

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

DEPARTMENT OF PUBLIC
HEALTH,
Petitioner

Docket No. PHET-23-0575

Date: April 17, 2025

v.

RUTH JOHNSON,
Respondent

Appearances

For Petitioner: Ryan Gibbons, Esq.

For Respondent: Ruth Johnson, *pro se*

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

Ruth Johnson, a certified nurse aide, did not abuse Resident A. Abuse requires willful conduct, but Ms. Johnson reflexively reacted to being forcefully hit by Resident A first. Moreover, the regulations indicate conduct is not abuse if the force used is only as much as is necessary and “occurs in the course of attempting to restrain the behavior of the” resident. That is what happened here. Finally, abuse also requires the infliction of harm. Here, however, there was no physical injury or pain; nor did Ms. Johnson’s conduct cause any psychological harm as defined in the regulations.

INTRODUCTION

Ruth Johnson timely appeals a notice by the Department of Public Health (“DPH”) alleging she abused a resident. 105 Code of Mass. Regs. §§ 155.013 & 155.014. I held an in-person hearing on April 9, 2025. DPH called three witnesses: Kristen Forget, a DPH investigator, Destiny Rivas, Ms. Johnson’s co-worker at the time of the incident, and Laura Ryder, the

director of nursing at the facility where the incident occurred.¹ Ms. Johnson testified on her own behalf. I entered exhibits 1-8 into evidence.

FINDINGS OF FACT

1. Ms. Johnson has been a certified nurse aide (“CNA”) for some time. (Ex. 1; general testimony².)
2. In September 2023, she was newly assigned to work at Alliance Health at Marie Esther (“Alliance Health”). September 9, 2023 was only her second day working there. (Ex.7; Johnson.)
3. Ms. Johnson and Ms. Rivas were assigned to work with Resident A. Ms. Rivas had only been a CNA for a few months and was not assigned (at least on that day) as the primary caregiver to any resident. (Rivas.)
4. Resident A had many cognitive impairments that sometimes made her difficult to work with: Alzheimer’s, adjustment disorder with depressed mood, psychotic disorder with delusions, and anxiety disorder. She could be very calm and cooperative. But she was often confused and it was common for her to be combative. (Ex. 6; general testimony.)
5. She was entirely dependent on staff for hygiene and required at least two staff members for toileting. (Ex. 6; general testimony.)

¹ Marilda Dechan was supposed to testify remotely because she was out of the country. Unfortunately, she was unable to connect due to technical difficulties. Several exhibits reference her statement of events which is identical to Ms. Rivas’s. Because Ms. Dechan did not testify, I place no weight on her statements in the record.

² There are some facts about which many witnesses testified, and are not in dispute, that I simply note as derived from “general testimony.”

6. Resident A had a care plan with several listed interventions. Nurses were expected to “maintain a calm environment and approach to the resident” and “if resident has verbal or physical outbursts, assess, maintain safety, and reapproach.” (Ex. 6.)
7. Ms. Rivas had some prior experience with Resident A. She explained that, when Resident A became combative, she would step back, let her reorient, and calm herself. (Rivas.)
8. Ms. Johnson had never previously worked with Resident A. That said, she was told about her cognitive issues and care plan. (Johnson.)
9. Ms. Johnson and Ms. Rivas went to Resident A’s room. They started by helping Resident A get from her bedroom to the bathroom. There, they began to clean her up. Among other things, she was covered in urine. (Johnson; Rivas.)
10. At some point while in the bathroom, Resident A became frustrated and combative. (General testimony.)
11. While Ms. Johnson was washing her with a washcloth, Resident A elbowed Ms. Johnson hard in her midsection. (Johnson.)
12. Although it appears Resident A was beginning to be resistant and was loud—possibly screaming—Ms. Johnson did not expect to be hit.³ (Johnson).

³ I say Resident A was “possibly screaming” because Ms. Rivas said she was, but Ms. Johnson said she was not. The difference may be a matter of perception. Ms. Rivas was a relatively inexperienced CNA. Thus, Resident A may have been combative enough that Ms. Rivas interpreted it as screaming whereas Ms. Johnson may have just expected her to act like that and did not characterize the same way. This may also explain why Ms. Johnson was surprised that Resident A hit her since she may not have understood how resistant and combative Resident A was becoming.

