionally alert staff for the oxygen apparatus. The claimant noted that the same employee failed to provide oxygen to the same claimant within fifteen minutes of this issue, but the claimant chose not to report it be she "picked her battles." The claimant provided no indication she did not find this solution acceptable.

Ongoing issues had been raised regarding hydration scheduled for residents. The documentation to show resident's had received the proper documentation, by

everyone's admission, were not always accurate. The sheets were not always updated as they should be when hydration was provided to residents. The claimant argued it appeared the residents were not receiving the proper hydration. The employer did research and found that residents were receiving proper hydration, however, the documentation was not correct. They added this as a training issue to staff meetings and discussed employee's would be written up for failure to properly document hydration. Again, the claimant did not indicate she did not find this solution acceptable.

On May 26, 2017, the claimant was involved in an incident at the facility. A patient was being taken to the emergency room due to an ongoing issue causing pain. The claimant's shift was just beginning as preparations were being made to transport this patient. A verbal discussion between the claimant and April Jalosky escalated into the claimant yelling profanities at her in the presence of five residents.

The claimant did not file any incident reports with the employer regarding this incident.

Emily Newhouse, the Family Services Coordinator with the employer, contacted the State's Bureau of Developmental Services (BDS) and filed a complaint on behalf of the five residents who witnessed the verbal altercation. She filed because the patient was being denied care and all five were subject to the yelling and swearing by the claimant.

The employer's representatives provided credible testimony that incident reports are a normal part of daily business and no one, including the claimant, has been told not to fill one out. Two or three reports are normally received on any given day. The employer's policy is "when in doubt, fill it [an incident report] out."

The employer terminated the claimant as a result of her actions on May 26, 2017, and her prior outburst.

The BDS investigation came back as founded regarding the claimant's behavior on June 30, 2017, after her termination. However, the employer noted that the claimant would have been terminated upon receipt of that report, as they had terminated other employees who has been found to violate resident rights by BDS.

DISCUSSION AND CONCLUSIONS

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "pretext" analysis because of the circumstantial evidence of retaliation presented. Under this analytical framework, the claimant has the initial burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. she engaged in an act or acts protected by the statute;
2. she suffered an action proscribed by the statute (termination); and
3. there was a causal connection between the protected acts she engaged in and the action she suffered as a result of that/those protected act/s (termination).

In Collazo v. Bristol-Myers Squibb Manuf., Inc. 617 F.3d 39, 49-50 (1st Cir. 2008), the court opined that "[O]ur law is that temporal proximity alone can suffice to meet the relatively light burden of establishing a *prima facie* case of retaliation."

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). This burden of proof is only one of production. The claimant retains the burden of proof to persuade. In response to the employer's rebuttal, the claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that his assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to her protected act/s.

The claimant establishes a prima facie case of illegal termination. She reported two incidents to the employer, January 25 and April 14, 2017. The claimant was fired by the employer. There is no causal connection, between both her protected reporting, to her termination.

There is no evidence that the employer told the claimant not to file any incident reports. Her participation in the investigation by the State did not take place until after her termination.

The employer provided credible testimony and evidence that the claimant was not terminated for the January 25 and April 14, 2017, reporting's, or for any other reason except for her behavior on May 26, 2017, and similar prior behavior. The Hearing Officer finds that the claimant failed to show that the proffered legitimate, non-retaliatory reason for her termination was not the true reason for her termination, and that her assertion was the true reason for the unlawful conduct/retaliation.

Therefore, the Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence she was terminated for any protected activity.

DECISION

Based on the testimony and evidence presented, as this Department finds that the claimant failed to prove by a preponderance of the evidence that she was terminated in retaliation for her protected activities, it is hereby ruled that the Whistleblower's Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: October 12, 2017

Original: Claimant
cc: Employer

MJD/nm