

State of Wisconsin



Labor and Industry Review Commission

Ruzica Kuzmanovic  
Complainant

Petra Living Assistance LLC,  
d/b/a Visiting Angels  
Respondent

ERD Case No. CR201600029

Fair Employment Decision<sup>1</sup>

Dated and Mailed:

AUG 22 2018

The decision of the administrative law judge (copy attached) is **affirmed**. Accordingly, the complaint is dismissed.

By the Commission:

Handwritten signature of Georgia E. Maxwell in blue ink.  
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Georgia E. Maxwell, ChairpersonHandwritten signature of Laurie R. McCallum in black ink.  
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Laurie R. McCallum, CommissionerHandwritten signature of David B. Falstad in black ink.  
\_\_\_\_\_  
David B. Falstad, Commissioner

<sup>1</sup> **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website <http://lirc.wisconsin.gov>.

### **Procedural History**

On January 22, 2016, the complainant filed a retaliation complaint under the elder abuse and health care worker protection laws; specifically, Wis. Stat. §§ 16.009, 46.90, 50.07, 55.043 and 146.997.

Wisconsin Stat. § 106.54(5) and (6) provide that the Equal Rights Division (ERD) shall receive complaints of discharge, retaliation, discipline or discrimination under Wis. Stat. §§ 16.009(5)(d), 46.90(4)(b), 50.07(3)(b), 55.043(1m)(c) and 146.997(4)(a) and shall process the complaints in the same manner that employment discrimination complaints are processed under Wis. Stat. § 111.39.

On November 22, 2016, an equal rights officer for the Equal Rights Division (ERD) issued a preliminary determination dismissing the complainant's complaint for lack of jurisdiction under the elder abuse and health care worker protection laws. The complainant timely appealed. On May 16, 2017, an administrative law judge (ALJ) issued a decision affirming the preliminary determination. The complainant timely petitioned the Labor and Industry Review Commission (commission) for review.

On September 8, 2017, the commission set aside the Preliminary Determination and the ALJ's decision and remanded to ERD the matter for further investigation of the complainant's retaliation claims under Wis. Stats. §§ 16.009, 46.90, 50.07, 55.043 and 146.977, and to address the issue of whether Visiting Angels and the limited liability company of which it is a part, Petra Living Assistance LLC, singly or jointly should be considered a home health agency and complainant's employer.

On March 20, 2018, an equal rights officer for the Equal Rights Division (ERD) issued four separate preliminary determinations dismissing the complainant's complaint for lack of jurisdiction under Wis. Stats. §§ 16.009, 50.07, 55.043 and 146.977.<sup>2</sup> On June 22, 2018, an administrative law judge (ALJ), issued a decision affirming the preliminary determinations, and dismissing the complaint.

The complainant timely petitioned the commission for review. The commission has considered the complainant's petition and the positions of the parties, and based on its review, agrees with the decision of the ALJ and adopts that decision as its own.

### **Memorandum Opinion**

The complainant worked as a caregiver for the respondent, a non-medical homecare business. The respondent's caregivers provide services to the elderly and others who need assistance with basic caregiving tasks, such as bathing, bathroom assistance, light housekeeping and food preparation. The respondent, Petra Living Assistance,

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<sup>2</sup> ERD's complaint form provides that the division will determine which of the Elder Abuse/Health Care laws apply after review of the complaint, and will so notify the parties. ERD did not issue a preliminary decision under Wis. Stat. § 46.90, Elder Abuse Reporting System. While the commission infers that ERD concluded this law was inapplicable, the commission disposes of any potential issues, for clarity and finality purposes, by addressing the statute in its decision.

LLC is registered with the state of Wisconsin as a limited liability company and conducts business under the trade name of "Visiting Angels." Therefore, Visiting Angels is not a legal entity separate from Petra Living Assistance LLC.<sup>3</sup> Therefore, for purposes of this complaint Petra Living Assistance LLC is the complainant's employer and the caption has been amended to reflect that fact.

The complainant began work for the respondent in May 2012 and worked for respondent until October 29, 2015, when she was discharged for insubordination under respondent's employment policy. Shortly before her termination, complainant filed an incident report with respondent regarding the health of the woman she cared for and alleging a back injury from working as a caregiver.

On January 22, 2016, complainant filed a retaliation complaint with ERD under the elder abuse and health care worker protection laws. The complainant is not licensed to provide health care services to the respondent's clients. In her complaint, the complainant argues that the respondent acted as a "health care provider" to its clients the complainant served and that her retaliation claims against the respondent should proceed.

Wisconsin Stat. § 146.997 Health Care Worker Protection

Pursuant to Wis. Stat. § 146.997(4)(a), any employee of a health care facility or health care provider who is subjected to disciplinary action, or who is threatened with disciplinary action, in violation of Wis. Stat. § 146.997(3) may file a complaint with ERD under Wis. Stat. § 106.54(6). Wisconsin Stat. § 146.997(3) protects individuals who report certain information under Wis. Stat. § 146.997(2)(a), which provides employees a mechanism to report violations of laws or regulations, or standards established by law, regulations or clinical or ethical standards that may pose a potential risk to public health or safety.<sup>4</sup> Reports to officers, directors, or employees of the health care facility or health care provider who are in a supervisory capacity to take corrective action are sufficient to gain protection under this statute. However, this statute only governs employees who are employed by a "health care facility" or a "health care provider" as defined in Wis. Stat. § 146.997(1)(c) and (d), respectively. Therefore, the initial issue for review is whether respondent is a health care facility or a health care provider under these statutes.

