

2013 WL 8149162 (Iowa Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Iowa.
Dallas County

Terri Aleta RIVERA,
v.
WOODWARD RESOURCE CENTER, et al.

No. LACV035284.
December 2, 2013.

Defendants' Trial Brief

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COMES NOW Defendants Woodward Resource Center and State of Iowa (collectively, “the State” or “Defendants”) and, in accordance with the Trial Scheduling Order dated August 14, 2013, submit this Trial Brief:

I. Background Facts

A. The Players

Plaintiff Terri Rivera (“Rivera”) was employed as a Resident Treatment Worker at the State of Iowa's Woodward Resource Center (“WRC”). The WRC provides residential services to individuals with mental disabilities.

The State employed Rivera for less than six months and, importantly, before becoming a permanent employee. At all times, Rivera was an “at will” employee who could be discharged for any lawful reason, or for no reason at all. Rivera was not, for example, an employee subject to a “just cause” standard for discharge in a collective bargaining agreement.

The State discharged Rivera during her probationary period nearly immediately after she incurred her third unscheduled absences from work. Indeed, a prior employer had also fired Rivera for missing work, and Rivera omitted this job from her State employment application.

In this lawsuit, Rivera alleges the State illegally discharged her because she made a complaint of dependent adult **abuse**. In support of her wrongful discharge claim, Rivera relies upon public policy as set forth in Iowa Code Chapters 135C and 235B.

B. WRC

The WRC has a license from the Iowa Department of Inspections and Appeals (“DIA”) to operate as an Intermediate Care Facility for persons with mental retardation. The WRC provides health and rehabilitative services to children and adults with intellectual disabilities. Clients receiving Intermediate Care Facility services reside in homes on the premises of the Woodward Resource Center. The facility hires employees in the position of Resident Treatment Worker to monitor clients and implement their individual care plans. Attendance is an essential requirement of the job.

On April 28, 2006, the WRC hired Rivera as a Resident Treatment Worker. (While employed at the WRC, Rivera's last name was Magana). The WRC assigned Rivera to work at a house known as 103 Cedar, where adult males resided. Rivera's supervisor was Jamie Archer, Resident Treatment Supervisor. Jamie Archer's supervisor was Sue Godfrey, Treatment Program Manager ("TPM"). Sue Godfrey's supervisor was John Andorf, Treatment Program Administrator ("TPA"). John Andorf's supervisor was Mark Boley, Program Services Director. Mark Boley's supervisor was Mike Davis, Superintendent.

C. Abuse Reporting

The State has policies and procedures in place to guard against dependent adult **abuse** and ensure that employees at the WRC report any such allegations of **abuse**. On April 28, 2006, Rivera signed a statement acknowledging receipt of the Woodward Resource Center Protection from Harm Policy. The Protection from Harm Policy required mandatory reporters such as Rivera to report **abuse** to the Central Abuse Registry ("the Registry"). Specifically, as a mandatory reporter Rivera was required by state law to report suspected **abuse** to the Iowa Department of Human Services both orally and in writing. Within 24 hours any incident which a mandatory reporter reasonably believes to be child **abuse** or dependent adult **abuse** shall be orally reported to the Registry. The written report shall be made within 48 hours of the oral report. Rivera knew that she could ask her supervisor questions about the Protection from Harm Policy and does not recall that she ever asked any questions about applying the policy.

The Protection from Harm Policy required employees witnessing or having knowledge of any act believed to be **abuse** or inappropriate conduct on the part of an employee to immediately report the incident internally to the supervisor. The Protection from Harm Policy stated an internal procedure addressing immediate intervention for the protection of the client, medical care for the client, reporting the injury to the supervisor as soon as possible, supervisor's requirements for reporting **abuse** of neglect allegations, contact with the Department of Inspections and Appeals and the Registry, decision making regarding separation of accused staff from clients, the role of the health practitioner treating a client, and notification of the client's parent, guardian, or other person designated for notification. On May 1, 2006, Woodward Resource Center trained Rivera on its Protection from Harm Policy.

D. Plaintiff's Report of Alleged Abuse

According to Rivera, on September 6, 2006, Rivera's co-worker Steve Wittrig told Rivera that he had witnessed a coworker, J.B., put jalapenos in a client's eye. According to Rivera, the incident that Wittrig allegedly told Rivera about happened on or about September 3, 2006. According to Rivera, on September 11, 2006, Rivera told Archer and Godfrey about incidents of **abuse** that she had witnessed and the incident that Wittrig reported to her on September 6, 2006.

Archer recalls that Rivera told her that it had been reported that J.B. was putting hot sauce in the eyes of a client within the last couple of weeks and she does not recall that Rivera told her about any other incidents of **abuse**. Archer recalls that she reminded Rivera during their conversation that concerns of **abuse** had to be immediately addressed with her supervisor and that they needed to protect the safety and welfare of the individuals that they were supporting. To follow up, Archer retrained Rivera and reminded her staff that instances of **abuse** and neglect had to be reported immediately, "reminded of the proper reporting procedures to DIA/RTS/TPM **abuse** or otherwise misconduct," and documented in everyone's files, including her supervisory file for Rivera, that she did this on September 12, 13, 14, and 15, 2006.

