

A-06-1799

**STATE OF MINNESOTA
IN COURT OF APPEALS**

MARGIE KLEVEN, RELATOR

VS.

COMMISSIONER OF HUMAN SERVICES, RESPONDENT

APPELLANT'S BRIEF

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LEGAL ISSUES

- I. **Did the Commissioner of Human Services, Respondent herein, err as a matter of law in interpreting M.S.A. §626.5572, Subd. 2(b) to determine that the Relator's words constituted acts of verbal abuse against vulnerable adults?**

Yes. The "reasonable person" standard found in M.S.A. §626.5572, Subd. 2(b)(2) is limited to describing only that type of language which is to be deemed "disparaging, derogatory, humiliating, harassing, or threatening". The "reasonable person" standard does not apply in determining whether conduct, in the form of particular language, is abusive.

STATEMENT OF THE CASE

Appeal has been taken from the Order of the Commissioner of Human Services dated August 17, 2006, affirming the recommendation of Administrative Law Judge Steve Milhalchick dated May 22, 2006, to disqualify the Relator from having direct contact with persons served in programs licensed by the Department of Human Services, and affirmed the decision to not set aside the Relator's disqualification. The Relator asserts that both the ALJ and Commissioner of Human Services erred as a matter of law in interpreting M.S.A. §626.5572, Subd. 2(b) by concluding that the Relator's use of the word "a-hole" on several occasions in reference to the vulnerable adults she was serving, and attempting to get a vulnerable adult to say "f-k you", amounted to abuse.

STATEMENT OF FACTS

Relator Margie Kleven was employed as a Human Services Technician while assigned to an Alexandria MSOCS home (Relator's Appendix, A-11). In her capacity, she provided care for several vulnerable adults who had severe developmental disabilities and resided at the home

(Id.). The residents have the following characteristics:

1. The clients . . . function mentally about the level of a normal eighteen-month old child (Relator's Appendix, A-10);
2. They cannot communicate verbally (Id.);
3. They do not use words to communicate, either oral or written (Id.;
4. With very few exceptions related to their daily routine, the clients do not understand words spoken to them (Id.);
5. They gave "no indication was given that the reference caused anyone emotional distress" (Relator's Appendix, A-12);
6. (N)ever gave any indication of emotional distress in response to such comments; (Relator's Appendix, A-13); and
7. They could not understand "what was being said by staff" (Relator's Appendix, A-13).

In 2004, allegations surfaced that the Relator had referred to the residents as "a-holes" on several occasions (Relator's Appendix, A-12), and had attempted to teach one of the residents to say "f-k you" (Relator's Appendix, A-13). An investigation was commenced by MSOC management and the Department of Human Services' Division of Licensing (Relator's Appendix, A-14). On December 24, 2004, the Department's investigations resulted in a

determination that the Relator's language constituted recurring maltreatment, and that she posed an imminent risk of harm to people served by programs requiring a license from the Department of Human Services (Relator's Appendix, A-15). Consequently, the Relator was disqualified from being in any position which allowed direct contact with persons served by programs requiring a Department of Human Services license (Relator's Appendix, A-16).

On January 10, 2005, the Relator requested reconsideration of the maltreatment, disqualification, and risk of harm determinations (Id.). On May 3, 2005, this request was denied (Relator's Appendix, A-17). On May 23, 2005, the Relator submitted a request for a contested case appeal of the disqualification and maltreatment determination (Id.), and said contested hearing took place before Administrative Law Judge Steve M. Milhalchick on March 20, 2006 (Relator's Appendix, A-8). On May 22, 2006, Judge Milhalchick issued a Findings of Fact, Conclusions, and Recommendation recommending that Commissioner of Human Services affirm the determination of recurring maltreatment, the determination of disqualification, and the determination that the disqualification not be set aside (Relator's Appendix, A-8 - A-23). On August 17, 2006, the Commissioner of Human Services issued an Order adopting Judge Milhalchick's Findings of Fact, Conclusions, and Recommendations, and affirmed the decision to disqualify the Relator from having direct contact with persons served in programs licensed by the Department of Human Services, and affirmed the decision to not set aside the Relator's disqualification (Relator's Appendix, A-1 - A-7).

ARGUMENT

M.S.A. §14.69(d) states that an appellate court “may reverse . . . the decision (of an agency) if the substantial rights of the (Relator) may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are: . . . (d) Affected by other error of law . . .” Statutory interpretation is a question of law that is reviewed de novo. Harms v. Oak Meadows, 619 N.W.2d 201, 202 (Minn. 2000). The Court should reverse the Order of the Commissioner of Human Services dated August 17, 2006, due to its misinterpretation of M.S.A. §626.5572, Subd. 2(b).

I. The Commissioner of Human Services erred as a matter of law in interpreting M.S.A. §626.5572, Subd. 2(b) by determining that the Relator’s words constituted acts of verbal abuse against vulnerable adults?

M.S.A. §626.5572, Subd. 15 defines "maltreatment" as meaning “abuse as defined in subdivision 2 (of this statute).” M.S.A. §626.5572, Subd. 2(b), defines “abuse” as being the following:

Conduct which is not an accident or therapeutic conduct as defined in this section, which produces or could reasonably be expected to produce physical pain or injury or emotional distress including, but not limited to, the following:

- (1) Hitting, slapping, kicking, pinching, biting, or corporal punishment of a vulnerable adult;
- (2) Use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening;
- (3) Use of any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion, including the forced separation

- of the vulnerable adult from other persons against the will of the vulnerable adult or the legal representative of the vulnerable adult; and
- (4) Use of any aversive or deprivation procedures for persons with developmental disabilities or related conditions not authorized under section 245.825.

