

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

REBECCA J. FAUDE, Complainant,

vs.

CLARK COUNTY, Respondent.

Case ID: 362.0000

Case Type: COMP-MP

DECISION NO. 35793-A

Appearances:

Rebecca J. Faude, N16248 River Avenue, Withee, Wisconsin, appearing on her own behalf.

Andrew T. Phillips, von Briesen & Roper, S.C., 411 E. Wisconsin Avenue, Suite 1000, Milwaukee, Wisconsin, appearing on behalf of Clark County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 4, 2015, Complainant Rebecca J. Faude (hereinafter “Faude” or “Appellant”) filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that Respondent Clark County (hereinafter “County”) had committed a prohibited practice when it terminated her employment.

On May 8, 2015, the County filed a Notice of Motion and Motion to Make Complaint More Definite and Certain. The County’s motion requested Faude to identify specific protected, concerted activities she believed served as the basis for the County’s alleged retaliation.

In response to the County’s motion, Faude in a May 13, 2015 email represented that:

If I am understanding this right,(Lots of lawyer talk), The Clark County Health Care Center[’s lawyers are saying that they want to see more precise times, dates,ect. [sic] of my protected activities as a union steward.

These were on-going issues that employees were coming to me with which I (as a steward), took to the Administrator, which she agreed to and herself set up meetings.

I want to show that there was not any issues until I contacted the County Board to inform them of problems at the Health Care Center.

On June 12, 2015, Faude sent the County and the Examiner an email which included the sentence, "The meeting that we had with the sub-committee of the county board was not the protected activity that was the issue." In response to Faude's email, the County prepared an order which stated that "Faude's protected activity which forms the basis of her Complaint is limited to the fact of her status as a union steward."

On June 17, 2015, the County withdrew its Motion to Make Complaint More Definite and Certain.

In a June 24, 2015 letter, the Examiner afforded Faude the opportunity to respond to the proposed order and specifically requested that Faude respond to the following:

Ultimately, I need clarification as to what concerted activity you believe was the basis for your termination in violation of that Sec. 111.70(3)(a)1 and 3, Stats. Whether it is as the Order provides, due to your "status as Union Steward" or if it was due to the meeting with the County Board (sub-committee or full Board) or for some other reason or reasons, then that will be the issue(s) addressed at hearing and testimony and evidence will be limited to that issue(s).

Faude returned a lengthy email on June 30, 2015, and after reviewing her interactions as a union steward leading up to her termination, she concluded, "[w]e did have a meeting with the County Board, but that was not the protected activity, it was a lot of things leading up to that point."

As a result of Faude's explicit denial that her communications with the County Board were the basis, in whole or in part, for her allegations, the Examiner issued an order which read in relevant part:

... IT IS ORDERED that Faude's protected activity which forms the basis of her Complaint is limited to the fact of her status as a union steward. IT IS FURTHER ORDERED, that testimony or

other evidence presented at hearing relating to Faude's protected activity is limited to her status as a union steward.

Hearing on the complaint was convened on July 21, 2015, in Owen, Wisconsin.

The parties filed briefs and reply briefs. Upon review of same, the Examiner, in a letter dated October 27, 2015, identified to the County that its interpretation of the order was more limited than the Examiner's. Specifically, the Examiner clarified that:

... Faude's activities "leading up to" the meeting with the County Board – including listening to employees and meeting with Administrator Schmitz – are activities which are part and parcel to Faude's service as a union steward and are accepted as part of her "status" as said steward.

The Examiner afforded the parties the opportunity to file a supplemental brief to clarify and/or expand its arguments. Faude and the County filed supplemental briefs, the last of which was received by November 27, 2015, whereupon the record was closed.

Having reviewed the record and being fully advised in the premises, the Examiner makes and issues the following:

FINDINGS OF FACT

1. Faude was employed by the County in the position of Certified Nursing Assistant since at least 2006 and held that position until her termination effective November 19, 2014. Faude was a union steward at all times relevant herein and her supervisor was Shift Nurse Carrie Anderson.

2. The County is a municipal employer and is responsible for the management and administration of the Clark County Health Care Center (hereinafter "HCC"). HCC employs 350 staff and provides nursing services and health care services to the public of the County. At all times relevant herein, Jane Schmitz was the Administrator at HCC, Karen Simington held the position of Director of Nursing, and Joan Jalling held the position of Business Office Manager while also performing human resource work.

3. HCC implemented new policies effective May 22, 2014 due, in part, to the authority granted public employers pursuant to 2011 Wisconsin Act 10.

4. The chain of command for a Certified Nursing Assistant at HCC begins with the Floor Nurse who is the Certified Nursing Assistant's immediate supervisor. The Floor Nurse

reports to the Nursing Supervisor, who reports to the Nursing Care Coordinator, who reports to the Director of Nursing. The Administrator is the final line of authority and responsibility.

5. When union stewards at HCC identified issues of concern, the procedure in place was to contact Schmitz and request a time to meet. Schmitz would respond by leaving a note / message in the stewards' mailboxes with available dates and times. Stewards would then confirm a date and time based on their availability and the parties would meet.

6. In their capacities as union stewards, Bernard Rusch and Faude met with Schmitz to discuss grievances and employee concerns for greater than three years prior to Faude's termination. The frequency of the meetings increased following the enactment of 2011 Wisconsin Act 10.