Godfrey recalls that Rivera told her that a co-worker was treating a client in an **abusive** way and the incident involved pepper and the client's eyes and she does not recall that Rivera told her about any other incidents of **abuse**. Godfrey recalls that she did a visual check of the client, saw no visual injury, and checked the incident reports and found no reports. Godfrey recalls that she spoke with Boley and he made the decision that there was nothing to report because there was no evidence of **abuse**.

Rivera's sole report of alleged **abuse** were her verbal reports that she made to Archer and Godfrey. Rivera never made any written reports of alleged **abuse**. Rivera never called the Registry to report dependent adult **abuse**, and given that she never

made a verbal report, she also never made a written report. Rivera never called or went to a county office of the Iowa Department of Human Services to verbally report dependent adult **abuse**, and given that she never made a verbal report, she also never made a written report. Rivera never contacted the Iowa Department of Inspections and Appeals to verbally report dependent adult **abuse**, and given that she never made a verbal report, she also never made a written report. Rivera never contacted the Iowa Department of Inspections and Appeals to verbally request the agency to investigate the WRC, and given that she never made a verbal report, she also never made a written report. Rivera never contacted the Iowa Commission of **Elder** Affairs to verbally report dependent adult **abuse**, and given that she never made a verbal report, she also never made a written report. Rivera never contacted the Iowa Commission of **Elder** Affairs to verbally request the agency to investigate the WRC, and given that she never made a verbal report, she also never made a written report. Rivera did not report dependent adult **abuse** to any other agency or committee.

E. Discharge After Three Unscheduled Absences

On October 3, 2006, after a third unscheduled absence during her probationary period, the State terminated Rivera's employment. The State discovered Rivera went to a garage sale instead of work. It is undisputed that Rivera had three unscheduled absences during her probationary period -- a fact for which other probationary employees have lost their jobs -- and was fired nearly immediately after she went to a garage sale instead of work.

II. Legal Issues

A. Motion in Limine

Defendants are contemporaneously filing with this Trial Brief a Motion in Limine. The Motion in Limine seeks exclusion at trial of four categories of evidence: (1) punitive damages and prejudgment interest; (2) evidence of alleged other negative actions; (3) alleged “keep your mouth shut” comments; and (4) Plaintiff's notes. Because these four evidentiary issues are discussed in detail in the Motion in Limine, Defendants will not repeat these legal arguments here.

B. Pending Motion for Summary Judgment/Leave to Amend Petition

A portion of Defendants' Motion for Summary Judgment, originally filed on August 11, 2011, and as supplemented on September 4, 2013, remains pending before the Court. The Court should rule on the Motion before trial.

In her “Resistance to Defendants' Supplemental Authority to Their Motion for Summary Judgment,” filed October 10, 2013, Rivera alternatively requests that, even if the Court is inclined to grant Defendants' pending Motion for Summary Judgment, the Court grant her leave to amend her Petition to include a claim under [Iowa Code section 70A.28](#). The Court should deny this request. *See, e.g., In re Novastar Fin. Inc., Sec. Litig.*, 579 F.3d 878, 884-85 (8th Cir. 2009) (holding that district court properly denied plaintiff leave to amend complaint, when plaintiff only did so in resisting a motion to dismiss). It is also important to note the Trial Scheduling Order set forth a pleadings deadline in this case of October 10, 2013, and Rivera did not comply with [Iowa R. Civ. P. 1.402](#) and make an attempt to amend her Petition.

C. Plaintiff's Burden of Proof

The sole cause of action in this case is a common law wrongful discharge claim in violation of public policy. *See* Petition, *passim*; [Rivera v. Woodward Resource Ctr.](#), 830 N.W.2d 724, 725 (Iowa 2013). The Iowa Supreme Court recently set forth the elements of a successful claim of wrongful discharge in violation of public policy as follows:

- (1) the existence of a clearly defined and well-recognized public policy that protects the employee's activity;
- (2) this public policy would be undermined by the employee's discharge from employment; (3) the employee

engaged in the protected activity, and this conduct was the reason the employer discharged the employee; and (4) the employer had no overriding business justification for the discharge.

Jones v. Univ. of Iowa, 836 N.W.2d 127, 144 (Iowa 2013) (quoting *Dorshkind v. Oak Park Place of Dubuque, LLC*, 835 N.W.2d 293, 300 (Iowa 2013)). In analyzing each of these elements, it is important remember that:

Wrongful discharge is an exception to Iowa's general rule that employment is at-will. At-will employment “means that, absent a valid contract of employment, the employment relationship is terminable by either party at any time, for any reason, or for no reason at all.” The narrow public-policy exception to the at-will employment doctrine “limits an employer's discretion to discharge an at-will employee when the discharge would undermine a clearly defined and well-recognized public policy of the state.”

Id. (quoting *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109-110 (Iowa 2011)).

The fighting factual issues at trial are likely to revolve around (1) whether Plaintiff engaged in protected activity; (2) whether the protected activity was the reason the State discharged Plaintiff; and (3) whether the State had no overriding business justification for the discharge. Here, although it is certainly *Plaintiff's* obligation to prove that a complaint of dependent adult **abuse** was the reason for Plaintiff's discharge, Defendants will demonstrate to the jury that it was a sound business reason -- Plaintiff's three unscheduled absences during her probationary period -- that resulted in her discharge. (In any event, if the State would have known Rivera had lied on her employment application, it would have made the same decision and fired her for that reason, as well.) The State does not condone dependent adult **abuse** and did not fire Plaintiff for any report of alleged dependent adult **abuse**.

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