13. Ms. Johnson reflexively grabbed Resident A's hand, slapped it on top, and said words to the effect of "don't do that." (Johnson.)⁴
14. By that point, another CNA, Ms. Dechan, was present and witnessed the interaction. Ms. Johnson left to go eat lunch and let Ms. Rivas and Ms. Dechan finish caring for Resident A. (Rivas; Johnson.)
15. Laura Ryder was informed of the incident and immediately began to investigate. She found Ms. Johnson in a break room eating lunch. Ms. Johnson did not deny slapping Resident A's hand and demonstrated for Ms. Ryder what she did. Ms. Ryder then asked Ms. Johnson to leave but had a hard time getting her out of the building. She had to ask another nurse to intervene. (Ryder.)
16. For her part, Ms. Johnson explained that, since this was only her second day at this facility, she did not know everyone and did not know exactly who Ms. Ryder was. She was confused about why she was being disciplined and asked to immediately leave. She wanted to finish her lunch and, when told to leave the facility, tried to ask another nurse for help figuring out what was happening. (Johnson.)⁵
17. There was an attempt to interview Resident A, but she could not recall the event. The facility completed a skin assessment and there were no abnormal findings; she had no

⁴ The witnesses each gave a slightly different version of what Ms. Johnson said. The exact words are not important. They all agreed the message was the same: telling the Resident to stop. (General testimony.)

⁵ Again, whether Ms. Johnson caused a scene is a matter of perception. Given Ms. Johnson's general presentation as a witness, and the fact she was not sure who Ms. Ryder was, I can understand why Ms. Ryder felt she was being difficult. However, in Ms. Johnson's mind, she was just trying to figure out what was going on.

- bruising or even redness on her hand. Also, the incident report noted that Resident A was not emotionally distressed. (Ex. 7.)
18. Further investigation revealed no other complaints against Ms. Johnson by other CNAs at Alliance Health nor “alert-oriented” residents. A search of Ms. Johnson’s CNA registry information did not identify any concerns. (Ex. 7.)
 19. Ms. Ryder’s investigation resulted in a preliminary and supplemental incident report. Both have a space under “incident information” to describe the “type of harm.” In the preliminary report, she noted the type of harm was “unknown.” In the supplemental report, she noted there was “no harm.” (Ex. 7.)
 20. DPH then issued a “Notice of Right of Hearing” to Ms. Johnson, indicating that the allegation against her was valid. (Ex. 1.)

DISCUSSION

1. Legal framework

A nurse aid who abuses a resident (or patient) may be subject to disciplinary action and placed on a registry of abusers. *See generally* G.L. c. 111, § 72F; 105 Code of Mass. Regs. § 155.001, *et seq.* The regulations define abuse as follows:

The willful infliction of injury, unreasonable confinement, intimidation, including verbal or mental abuse, or punishment with resulting physical harm, pain, or mental anguish, or assault and battery; provided, however, that verbal or mental abuse shall require a knowing and willful act directed at a specific patient or resident. In determining whether or not abuse has occurred, the following standards shall apply:

(1) A patient or resident has been abused if: (a) An individual has made or caused physical contact with the patient or resident in question, either through direct bodily contact or through the use of some object or substance; (b) The physical contact in question resulted in death, physical injury, pain or psychological harm to the patient or resident in question; and (c) The physical contact in question cannot be justified under any of the exceptions set forth in 105 CMR 155.003[.]

105 Code of Mass. Regs. § 155.003. There is one relevant exception to what constitutes abuse:

(3) Notwithstanding the provisions of 105 CMR 155.003 . . . if an individual has used physical contact with a patient or resident which harms that patient or resident, such contact shall not constitute abuse if:

. . .

(c) The physical contact with the patient or resident occurs in the course of attempting to restrain the behavior of the patient or resident in question, and both the type of physical contact involved and the amount of force used are necessary in order to prevent that patient or resident from injuring himself, herself, or any other person[.]

105 Code of Mass. Regs. § 155.003. Also relevant is the definition of harm:

[Harm] includes, but is not limited to, death, physical injury, pain or psychological injury. Psychological injury includes, but is not limited to, conduct which coerces or intimidates a patient or resident, or which subjects that patient or resident to scorn, ridicule, humiliation, or produces a noticeable level of mental or emotional distress.

Id.

DPH bears the burden of proof by a preponderance of the evidence that Ms. Johnson abused Resident A. *Dept. of Pub. Health v. Bernal*, PHNA-16-314 (Div. Admin. Law App. Nov. 30, 2016); *see also C.M.J. v. Disabled Person Protection Comm.*, DPPC-23-0143 (Div. Admin. Law App. Aug. 2, 2024).

2. Credibility determinations

Before getting to the substance of the appeal, I comment on the witnesses' credibility. I credit Ms. Johnson that Resident A forcefully hit her first. Accordingly, I do not fully credit Ms. Rivas's version of events because she did not acknowledge that Resident A hit Ms. Johnson first, let alone hit her hard. Ms. Rivas gave a statement at the time of the incident, then testified again at the hearing, and both times left that fact out. There are many possible reasons she failed to explain this. I found Ms. Rivas to be forthright, so the most likely explanation is that she simply

did not see it happen. But that fact places Ms. Johnson's reaction into context. Indeed, it can only be described as a "reaction" because she was hit first, which I would not have known if I relied on Ms. Rivas's testimony. Thus, because Ms. Rivas did not see that Resident A forcefully hit Ms. Johnson first, that colors how she views the whole event, and I trust her version a little less.