The Respondent determined that the Relator committed acts of abuse against residents because the act of referring to the residents as “a-holes” and attempting to teach one resident to say, “f-k you”, were verbal acts which “would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening.” No analysis was given as to whether the verbal acts “produce(d) or could reasonably be expected to produce . . . emotional distress;” in fact, the Respondent flatly rejected that any analysis need be given. Instead, the Respondent adopted the Administrative Law Judge’s reasoning and determined that since a reasonable person would be offended by the verbal acts of the Appellant, abuse had occurred. This interpretation is incorrect.

A statute must be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascertained from context, nature of subject treated of, and purpose of intention of Legislature. Tankar Gas v. Lumberman’s Mutual Casualty Company, 9 N.W.2d 754 (Minn. 1943). A reviewing Court must consider sections of a statute together to determine its plain meaning. Chanhassen Estates Residents Association v. City of Chanhassen, 342 N.W.2d 335, 339 (Minn. 1984). Determining the integrated plain meaning requires a reviewing Court to “read a particular provision in context with other provisions of the same statute in order to determine the meaning of the particular provision.” ILHC of Eagan, LLC v. County of Dakota, 693 N.W.2d 412, 419 (Minn.2005); *see also* Glen Paul Court Neighborhood Association

v. Paster, 437 N.W.2d 52, 56 (Minn.1989) (recognizing that sections of a statute must be read together because arrangement of sections may provide plain meaning)

In reading M.S.A. 626.5572, Subd. 2, as a whole, it is clear that the 4 subparts are describing the types of *conduct* which, if performed towards a vulnerable adult, causes or could reasonably cause the vulnerable adult physical or emotional harm. The subparts are not describing the types of actual *harm* which would result in a finding of abuse. Focusing on Subdivision 2(b), the subpart should thus properly be read as follows:

Repeated or malicious oral, written, or gestured language toward a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening, and which produces or could reasonably be expected to produce physical pain or injury or emotional distress for the vulnerable adult.

This reading is what the state legislature intended - language towards a vulnerable adult that a reasonable (i.e., non-vulnerable) person would find harmful and which actually causes or could be expected to cause harm. Just because the recipient of foul language, for example, may feel disparaged, humiliated, or harassed, this does not mean that they have been abused - that is a wholly separate, and much more severe, reaction.

The Respondent takes the position that the mere fact that a reasonable person would find language disparaging, derogatory, humiliating, or harassing is enough to find emotional harm. But this is plainly not what Subdivision 2 says - an analysis as to whether the language caused or could cause harm must be made, just like it must be made in situations involving physical contact (2a), aversive or deprivation procedures, unreasonable confinement, or involuntary seclusion (2c), or aversive or deprivation procedures for people with mental retardation not authorized by law (2d). There is no “abuse per se” aspect to subparts 2a or 2c, while there is a specific “per se”

aspect to subpart 2d based upon M.S.A. §245.825. If physical or emotional harm has not or could not be expected to occur from the actions described in subparts 2a or 2c, then no abuse has occurred. Since there is no “per se” language in subpart 2b, it follows that physical or emotional harm must result be abuse can be found.

It is thus clear that the Respondent is reading into Subdivision 2 something that is not there. While it is doing so with good intentions, carrying out the overall legislative intent of “protect(ing) adults who, because of physical or mental disability or dependency on institutional services, are particularly vulnerable to maltreatment” (*see* M.S.A. §626.557, Subd. 1), Courts are prohibited from adding words to a statute or reading into a statute what was either intentionally or inadvertently omitted by the legislature. Genin v. 1996 Mercury Marquis, 622 N.W.2d 114 (Minn. 2001). A statute must be enforced literally if its language embodies a definite meaning, which involves no absurdity or contradiction, statute in such case being its own best expositor. Peterson v. Halvorson, 273 N.W. 812 (Minn. 1937). Not interpreting the statute in the manner that the Respondent has done will not result in an absurdity or contradiction - the goal of the statute is protect vulnerable adults from physical and emotional harm. Interpreting the statute as it is written still does exactly that function.

Given the proper interpretation of M.S.A. §626.5572, Subdivision 2(b), the Respondent completely failed to demonstrate in any way in its investigation, disqualification proceeding, reconsideration proceeding, and court proceeding, how the alleged conduct of the Relator in any way, shape, or form produced, or could reasonably be expected to produce given the mental capacity of the vulnerable adults, physical pain or injury or emotional distress. As stated in the

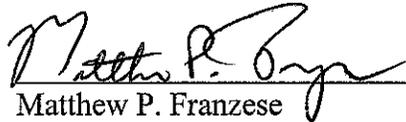
Administrative Law Judge's findings¹, there was no testimony or evidence presented to the Court which demonstrated that any of the vulnerable adults were in any way ever physically harmed or emotionally distressed based upon the Judge's findings of what the Relator had done.

CONCLUSION

The law does not sustain the Respondent's determination that the Relator engaged in acts of abuse towards the vulnerable adults that she was licensed to provide care for. This Court should reverse the Respondent's Order dated August 17, 2006, and re-instate the Relator's license.

Respectfully submitted,

Dated: October 23, 2006



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¹It should be noted that the Relator does not agree with the findings of fact made herein that she had referred to the vulnerable adults as "a-holes" in a negative manner or that she had attempted to teach a vulnerable adult to say "f-k you". However, since all due deference is given to the trier of fact on appeal with regard to the findings made in its Order, the Relator is not challenging said findings that she had engaged in said behavior.

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).