7. During June and July 2014, Faude was obstructive and argumentative during shift change meetings which caused the meetings to go beyond the scheduled time and resulted in overtime costs to HCC. Faude's discontent related to: patient care; her belief that the HCC physician was not providing quality care to one patient in particular; and her belief that resident needs were not being met.

8. Faude, Rusch, Schmitz, and Jalling met on July 28, 2014 to discuss employee concerns, including HCC's attendance policy. During the meeting, Faude communicated to Schmitz that some employees at HCC "hated" Simington. Faude did not state that she "hated" Simington, that she "could not stand to listen to" Simington, or that she "could not stand to look at" Simington.

9. Faude contacted Clark County Board of Supervisors (hereinafter "Board") member David Holtzhausen by telephone and informed him that there were a number of conditions at HCC that needed to be addressed and, while attempts were made to address the issues through the facility chain of command, those efforts were for naught. Holtzhausen agreed to meet provided the chairperson was present.

10. On August 27, 2014, Schmitz learned that Faude had contacted Holtzhausen regarding issues at HCC.

11. Faude was placed on administrative leave with pay on August 27, 2014.

12. On September 4 and 5, 2014, the County surveyed 51 HCC employees. Fifteen dietary department employees responded to the following survey:

Dietary

NAME: _____

- 1) In the course of daily conversation has Becky Faude and/or Jamie Faude talked about union issues while on duty?
- 2) Has Jamie Faude and/or Becky Faude talked negatively about the facility or about management?
- 3) Has either Jamie or Becky asked you or other co-workers to write up complaints regarding the facility?
 - 3a) If yes, did she ask you to do so during work time?
- 4) Do you have more information you would like to share regarding these questions or this investigation?
 Yes No (please circle one)

One dietary employee responded yes to question one and nine responded yes to question two; although of the nine, three specified that Jamie Faude spoke negatively about the facility or management.

Thirty-six nursing department employees responded to the following survey:

Nursing

NAME: _____ Date: _____

- 1) In the course of daily conversation does Becky Faude talk about union issues while on duty?
 - 1a) If yes, does this occur in front of residents and families?
- 2) Does Becky Faude talk negatively about the facility and management?
- 3) Has she asked you or other co-workers to write up complaints regarding the facility?
 - 3a) If yes, did she ask you to do so during work time?
- 4) Do you have more information you would like to share regarding these questions or this investigation?
 Yes No (please circle one)

Seven nursing employees confirmed that Faude spoke about union issues at work, one of which was in an office. Three nursing staff indicated yes with regard to whether Faude spoke negatively about the facility or management and an additional three commented: “sometimes but so do other people,” “yes – disrespectful of the MDS,” and “opinions of facility.” Two more commented: “not during working hrs.” and “has some personal opinions - talked in parking lot.”

The survey identified eight individuals who heard Faude talk about union issues while on duty, including one who clarified that it occurred in an office. The survey also identified three individuals who heard Jamie Faude, Respondent’s daughter, talk negatively about the facility or management; four individuals who heard Faude talk negatively about the facility or management; and six individuals who heard either Respondent or Jamie Faude talk negatively about the facility or management. The question, however, did not restrict the location to HCC.

13. Schmitz contacted Rusch prior to the meeting with the Board to resolve the issues previously presented by Faude and Rusch.

14. A subcommittee of the Board met with 10 to 12 employees of HCC during September 2014 for the purpose of addressing a series of issues. These were the same issues that Faude and Rusch had presented to Schmitz.

15. The County engaged the services of private legal counsel to conduct an investigation into Faude’s alleged misconduct.

16. Faude was terminated effective November 19, 2014, pursuant to a letter which read, in pertinent part, as follows:

Dear Ms. Faude:

This is to inform you that the Clark County Health Care Center is terminating your employment effective immediately. As explained in greater detail below, your termination is the result of your violation of the Health Care Center's rules, policies, procedures and Employee Handbook provisions as well as your failure to meet the Health Care Center's established performance expectations including, without limitation, those set forth in your job description.

A summary of the grounds for your termination appear in this letter. Any one or combination of the grounds is sufficient to support the termination of your employment. The descriptions and information in the summary is not intended to be exhaustive.

Likewise, the policy violations identified are not intended to be exhaustive of each rule, policy, regulation, law or administrative code provision that your conduct may have violated. The Health Care Center hereby reserves any and all defenses and claims related to your employment and this letter should not be construed as a limitation or waiver.

I. CONSIDERATION OF APPLICABLE POLICIES, PROCEDURES, WORK RULES AND DIRECTIVES

In reaching our decision to terminate your employment, we have reviewed and considered your conduct in light of the rules, policies and procedures that exist within the Health Care Center. The rules, policies and procedures that we considered are set forth below.

A. The Clark County Employee Handbook

You have admitted to having received and reviewed the Clark County Employee Handbook. Understanding the Health Care Center's expectations associated with your continued employment with the Health Care Center is important. Among those basic expectations are a series of Work Rules codified in Section 3.7 of the Handbook. For purposes of our review of the facts and circumstances surrounding your performance and conduct, the following Work Rules were considered:

- Employees are expected to work in a competent and conscientious manner which reflects favorably upon the employee and the County, consistent with Clark County's Core Values.
- The following is a non-exhaustive list of examples of behavior which would normally justify corrective action.
 - Insubordination or failure to perform duties as instructed; willful and intentional refusal to perform work assignment, or to follow orders of supervision.
 - Insulting, abusive or inflammatory conduct toward the public, employer or fellow employees.

In addition to the Work Rules, the Handbook, at Section 4.1 provides that County time, space, materials and equipment are maintained for the purpose of conducting county business.

B. Clark County Health Care Center Employee Handbook

In addition to the Clark County Employee Handbook, the Health Care Center maintains a Handbook separate and distinct from the County, which serves to supplement the County Handbook. Again, it is clear that you received a copy of the Health Care Center Handbook and it is likewise clear that the Health Care Center has an interest in ensuring the facility's smooth operation through communication of basic Work Rules.

The Introduction portion of the Health Care Center Handbook provides as follows (in relevant part):

... A cheerful, positive attitude is essential if our residents are to receive proper care. Please work to develop and maintain a good attitude in your approach to your job and with your co-workers. This can best be accomplished by everyone carrying his or her share of the work. This, in turn, can be very satisfying and result in creating a spirit of teamwork and camaraderie which has a positive effect, not only upon individual employees but the organization as a whole. ...

At page 14 of the Health Care Center Handbook, it is clear that employees are to address questions, complaints and problems with their immediate supervisor. In this regard, the Health Care Center states:

Most of us will have questions from time to time. If you do, remember, the only way we can answer your questions or solve your problems is for you to tell us about it. Your supervisor knows more about you and your job than any other member of management and is, therefore, in the best position to handle your problems directly and properly.

Your supervisor is your first communicative link with the facility and is entrusted to resolve problems so that you can do your job.

The facility maintains an “open door” policy within all levels of management for all employees. However, you should first try to solve your problem through your supervisor before requesting to see someone else.

Similar to the County Handbook, the Health Care Center Handbook also contains a provision relating to employee discipline. Page 20 of the Health Care Center Handbook states (in relevant part):

The Administrator or designee is responsible for discharge of employees. The Administrator reserves the right to discharge or suspend any employee for unsatisfactory service or misconduct and may supersede the discipline progression outlined in this policy. Longevity or period of employment is not guaranteed and may be terminated if conditions warrant.

Unsatisfactory service or misconduct may include, but is not limited to the following:

- Failure to maintain acceptable standards of respect for residents, visitors, co-workers, and supervisors.
- Failure to readily cooperate with fellow employees and supervisor.
- ...
- Making false or malicious statements about a resident, employee, supervisor, or the Health Care Center.

Finally, in the Reminders section of the Health Care Center Handbook at page 33, employees are reminded to “[p]resent an attitude of enthusiasm and a positive outlook.”

C. State and Federal Definitions of Caregiver Misconduct

As you are aware, State and Federal law prohibit certain categories of misconduct by those persons employed by the Health Care Center to provide care for the Health Care Center's residents. Under 42 C.F.R. § 488.301, it is considered “abuse” to engage in “the use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability.”

D. Job Description and Orientation Materials

The Job Description for a Nursing Assistant with the Health Care Center provides that the following are considered essential “Job Responsibilities and Duties:”

- Works tactfully and cooperatively with residents, families, visitors and the entire staff throughout the facility.
- Knows and follows existing lines of communication and authority.
- Performs all resident care as assigned and according to plan of care, nursing department's policies, procedures and participates in care conferences of residents.
- Works assigned schedule to meet the needs of the department.

Similarly, during employee orientation, the Health Care Center stresses the need for employees to “treat co-workers with respect and dignity.” *Expectations of a Nursing Service Employee.*

II. RESULTS OF INVESTIGATION AND FINDINGS OF MISCONDUCT

As you are aware, you were placed on administrative leave on August 27, 2014, to allow the Health Care Center to conduct an investigation into reports from staff that you were engaged in conduct in violation of one or more of the work rules and standards set forth above. The Health Care Center retained outside counsel to assist in the investigation process. Outside counsel personally interviewed numerous employees and asked specific questions regarding your conduct.

It is clear to us that your conduct in the weeks leading up to the Health Care Center's decision to place you on paid administrative leave violated the work rules and standards set forth in detail above. Specifically, staff in the Health Care Center have indicated the following:

- You have communicated to other staff “very harsh” words toward management of the facility. These communications occurred both during work hours and after hours. Staff reported that a portion of the negative comments were directed toward the Health Care Center's Administrator, Jane Schmitz and related to your opinion of how her salary was inflated when compared to her responsibilities.
- You were very disruptive during shift changes between AM and PM shift. Nursing staff had to consistently “re-direct” you to focus on the information and work that was important to nursing and CNA staff relating to resident care and related issues. The “re-directions” occurred with greater and greater frequency in the six (6) weeks leading up to the date you were placed on administrative leave. Despite consistent reminders and “re-directions,” you did not cease your disruptive actions and it became apparent to nursing staff that you were willfully disregarding your job duties. Your disruptions during shift change took up staff time and resources that should have been spent on the shift change process and focused on resident care issues.

- You were witnessed being disrespectful of Dr. Writz (Health Care Center MD) related to issues surrounding Dr. Writz's prescribed protocol for dealing with certain residents. Your disrespectful comments were heard by other staff. Nursing staff believes the comments were highly inappropriate and showed that you have a lack of respect for chain of command.
- At the July 28 meeting with Administrator Jane Schmitz, you made certain comments about Karen Simington that were highly inappropriate and contrary to Health Care Center policy and procedure:
 - You indicated that you “hated” Ms. Simington
 - You indicated that you “could not stand to listen to” Ms. Simington
 - You stated that you “could not stand to look at” Ms. Simington
- You have admitted that you consistently raised issues directly with Administrator Jane Schmitz rather than following appropriate chain of command protocol as set forth in policy.

All of these verified instances of misconduct implicate the rules, standards, policies and procedures set forth in detail above. It is clear that you understood the work rules and the policies that govern the employer/employee relationship, but you chose to disregard those rules and policies. Your intentional disregard of the rules and policies, which are designed to ensure a harmonious work environment focused on resident care, had a significant negative impact on the facility and your fellow employees. Significant staff time and resources were diverted from the critically important tasks associated with resident care and instead devoted to dealing with your conduct. This had a ripple effect throughout the entire Health Care Center. In short, the overall staff attitude became very negative as a result of your conduct and difficult for management to manage.

III. HISTORY OF PRIOR DISCIPLINE

In making its determination to terminate your employment, the Health Care Center considered your prior disciplinary history. Your employment file reflects the following incidents of prior discipline or issues identified during the annual evaluation process:

- 2/18/14 – Work instruction – discussing matters unrelated to work while on duty
- 12/16/13 – Three day suspension with removal from duty – attendance issues
- 1/3/13 – Work instruction – communication issues with co-workers
- 2013 evaluation concerns – attendance and needs to improve leadership role
- 4/17/12 – Last warning termination would occur if attendance issues continue
- 2012 evaluation concerns – attendance issues, negative attitude and input to unit issues
- 4/20/11 – 2nd One day suspension – attendance issues
- 2011 evaluation concerns – attendance issues, doing short cuts to get the work done
- 7/7/10 – Oral warning – taking time off without benefits
- 2/2/10 – One day suspension – attendance issues
- 2010 evaluation concerns – attendance issues, talks under her breath about others, negative attitude, not working as a team, uncooperative
- 6/10/09 – Oral warning – failure to provide bedtime cares
- 2/2/09 – 2nd Written warning – attendance
- 2009 evaluation concerns – attendance concerns, putting residents to bed early, does not accept correction/instruction from supervisor, becomes argumentative
- 4/15/08 – Written warning – attendance
- 4/10/08 – Notice of termination if attendance issues continue
- 2008 evaluation concerns – missing documentation, not doing programming, not following plan of care, needs to be aware of your tone of voice, is out spoken – tasks have to be her way
- 1/16/07 – Oral warning – attendance issues
- 7/19/06 – Oral warning – not filling out a slip for time off

IV. CONCLUSION

The Health Care Center is proud of the unique relationship it has with its residents, its staff and the entire community. The work rules, policies and procedures exist to ensure the integrity of those relationships. As a result, while the decision to terminate an employee is never easy or simple, the Health Care Center is left with no choice but to terminate your employment given the circumstances.

Your last day of employment will be November 21, 2014. You have the right to appeal this decision under section 1.03 of the Clark County Grievance Procedure. For questions regarding insurance coverage and any other benefits you are eligible to receive, please contact Joan Jalling, Office Manager.

You are hereby directed to return all Health Care Center property in your possession and control immediately to Ms. Jalling. Please contact Administrator Jane Schmitz if you have any questions regarding the grievance procedure or any other aspect of your termination. Thank you for your attention to this matter.

Sincerely,

/s/ Karen Simington

Karen Simington, RN, MSN
Director of Nursing

/s/ Jane Schmitz

Jane Schmitz
Administrator

17. It is unclear whether Faude was the first employee whose alleged misconduct was investigated by outside legal counsel for the purpose of imposing discipline.

18. Faude was engaged in protected, concerted activity when she met with Schmitz on July 28, 2014.

19. Faude was engaged in protected, concerted activity when she communicated with Schmitz to schedule meetings to address HCC employee concerns.

20. Faude, in her capacity as a union steward, did not deviate from HCC's chain of command when she presented issues of concern to Schmitz.

21. Faude was terminated, in part, due to her protected, concerted activity.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following:

CONCLUSIONS OF LAW

1. Faude was an “employee” within the meaning of § 111.70(7), Stats.
2. The County is an “employer” within the meaning of § 111.70(1)(j), Stats.
3. Faude was engaged in lawful, concerted activity within the meaning of § 111.70(2), Stats., when, as a union steward, she represented the labor organization membership in meetings with Schmitz to discuss implementation of new policies and procedures following the enactment of 2011 Wisconsin Act 10.
4. Faude was engaged in lawful, concerted activity within the meaning of § 111.70(2), Stats., when, as a union steward, she represented the labor organization membership in a July 28, 2014 meeting with Administrator Jane Schmitz.
5. Faude has established, by a clear and satisfactory preponderance of the evidence, that HCC’s decision to terminate her employment, effective November 19, 2014, was motivated, in part, by its hostility to Faude’s exercise of lawful, concerted activity protected by the Municipal Employment Relations Act (hereafter “MERA”), and, therefore, the County violated § 111.70(3)(a)1, Stats.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following:

ORDER

The County, its officers, and agents shall immediately:

1. Cease and desist from interfering with, restraining, or coercing Faude or any of its employees in the exercise of their rights guaranteed in § 111.70(2), Stats.
2. Cease and desist from discriminating against Faude or any of its employees for engaging in lawful concerted activity.
3. Take the following affirmative actions which the Wisconsin Employment Relations Commission find will effectuate the purposes of MERA:

- (a) Immediately offer to reinstate Faude to her former position on a non-probationary basis and without loss of seniority and benefits. Make Faude whole by paying her all wages and benefits she would have earned, less any amount she earned or received that she would not otherwise have received but for her termination, plus interest at the rate of twelve percent (12%) per annum.¹
- (b) Expunge from Faude's personnel file any reference to her termination on November 17, 2014.
- (c) Notify all of its employees in the nursing home bargaining unit represented by Teamsters Union Local No. 662 by posting in conspicuous places where employees are employed copies of the Notice attached hereto and marked "Appendix A."

The Notice shall be signed by the Chairperson of the Clark County Board of Supervisors and shall be posted immediately upon receipt of a copy of this order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to insure that said notices are not altered, defaced, or covered by other material.

- (d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this order as to what steps have been taken to comply herewith.

Dated at Rhinelander, Wisconsin, this 21st day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot, Examiner

¹ The applicable interest rate is that set forth in § 814.04(4), Stats., in effect at the time the complaint was initially filed with the Commission. *Wilmot UHS*, Dec. No. 18820-B (WERC, 2/83), citing *Anderson v. LIRC*, 111 Wis.2d 245 (1983), and *Madison Teachers, Inc. v. WERC*, 115 Wis.2d 623 (Ct. App. 1983).

APPENDIX "A"

NOTICE TO ALL CLARK COUNTY EMPLOYEES

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL immediately offer to reinstate Rebecca J. Faude to her former position at the Clark County Health Care Center on a non-probationary basis, and we will make her whole for all wages and benefits lost as a result of her termination.

2. WE WILL NOT interfere with, restrain, or coerce Rebecca J. Faude or any other employees in the exercise of their rights pursuant to the Municipal Employment Relations Act.

3. WE WILL NOT discipline or otherwise discriminate against Rebecca J. Faude or any other employees because of their having exercised their rights pursuant to the Municipal Employment Relations Act.

Dated this _____ day of _____, 2016.

CLARK COUNTY

Chairperson, Clark County Board of Supervisors

**THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE
HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER
MATERIAL.**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The complaint contends that the County violated § 111.70(3)(a)1, Stats., and, derivatively, § 111.70(3)(a)3, Stats., when it terminated Faude on November 19, 2014. The County asserts that Faude was terminated for legitimate non-discriminatory and legally permissible reasons unrelated to her status as a union steward.

Applicable Legal Standard

Examiner David Shaw, in *Milwaukee County (Sheriff's Department)*, Dec. No. 31428-A (WERC, 7/06), summarized the law with regard to retaliation. Examiner Shaw explained:

Sec. 111.70(3)(a)1, Stats. provides that it is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Sec. 111.70(2), stats., referred to above, states:

Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection

In order to establish a violation of Sec. 111.70(3)(a)1, Stats., a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere

with the exercise of protected rights. WERC V. EVANSVILLE, 69 Wis. 2D 140 (1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

Sec. 111.70(3)(a)3, Stats. provides that it is a prohibited practice for a municipal employer:

“3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms of conditions of employment; but the prohibition shall not apply to a fair-share agreement.”

In order to establish a violation of this section, a complainant must establish by a clear and satisfactory preponderance of the evidence all of the following elements: (1) the employee was engaged in lawful and concerted activities protected by MERA; (2) the employer was aware of those activities; (3) the employer was hostile to those activities; and (4) the employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 Wis. 2D 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 Wis. 2D 132 (1985); CITY OF MILWAUKEE, ET AL, DEC. NO. 29270-B (WERC, 12/98).

Evidence of hostility and illegal motive may be direct, such as with overt statements of hostility, or as is usually the case, inferred from the circumstances. See TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. See COOPERATIVE EDUCATION SERVICE

AGENCY #4, ET AL., DEC. NO. 13100-E (Yaffe, 12/77)),
AFF'D, DEC. NO. 13100-G (WERC, 5/79).

It is irrelevant that an employer has legitimate grounds for its action, if one of the motivating factors was hostility toward the employee's lawful, concerted activity. See LA CROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the Wisconsin Supreme Court noted that an employer may not subject an employee to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's actions. See MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. W.E.R.B., 35 Wis. 2D 540, 562 (1967). Although the legitimate bases for an employer's actions may properly be considered in fashioning an appropriate remedy, discrimination against an employee due to lawful, concerted activity will not be encouraged or tolerated. See EMPLOYMENT RELATIONS DEPT. V. WERC, 122 Wis. 2D 132, 141 (1985).

The Commission has concluded that in cases such as this, where the alleged violations are based upon alleged retaliation for engaging in lawful, concerted activity, it is appropriate to apply the traditional four-part analysis under Sec. 111.70(3)(a)3 to the alleged violation of Sec. 111.70(3)(a)1, as well:

Because retaliation for lawful, concerted activity inherently discourages other employees from engaging in concerted activity, a violation of Section (3)(a)3 is also a violation of Section (3)(a)1

* * *

In our view, a Section (3)(a)3 type analysis is sufficient and appropriate to apply to alleged violations of Sec. 111.70(3)(a)1, Stats., in cases like the present one, where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees.

* * *

CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at p.15.

Was Faude Engaged in Protected, Concerted Activity?

