

U.S. Department of Labor

Occupational Safety and Health Administration
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2300 Main Street, Suite 1010
Kansas City, Missouri 64108
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Reply to the Attention of EP/WPP

June 18, 2010

Mr. James E. Rhodes
Rhodes & Lally, L.L.C.
Magna Place
1401 S. Brentwood Blvd., Suite 825
Saint Louis, MO 63144

COPY

CERTIFIED MAIL # 7009 0080 0001 4428 1644

Re: St. Joe Manor/Lange/Case File No.: 7-7080-10-014

Dear Mr. Rhodes:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by your client, Ms. Terri Lange (Complainant), against St. Joe Manor (Respondent) on March 3, 2010, under Section 11(c)(1) of the Occupational Safety and Health Act, 29 U.S.C. §660(c) (the Act). In brief, your client alleged that she was fired in retaliation for filing a safety and health complaint with the Occupational Safety and Health Administration (OSHA).

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA, Region VII, finds that there is no reasonable cause to believe that Respondent violated the Act and issues the following findings:

Secretary's Findings

Respondent, a nursing home located in Bonne Terre, MO, is a company within the meaning of 29 U.S.C. §660. Complainant was employed by Respondent as its Staffing/Unit Coordinator. Complainant is an employee within the meaning of 29 U.S.C. §660.

Respondent fired Complainant on March 1, 2010. On March 3, 2010, Complainant filed a complaint with the Secretary of Labor alleging that she was fired in violation of the Act. As this complaint was filed within 30 days of the alleged adverse action, it is deemed timely.

Respondent hired Complainant on May 5, 2003. As a Staffing/Unit Coordinator, Complainant performed medical duties and put together the work schedules for most of Respondent's medical staff. In February 2010, Respondent implemented a number of personnel changes. Most notably, Respondent fired its Administrator and Director of Nursing on February 8. Respondent also eliminated the position of Admissions Coordinator.

On February 16, Respondent hired Rebecca Moyers as its Administrator and Christina Mounce as its Director of Nursing. Prior to their arrival, Respondent hired a contractor to perform a number of renovations at the facility. These included painting and the removal and installation of floor tile. The renovations were ongoing. On February 23, Complainant, with the assistance of Debbie Peters, Respondent's Activity Director and Complainant's sister, faxed a written complaint to the OSHA Saint Louis Area Office regarding the renovations. The complaint, which was signed by Complainant only, raised concerns about dust, mold, and chemicals causing respiratory problems among the staff and residents. Complainant faxed the complaint from Respondent's facility. OSHA conducted an onsite inspection on February 25. Neither Complainant nor Peters spoke with the inspector. The complaint was closed without citations on March 3, 2010.

On March 1, 2010, both Complainant and Peters were fired. The decisions were made by Moyers and Mounce. Complainant's discharge forms state that she was fired for "disclosing confidential information" related to an employee at the facility. Peters discharge forms state that she was fired for "failure to perform job duties" and because her "activity calendar does not meet state regulation and activities on calendar were not being performed." Peters claimed that the day she and Complainant were fired, she spotted the OSHA safety and health complaint that was signed by Complainant on Moyers' desk. Peters claimed that Moyers pushed the complaint to the side after she noticed that she had seen it. Moyers denied that she had ever seen the complaint prior to this whistleblower investigation.

The evidence indicates that Complainant engaged in protected activity when she signed and submitted a safety and health complaint to OSHA on February 23.

A preponderance of the evidence, however, indicates that Respondent did not have knowledge of Complainant's protected activity when the decision was made to fire Complainant. Moyers and Mounce claimed that they suspected a former disgruntled employee of filing the complaint. Personnel actions taken before the complaint was filed make their claim plausible. As stated above, the Administrator and Director of Nursing had been fired. The Admissions Coordinator's position had been eliminated.

In addition, two other employees had been fired and two others had resigned in February before the OSHA inspection was conducted. Neither Complainant nor Peters brought their concerns to the attention of Moyers or Mounce. The OSHA inspector noted that when he arrived to conduct his inspection, the facility's management told him that they suspected a former employee of having filed the complaint.

Ms. Terri Lange

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Moyers also was credible when she testified that she had never seen the original OSHA complaint until it was shown to her during her interview for this investigation. No evidence came about in support of Peters' claim that Moyers had a copy of the original complaint. The Compliance Officer did not give Respondent a copy of it, nor reveal the identity of the complaining party. Although the information on the complaint shows that it was faxed from the facility, Complainant's testimony on this point fluctuated throughout the investigation. At first, Complainant was not sure if she had faxed the complaint from the facility. Later on, however, she was adamant that she had faxed it from the facility. In all, the evidence indicates that Respondent, specifically Moyers, did not have a copy of the complaint when the decision was made to fire Complainant.

Last, Respondent's legitimate, non-retaliatory reason for firing Complainant was not a pretext. Although Complainant denied that she was counseled by Moyers or Mounce about her work performance, the evidence, through witness testimony and documentation, indicates that Mounce did counsel Complainant. The evidence indicates that Complainant would give preference to certain employees when drafting her schedules and would change the schedule without giving proper notice. Further, the evidence indicates that Complainant sent out an inappropriate text message about a subordinate to another subordinate, with verbal instructions to forward it to the rest of the medical technicians. Consequently, this complaint is dismissed.

This case will be closed unless Complainant files an appeal by sending a letter to:

Mr. Thomas Galassi, Acting Director
Directorate of Enforcement Programs
U.S. Department of Labor - OSHA
200 Constitution Avenue, N.W., Room N 3610
Washington, D.C. 20210

With copies to:

Mr. Andrew J. Martone
Bobroff, Hesse, Lindmark & Martone P.C.
1650 Des Peres Road, Suite 200
St. Louis, MO 63131

Mr. Charles E. Adkins, CIH
OSHA Regional Administrator
U.S. Department of Labor, OSHA
Two Pershing Square Building
2300 Main Street, Suite 1010
Kansas City, MO 64108

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To be considered, an appeal must be postmarked within 15 days of receipt of this letter. If this finding is appealed, the Director of Enforcement Programs will review the case file to ascertain whether the investigation dealt adequately with all factual issues and the investigation was conducted fairly and in accordance with applicable laws. The outcome of an appeal is either the return of the case to the investigator for further investigation or denial of the appeal, after which the case is closed.

Sincerely,

Christine D. Stewart

Christine D. Stewart

Regional Supervisory Investigator

cc: Respondent

Mr. Timothy Kellett, Attorney for Complainant