In speaking about credibility, I am aware of, and have considered, related proceedings in District Court. I also acknowledge that aspects of Ms. Johnson's presentation, both at the hearing and at various status calls, were strange and might cause someone to totally discount her testimony. For example, at the hearing, she did not believe anyone was actually who they said they were. She indicated that she knew who Ms. Rivas and Ms. Ryder were but the witnesses at the hearing were not them. She also doubted I was the same person she had spoken to on the phone at the prior status hearings—she claimed my voice in person was different than the voice of the person on the phone. I assured her the witnesses and I were the same people she knew. I am not convinced Ms. Johnson ultimately believed me.

And yet, nothing about her beliefs interfered with her ability to understand the proceedings, conform with the hearing procedures, or coherently explain her version of events. She may have been a little loud and excited, but that appears to be a combination of her personality and the fact that this hearing was extremely important to her. Moreover, her version of events makes sense and accounts for why others may have seen it differently. I thus credit her testimony, at least the parts of it that comprise my factual findings.

3. Ms. Johnson did not commit "abuse"

Whether a nurse aide committed abuse first involves determining whether their conduct was "willful." 105 Code of Mass. Regs. § 155.003. "The term 'willfully' means 'intentional and by design in contrast to that which is thoughtless or accidental.'" *Commonwealth v. Pfeiffer*, 482

Mass. 110, 116 (2019), *quoting Commonwealth v. McGovern*, 397 Mass. 863, 868 (1986).

Indeed, a CNA may be rough, but that alone does not mean they *intended* to abuse a resident, even if they do something rough enough, for example, to cause bruising. *See, e.g., Dept. of Pub. Health v. Bernal*, PHNA-16-314 (Div. Admin. Law App. Nov. 30, 2016). Here, there was no bruising or any other physical sign of abuse, though that alone does not mean Ms. Johnson did not act willfully. But the absence of any physical sign of abuse gives credence to Ms. Johnson's testimony, which I credit, that her actions were reflexive. I do not believe she was prepared for Resident A to hit her. She cared for Resident A, probably similarly to how she cared for countless other residents before, including residents with cognitive issues. Startled by Resident A's actions, her reaction was reflexive, essentially hitting Resident A's hand away in an effort to tell her to stop. If she had intended to punish Resident A, or premeditated hitting her, I would expect the contact to have been harder.

And even if I assumed her actions were willful, that still would not constitute "abuse" in the context of this case. Recall, the regulations allow CNAs some room to respond to violence directed at them. Abuse does not include when "physical contact with the patient or resident occurs in the course of attempting to restrain the behavior of the patient or resident in question, and both the type of physical contact involved and the amount of force used are necessary in order to prevent that patient or resident from injuring himself, herself, or any other person." 105 Code of Mass. Regs. § 155.003. That captures exactly what happened here. Ms. Johnson was attempting to get Resident A to stop hitting her, i.e. restrain her behavior, and used only so much force as was necessary to accomplish that—certainly not enough force to even cause physical pain or leave a physical mark.

4. Ms. Johnson did not harm Resident A

Additionally, even if Ms. Johnson acted willfully, and used more force than necessary, DPH must also prove that Ms. Johnson harmed Resident A in some way. At the hearing, DPH's counsel explained it was not proceeding with the theory that Ms. Johnson caused Resident A physical pain or injury. That said, an absence of physical pain or injury does not eliminate the possibility that Ms. Johnson caused Resident A psychological harm. *See Dept. of Pub. Health v. Pacheco*, PHNA-09-059 (Div. Admin. Law App. Sep. 16, 2009). "Psychological injury includes, but is not limited to, conduct which coerces or intimidates a patient or resident, or which subjects that patient or resident to scorn, ridicule, humiliation, or produces a noticeable level of mental or emotional distress." 105 Code of Mass. Regs. § 155.003.

Here, there is no evidence that Ms. Johnson caused psychological injury as defined by the regulation. Alliance Health's own investigative report noted that Resident A did "not appear emotionally distressed" and concluded there was "no harm." Alliance Health was in the best position to say whether Resident A was distressed; the employees of that facility knew her well, and they had no incentive to underrepresent how she was feeling. The fact that they did not document any real or even perceived psychological harm is telling.

I understand DPH is somewhat limited in its ability to call Resident A as a witness, both logistically and because Resident A has no memory of the incident. However, DPH must do more than allege harm. In other cases, even without the patient witness, it has been able to prove its case through witness observations. *See, e.g., Pacheco, supra* (witnesses testified that patient became upset, agitated, and worried he was going to be in trouble). But here, no witness reported or testified that Resident A suffered any emotional distress from this incident.

CONCLUSION AND ORDER

Accordingly, DPH has not proven that Ms. Johnson committed abuse and her name shall not be entered into its registry.

SO ORDERED

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate