



FILED  
OSAH

APR 16 2015

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA**

PAMELA DEVERO,	:	
	:	
Petitioner,	:	
	:	
v.	:	Docket No.
	:	OSAH-DCH-HFR-NAR-1526414-107-KENNEDY
	:	
GEORGIA DEPARTMENT OF	:	
COMMUNITY HEALTH,	:	
	:	
Respondent.	:	

*K. Westray*  
 \_\_\_\_\_  
 Kevin Westray, Legal Assistant

**INITIAL DECISION**

Petitioner appealed Respondent's decision to enter into the state's Nurse Aide Registry a finding that Petitioner both abused and neglected a resident.

An evidentiary hearing was held in Covington, Georgia on March 10, 2015. Petitioner appeared and represented herself. Stacey Hillock, Esq., represented Respondent. The following individuals testified: Tonia LeDoux; Brenda Robinson; Teresa Scales; Tracy Hernandez; and Petitioner.

The undersigned Administrative Law Judge, after conducting an evidentiary hearing and considering arguments of the parties, concludes that Respondent is not authorized to place Petitioner's name on the state's Nurse Aide Registry for an incident that occurred on July 3, 2014. Accordingly, Respondent's decision is **REVERSED**.

**FINDINGS OF FACT**

1.

Petitioner has held her Certified Nursing Assistant (CNA) certification for almost 14 years. *Testimony of Tonia LeDoux, Director of Nursing at Riverside Health Care Center; Testimony of Petitioner.*

2.

Riverside Health Care Center hired Petitioner as a CNA on May 20, 2014. She was terminated from her position in July 2014. *Testimony of LeDoux; Respondent's Exhibit 3.*

3.

L.C. is a 78-year old female who was admitted to Riverside Health Care Center on August 17, 2011, with a diagnosis of Alzheimer's Dementia and Depressive Disorder. L.C. is incapable of making her needs known. She is dependent on CNA's to perform all of her Activities of Daily Living, including dressing. *Testimony of LeDoux; Testimony of Teresa Scales; Respondent's Exhibit 3.*

4.

On July 3, 2014, Petitioner was dressing L.C. when her daughter, Teresa Scales, entered the room. *Testimony of LeDoux; Testimony of Scales; Respondent's Exhibits 2, 4.*

5.

When Ms. Scales entered the room she heard Petitioner say "that girl makes me sick buying these little ass bras." Petitioner was referring to the sports bra that Ms. Scales had purchased for her mother and had laid out with L.C.'s clothes for the day.<sup>1</sup> *Testimony of LeDoux; Testimony of Scales; Respondent's Exhibits 1, 2, 3.*

6.

Ms. Scales testified that, in addition to hearing Petitioner use profanity in the presence of her mother, referring to the word "ass," she also observed Petitioner "beating" on L.C. "like she was a dog" and "like she was nobody." The court finds Ms. Scales testimony that Petitioner was "beating" on L.C. "like she was a dog" to not be credible, in part, because L.C. did not exhibit any bruising, markings, or redness that would be expected if she had been beaten by someone. Moreover, no allegation was raised at the time of the incident that suggested Petitioner had beaten L.C. *Testimony of Teresa Scales.*

7.

Ms. Scales perceived her mother to be in distress because she felt her mother's eyes showed that she was thinking "why, Teresa, why," in regard to the manner in which Petitioner was providing care. She and Petitioner then engaged in a "loud conversation" in L.C.'s presence. Ms. Scales told Petitioner to "go get [her] supervisor." Petitioner refused to leave the room because she believed it would be neglectful to leave L.C. without completing the task of dressing her for the

---

<sup>1</sup> Ms. Scales visited her mother daily for four to five hours. She chooses the clothes she wants L.C. to wear and lays them out for the CNA. *Testimony of LeDoux; Testimony of Brenda Robinson; Testimony of Scales.*

day so she told Ms. Scales that she could go get the supervisor if she wanted to file a complaint. *Testimony of Scales; Testimony of Petitioner; Respondent's Exhibits 4, 7.*

8.

Brenda Robinson heard the loud exchange between Petitioner and Ms. Scales and entered the room. She told Petitioner and Ms. Scales that they should not argue about L.C.'s care in front of L.C., and escorted both of them to Tonia LeDoux, the Director of Nursing. *Testimony of LeDoux; Testimony of Brenda Robinson; Respondent's Exhibits 4, 7.*

9.

The facility reported the July 3, 2014 incident to Respondent, as required by law. *Testimony of LeDoux; Respondent's Exhibit 3.*

10.

After reviewing the Facility Incident Report, Respondent issued a notice dated September 17, 2014, advising Petitioner of Respondent's intent to place her name, a description of the incident and any written statement she may wish to make denying or explaining her conduct on the state Nurse Aide Registry for having verbally abused and neglected a resident.<sup>2</sup> Petitioner timely appealed Respondent's notice of adverse action.<sup>3</sup> *Respondent's Exhibits 1, 7.*

## CONCLUSIONS OF LAW

1.

Respondent bears the burden of proof in this matter. OSAH Rule 616-1-2-.07. The standard of proof is a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

2.

Each state participating in the Medicaid program must establish and maintain a registry of all individuals who have satisfactorily completed a nurse aide training and competency evaluation

---

<sup>2</sup> In addition to saying "that girl makes me sick buying these little ass bras," Petitioner is also alleged to have said "hold your ass still." However, the court finds this allegation to be unsubstantiated. L.C. is unable to move or assist in the performance of Activities of Daily Living, such as dressing. L.C. has never been combative while CNA's have provided care, and she has never refused care. Accordingly, the court finds that it improbable that Petitioner would say "hold your ass still." Instead, it is more likely than not, that this allegation was an exaggeration similar to the testimony provided by Ms. Scales at the hearing in this matter regarding how she perceived Petitioner's actions to be a beating. *Testimony of LeDoux; Testimony of Scales; Respondent's Exhibits 1, 2.*

<sup>3</sup> Petitioner admits that she cursed in front of L.C., but claims it was only when she said "damn" after hitting her elbow on the dresser or table while dressing L.C. The court finds Petitioner's explanation to not be credible, in part, because there is no probative evidence of how Petitioner could have hit her elbow on either a dresser or a table while dressing L.C. and because Petitioner's testimony changed regarding whether she hit a dresser or a table. *Testimony of Petitioner.*

program, or a nurse aide competency evaluation program. 42 U.S.C. §1396r(e)(2)(A). The registry must include “specific documented findings by a state . . . of resident neglect or abuse, or misappropriation of resident property involving an individual listed in the registry, as well as any brief statement of the individual disputing the findings.” 42 U.S.C. §1396r(e)(2)(B).

3.

The state is required to investigate every reported allegation of resident abuse, neglect, or misappropriation of property. Then, after notice to the individual involved and a reasonable opportunity for a hearing for the individual to rebut the allegations, the state must make a finding as to the accuracy of the allegations. If the state substantiates the allegation, the state must notify the nurse aide and the registry of such finding. 42 U.S.C. §1396r(g)(1)(C); 42 C.F.R. § 488.335(a)(1) and (2).

4.

In this matter, Respondent seeks to place Petitioner’s name on the state’s Nurse Aide Registry based on its determination that Petitioner both abused and neglected a resident by commenting “that girl makes me sick buying these little ass bras” while dressing L.C.

5.

Neglect is defined as a “failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.” There is insufficient evidence in the record that Petitioner failed to provide goods or services necessary to avoid physical harm, mental anguish, or mental illness. Instead, the evidence shows that Petitioner was in the midst of dressing L.C. when she made an inappropriate comment. Although the evidence suggests that Petitioner did not complete the task of dressing L.C., this occurred only because of the interruption of Ms. Scales rather than a failure on Petitioner’s part to complete the task at hand.

6.

Abuse is defined as “the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.”<sup>4</sup> 42 C.F.R. § 488.301. Abuse is further defined by Georgia law to mean “any intentional or grossly negligent act or series of acts or intentional or grossly negligent omission to act which causes injury to a resident,

---

<sup>4</sup> In the context of the Nurse Aide Registry law, the D.C. Court of Appeals has held that “willful” should be interpreted in such a way that “strikes a balance” between the need to protect elderly and infirm nursing home residents with the need to protect innocent nurses from false, career-destroying allegations. Hearns v. D.C. Dep’t of Consumer & Regulatory Affairs, 704 A.2d at 1183 (D.C. 1997).

including, but not limited to, assault or battery, failure to provide treatment or care, or sexual harassment of the resident.” O.C.G.A. § 31-8-81.

7.

Unlike neglect, abuse has a “willful” component. This “willfulness” component is satisfied when one voluntarily engages in the act that is alleged to have been inflicted with resulting physical harm, pain or mental anguish. Intent to harm or injure a resident is irrelevant. Salmon v. Dep’t of Health and Addiction Servs., 788 A.2d 1199 (Supreme Ct. Conn., 2001). “Instances of abuse do not occur in a vacuum. Rather, each is defined by its own set of factual circumstances. It is with respect to these circumstances, namely, the particular context in which the alleged abuse occurs, that a determination of abuse is made on a case-by-case basis.” Salmon, supra.

8.


In this matter, Petitioner voluntarily made the statement at issue. Accordingly, her actions were willful. However, there is a lack of probative evidence that the action was undertaken with the purpose of inflicting injury, unreasonable confinement, intimidation, or punishment. Additionally, there is a lack of probative evidence of resulting physical harm, pain or mental anguish. The only probative evidence of resulting pain or mental anguish was the testimony of Ms. Scales that lacked credibility. Moreover, unlike situations where pain or mental anguish can be presumed as a result of the abusive actions taken by an individual toward a resident, Petitioner’s comment that she was sick and tired of L.C.’s daughter buying small ass bras is not of such a degree that pain and mental anguish could be presumed under the particular set of facts in this case. *In contrast see* N.J. Dep’t of Health and Senior Servs. v. Moise, No. A-6248-09T2, 2011 N.J. Super. Unpub. LEXIS 2647, at \*10-11 (Super. Ct. App. Div. Oct. 25, 2011) (unpublished) (court found that “pushing, hitting and ordering [the patient] to ‘shut up’ were undertaken with a purpose to intimidate and punish [the patient] for his behavior, and resulted in his mental anguish, thereby constituting “abuse” within [the meaning of 42 C.F.R. § 488.301].”).

### DECISION

It is the decision of the undersigned ALJ that Respondent is not authorized to record Petitioner’s name on the state’s Nurse Aide Registry as having either abused or neglected a resident on July

3, 2014 at Riverside Health Care Center. Accordingly, Respondent's proposed action is **REVERSED.**

SO ORDERED, this 16<sup>th</sup> day of April, 2015.

  
\_\_\_\_\_  
Ana Kennedy  
Administrative Law Judge