Faude was a union steward at HCC since at least the enactment of 2011 Wisconsin Act 10. In her capacity as a union steward, Faude met regularly with Schmitz to address employee issues in the facility.

The Examiner signed an order prepared by the County's legal counsel which specified that "Faude's protected activity which forms the basis of her Complaint is limited to the fact of her status as a union steward." Faude, in agreeing to the language of the order, stated in her email that, "I will conclude with I believe that because of my union steward statis (sic) and my persistence to do my job as one, I was put in this position, and attacked by Administration." Faude specifically denied that her communication to and/or attendance at a Board subcommittee meeting had any bearing on the County's actions.

The Commission explained in *Paraprofessional Technical Council, et al. (Benzing)*, Dec. No. 30023-D (WERC, 10/03), that "... we give latitude to complainants, especially those who are unrepresented, showing patience with missed deadlines, inarticulateness, lost documents, difficulty in being contacted, etc." And further:

[a]s an agency, we are highly protective of the interests of *pro se* litigants, who are often unfamiliar with legalisms such as "stating a claim" or the difference between evidence and argument. The Commission has previously endorsed a "strong preference ... for affording litigants a day in court and a trial on the issues. *Prairie Home Cemetery*, Dec. No. 22316-B (WERC, 10/85). ...

Paraprofessional Technical Council, et al. (Benzing), Dec. No. 30023-D (WERC, 10/03).

As a result of Faude's May 13 and June 30, 2015 email communications which clearly explained her belief that her unlawful termination occurred because she tenaciously performed her union steward responsibilities, which included listening to employees and meeting with Schmitz to address concerns brought to her attention by employees, the Examiner placed the parties on notice that she interpreted the order to include:

... Faude's activities "leading up to" the meeting with the County Board – including listening to employees and meeting with Administrator Schmitz – are activities which are part and parcel to Faude's service as a union steward and are accepted as part of her "status" as said steward.

Meeting with and communicating to management the concerns and views of the union membership constitutes protected, concerted activity. The County does not dispute that Faude met with Schmitz in her capacity as a union steward and, therefore, the first two elements of Faude's § 111.70(3)(a)3, Stats., claim have been met.

Differential Treatment in Conduct of Investigation

Faude first asserts that the County treated her differently due to her union involvement when she was placed on leave for three months while the County retained the use of private legal counsel to conduct an investigation into Faude's alleged misconduct.

Faude was relieved of her duties and placed on administrative leave with pay on August 27, 2014. Schmitz testified that she, Simington, and Jalling made the decision because:

There was a lot of complaints that were going on at that time regarding – from the department heads, from coworkers, employees. There was a lot of disrespect going at that time and people walking out of meetings, and just a lot of disgruntled-ness happening around that time. And each situation always came back to Becky Faude.

July 21, 2015 Hearing Transcript (hereinafter “Tr.”) at page 92.

Schmitz further explained that it was HCC's practice to place employees on leave while an investigation is conducted and that she needed to find out if “... there [is] a problem with negativity and that effect on the resident care” Tr.93.

Schmitz, Simington, and Jalling then decided to survey employees who Faude interacted with in order to assess staff morale because they were of the opinion that Faude was negatively infesting HCC. The problem with Schmitz's testimony is that the survey questions did not address the alleged negativity created by Faude. Looking to the survey questions, the County prepared two different surveys; one to nursing staff and one to dietary staff. The first question of both surveys was very similar. The dietary survey asked, “[i]n the course of daily conversation has Becky Faude and/or Jamie Faude talked about union issues while on duty?” The nursing survey asked, “[i]n the course of daily conversation does Becky Faude talk about union issues while on duty?” This question would not have uncovered whether there was “disrespect” or “disgruntled-ness” in the workplace. Rather, it pried into Faude's conversations with coworkers, even though at no time did the County either allege or offer any

evidence which suggested there was a reasonable basis to inquire into whether Faude was conducting union business while in work status during the time period leading up to her leave.²

The County did not ask any questions about resident care. The County's only reference to residents can be found in the nursing survey and it simply asked whether Faude's union conversations occurred in the presence of residents. If indeed the County was interested in determining if Faude was placing resident care in jeopardy, the survey falls woefully short of obtaining any facts which could answer that question.

Finally, the survey results did not support the County's claim that Faude was instigating "disrespect" or "disgruntled-ness" in the workplace. The County surveyed fifteen percent of the workforce. Although the survey was not anonymous, it was redacted and therefore it is unclear whether management personnel were included. Ultimately the results did not support the County's suspicion and, in fact, many of those surveyed indicated that they either did not know or did not interact with Faude.

With regard to the County placing Faude on administrative leave, Schmitz testified that it is the County's common practice to put an employee on administrative leave. This limited record does not support this assertion. Faude offered eight termination letters and the County offered five. None of these letters make reference to the terminated employee having been placed on leave and all were terminated within ten days of the event which led to their termination.

Moving to the County's decision to engage the services of outside legal counsel to investigate Faude, Schmitz initially testified that she didn't believe a lawyer had ever been brought in to conduct an investigation into employee misconduct. But, in follow-up questioning by the County's counsel, Schmitz hedged her testimony:

Q: Have there been other instances involving administrative leave and investigation of employees where you call in an attorney to assist the facility?

A: We've had attorneys involved in other situations. I'm not recalling. We have had individuals with legal advice at times.

Tr.93.

² Although Faude, Rusch and two non-union employees were previously disciplined for engaging in a conversation regarding recertification of the Union, that occurred in February 2014 and the County did not offer this as justification for the content of the survey.

Faude bears the burden of proving by a clear and satisfactory preponderance of the evidence that the County's actions were predicated on hostility to Faude's protected activity. The County's reference to Faude's union status in the survey, when there was no legitimate link to any allegations of misconduct, is overt evidence of hostile intent. The evidence suggests that the County's placement of Faude on a three-month paid administrative leave and the hiring of a private attorney to conduct an investigation was a new practice. While Schmitz's testimony was incredible, neither a three-month paid leave nor the use of a private attorney establishes hostility.

Termination

Faude was terminated effective November 19, 2014 via a letter which specified that although the County has listed five grounds for termination, "[a]ny one or combination of the grounds is sufficient to support the termination of your employment."

The first ground for termination was Faude's "very harsh" criticism of HCC management. Faude challenged the existence of any evidentiary support to this charge. Schmitz explained this basis for termination was due to "my understanding that during the course of the investigation employee (sic) have reported negative comments that Ms. Faude had said about myself and my salary and my responsibilities." Tr.97. Schmitz did not conduct the investigation, therefore she did not have any personal knowledge of the investigative findings. The investigator did not testify as to the investigative results and the County did not present any investigative notes or findings at hearing. The record is silent as to when Faude made the alleged comments, where she made the alleged comments, to whom the alleged comments were made, and in what context the alleged comments were made. Thus, the only evidence addressing this charge is Schmitz's uncorroborated hearsay which I do not find reliable.³

The second cited reason for termination was Faude's disruptive behavior during shift change. Faude counters asserting that her actions were driven by her duty to serve as an advocate for the residents. First shift nursing supervisor, Carrie Anderson, who ran the shift meeting, testified to Faude's loyal but disruptive behavior in June and July 2014 during shift change meetings. Anderson explained that, although she attempted to reign in and / or redirect Faude during the meetings, she was unsuccessful. Anderson admitted she did not confront

³ Section 227.45(1), Stats., provides that:

Except as provided in s. 901.05, an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901.05. ...

While administrative agencies have the discretion to admit hearsay evidence, it is also true that "uncorroborated hearsay evidence alone does not constitute substantial evidence." *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, ¶8, 278 Wis.2d 111, 692 N.W.2d 572.

Faude and instead reported Faude to her supervisor. An employee cannot change her behavior unless the employee is aware that the behavior is inconsistent with the employer's expectations. Although the County's decision to avoid confronting Faude is concerning, the evidence establishes that Faude engaged in this behavior.

The third charge in support of Faude's termination was her disrespect for Dr. Writz which she voiced to staff. Anderson confirmed that she heard Faude challenge Writz's professional decision-making and prescribed protocol with regard to a few residents during June and July 2014, but this limited record fails to establish how often this occurred, when it occurred, and where – other than during shift change meetings – it occurred. Notably absent from the record is any evidence that Faude disregarded or failed to follow Writz's orders. Ultimately, Faude was disciplined for disrespectfully vocalizing her opposition to Writz's professional evaluations during shift change meetings and no reasonable inference can be made which links this sanction to her protected activity.

Faude's comments at a July 28, 2014 meeting comprised the fourth ground for her discharge. The termination letter cites three statements which Faude was alleged to have made at the meeting, all of which related to Simington. The evidence establishes that on July 28, 2014, Faude, Schmitz, and Rusch met for the purpose of addressing union issues and both Faude and Rusch were present in their capacities as union stewards. The conversation turned to the attendance policy and, specifically, the fact that some staff were not aware of the policy. Schmitz reminded the group that Simington held an in-service for the staff at the beginning of the year. The testimony conflicts as to what was said next. Schmitz testified that Faude then stated that she [Faude] "hated" Simington, that she [Faude] "could not stand to listen to" Simington, and that she [Faude] "could not stand to look at" Simington. Faude did not testify but she challenged Schmitz's recollection. Faude's failure to testify was the likely result of presenting her case at hearing; but since Faude has an interest in the outcome, had she testified, her testimony would have been suspect. Schmitz similarly has vested interest in her version of the truth.

The County's inaction after Faude's alleged statements regarding Simington discredit Schmitz's recollection. Faude was placed on leave on August 27, 2014, approximately one month after the July 28, 2014 meeting. The County claimed it viewed the alleged statements about Simington to be sufficiently severe so as to warrant termination, yet there is no evidence to suggest that the County took any remedial actions to address the behavior at that time. It is reasonable to conclude that Faude's and Simington's relationship would be sufficiently strained following Faude's pointed criticism, yet the County did not initiate a disciplinary investigation, did not separate the two employees, and Schmitz did not rely on Faude's alleged comments about Simington as one of the reasons for initiating an investigation into Faude's behaviors.

Rusch attended the July 28, 2014 meeting and testified at hearing. Rusch testified that Faude did not state that she personally hated Simington or that she personally "could not stand" to see or listen to Simington. Rather, Rusch testified that Faude communicated to

Schmitz that there were employees at HCC who held those views of Simington. I find Rusch credible. Rusch has nothing to gain in offering this testimony and, by testifying, subjected himself to repercussions as a result of said testimony. Further, Rusch's recollection is consistent with the purpose of the meeting which was to address the concerns of the employees and not Faude's individual view of management.

The parties do not agree as to whether Jalling was in attendance at the July 28, 2014 meeting. Rusch testified that she was present while Schmitz maintained that she was not. Jalling did not testify at hearing.

The evidence does not support a finding that Faude declared that she "hated," "could not stand to listen to," or "could not stand to look at" Simington. Even if she had, in *Village of Sturtevant*, Dec. No. 30378-B (WERC, 11/03), the Commission explained:

In general, the law gives wide berth to employees expressing mutual concerns about working conditions. Concerted activity by its nature often occurs in tense, confrontational, or chilly atmospheres, and some intemperance is to be expected in those situations. A mild-mannered complaint is likely to aggravate an employer less than a harshly-worded one, and sometimes it is the vehemence itself that renders concerted activity effective; certainly Section 2 cannot be read to protect only ineffective concerted activity. SEE CLARK COUNTY, DEC. NO., 30361-B (WERC, 11/03). Thus, unless concerted activity is marked by flagrant misconduct, it does not lose its protection. In addition, what constitutes "flagrant misconduct," will depend upon the nature of the work place and the effect on the employer's authority. For example, in CKS TOOL & ENGINEERING, 332 NLRB NO. 162, 168 LRRM 1047 (2000), the NLRB deemed protected an employee's obscenity-laden speech during a management presentation at a staff meeting, because the employee was deemed to be implicitly acting on behalf of his co-workers and because his language was commonly tolerated by management at such meetings. Some measure of "disloyalty" and "disparagement" are tolerated, even if the employer arguably has suffered some harm to its business. SEE, E.G., ALLSTATE INSURANCE CO., 332 NLRB NO. 66, 165 LRRM 1293 (2000) (insurance agent's activity was protected, where she gave interview to a magazine, in which she complained about the company's working conditions); ARLINGTON ELECTRIC, INC., 332 NLRB NO. 74, 166 LRRM 1049 (2000) (it was protected for an employee to distribute literature to the public urging them not to use a hospital that subcontracted with a company that did not

provide family health insurance). Hence, unless the form of expression exceeds the law's liberal parameters, the law does not distinguish between hostility towards the subject matter and hostility towards the attitude or manner of expression. See also CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03).

Faude's expressions that HCC employees were not enamored by Simington, in the context of discussing employee unfamiliarity with the attendance policy, was protected activity. It was not sufficiently accusatory, offensive or inflammatory so as to lose its protected status. It follows that the County's decision to terminate Faude in response to the voicing that sentiment amounts to hostility in violation of Section (3)(a)3 of MERA.

Moving to the final ground for Faude's termination, the County concluded that Faude did not follow the appropriate chain of command when she raised issues directly with Schmitz. The County did not offer any evidence to further explain or substantiate this basis for termination. The only interactions between Faude and Schmitz addressed in this record occurred when they met for the purpose of addressing issues and concerns raised by employees. The parties had a practice of Faude and Rusch informing Schmitz that an issue existed and then Schmitz responded with a telephone call or message in their mailbox as to what time would be convenient to meet. Thus, contrary to the County's assertion, the record does not establish that Faude deviated from the hierarchical structure.

The County argues that Rusch, in addition to other union stewards, also met with Schmitz and discussed Union concerns but were not terminated. Therefore it follows that the County is not averse to protected, concerted activity. As the Commission stated in *Clark County*, Dec. No. 30361-B (WERC, 11/03):

An employer is not free to exercise his annoyance at one employee's concerted activity simply because the employer has found other concerted activity less annoying. An aggressive grievance officer is likely to incur employer antipathy more readily than a steward who is passive; if the employer terminates the assertive grievance officer for his assertiveness, the employer cannot prevail by demonstrating that he bore no animus towards union stewards in general or towards passive stewards.

Faude's termination letter enumerated five bases for termination. Not only has the County failed to produce credible evidence to support that Faude personally made disparaging comments about Simington or that she failed to follow the chain of command when meeting with Schmitz, but these two charges arose while Faude was actively engaged in protected, concerted activity. Faude was meeting with Schmitz on behalf of and with the authority of HCC employees and not solely by and on her own behalf when she was alleged to have made the disparaging comments. Faude's alleged failure to follow the chain of command when she

scheduled meetings with Schmitz was on behalf of and with the authority of HCC employees to discuss employee workplace concerns in her role as a union steward. The County terminated Faude for her protected remarks and for scheduling protected activity with Schmitz.

Despite Schmitz's testimony to the contrary, the record establishes that Schmitz's frustration with Faude's vocal Union representation and her hostility toward those activities played a part in the County's pre-termination actions. The County's hostility was evidenced when it referenced Faude's union involvement in the survey distributed to HCC employees.

Although this record establishes that there were legitimate bases for Faude's termination, when there is evidence that an employer's decision is motivated, in part, by unlawful concerted activity, then the termination is invalid and in violation of § 111.70(3)(a)3, Stats.

§ 111.70(3)(a)3, Stats.

The County asserted that, since its decision to terminate Faude was for lawful reasons, its action could not be found to have been retaliatory, citing *Clark County*, Dec. No. 30361-B (WERC, 11/03). The evidence establishes that the County was motivated, in part, by anti-union animus when terminating Faude which is fundamentally retaliatory and deters other employees from engaging in protected, concerted activities in violation of § 111.70(3)(a)(1), Stats.

Dated at Rhinelander, Wisconsin, this 21st day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot, Examiner