*In Jasmin v. County of Douglas*, ERD Case No. CR200202481 (LIRC March 15, 2004), the commission said that the governing statutory language of Wis. Stat. § 146.997(1)(c) and (d) is unambiguous on its face and that the terms "health care

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<sup>3</sup> The ALJ notes that Visiting Angels is a national network of franchised home care agencies that provide in-home care, respite care, senior personal care, companion care and elder care services. Petra Living Assistance, LLC is a franchisee of Living Assistance Services, Inc.

<sup>4</sup> Wisconsin Stat. § 146.977(3) also protects those who participate in certain legal proceedings or share information with the legislature under Wis. Stat. § 146.977(2)(c) and (d). Those provisions are at issue in this case.

facility” and “health care provider” include within their definition only those persons or entities specified in the statute.

Wisconsin Stat. § 146.997(1)(c) defines a “health care facility” as “a facility, as defined in s. 647.01 (4), or any hospital, nursing home, community-based residential facility, county home, county infirmary, county hospital, county mental health complex or other place<sup>5</sup> licensed or approved by the department of health services under s. 49.70, 49.71, 49.72, 50.03, 50.35, 51.08 or 51.09 or a facility under s. 45.50, 51.05, 51.06, 233.40, 233.41, 233.42 or 252.10.”

Thus, the definition of “health care facility” has two parts. The first part is a facility as defined in Wis. Stat. § 647.01(4), which designates “one or more places in which a provider undertakes to provide a person with nursing, medical, or personal care services, in addition to maintenance services,” under a continuing care contract as defined under Wis. Stat. § 647.01(2). Under this subsection, a continuing care contract means “a contract entered into on or after January 1, 1985, to provide nursing services, medical services or personal care services, in addition to maintenance services, for the duration of a person's life or for a term in excess of one year,” conditioned upon either: (1) an entrance fee in excess of \$10,000, or (2) the transfer of at least \$10,000 if the amount is expressed in dollars or 50 percent of the person's estate if the amount is expressed as a percentage of the person's estate to the service provider upon the person's death.

This definition clearly does not cover respondent, whose services are not provided under a continuing care contract as defined in Wis. Stat. § 647.01(2). There is no entrance fee associated with respondent’s services and respondent may serve clients for less than a year where termination of services is not necessarily based on a client’s death. Therefore, respondent does not meet the first part of the definition of “health care facility” under Wis. Stat. § 146.997(1)(c).

The second part of the definition of “health care facility” under Wis. Stat. § 146.997(1)(c) sets out a long list of institutions: hospital, nursing home,

<sup>5</sup> The following are the “other places” licensed or approved by the Department of Health Services:

- Wis. Stat. § 49.70 involves county homes;
- Wis. Stat. § 49.71 involves county hospitals;
- Wis. Stat. § 49.72 involves county infirmaries;
- Wis. Stat. § 50.03 involves community-based residential facilities or DHS licensed nursing homes;
- Wis. Stat. § 50.35 involves hospitals approved by DHS;
- Wis. Stat. § 51.08 involves the Milwaukee County Mental Health Complex;
- Wis. Stat. § 51.09 involves county hospitals;
- Wis. Stat. § 45.50 involves veterans homes;
- Wis. Stat. § 51.05 involves mental health institutes;
- Wis. Stat. § 51.06 involves centers for the developmentally disabled;
- Wis. Stat. § 233.40 involves hospital charges;
- Wis. Stat. § 233.41 involves soldiers' preference as patients;
- Wis. Stat. § 233.42 involves UW Hospitals and Clinics; and
- Wis. Stat. § 252.10 involves public health dispensaries.

community-based residential facility, county home, county infirmary, county hospital, county mental health complex or "other place" licensed or approved by the Department of Health Services under the specified statutes noted above. Respondent is none of these institutions or entities specified in Wis. Stat. § 146.997(1)(c). Respondent is a non-medical home care business, providing services of primary caregivers to the elderly and others who need assistance with basic caregiving tasks, such as bathing, bathroom assistance, light housekeeping and food preparation, and its operations are not licensed or approved by the Department of Health Services. See, also, *Jasmin v. County of Douglas*, ERD Case No. CR200202481 (LIRC March 15, 2004) and *Burreson Hance v. State of Wisconsin, DOC*, ERD Case No. CR201101129 (LIRC Sept. 16, 2013). For all the above noted reasons, respondent is not covered under Wis. Stat. § 146.977(1)(c) as a health care facility.

The next inquiry is whether the respondent is a "health care provider" under Wis. Stat. § 146.997(1)(d). Under this statute, a "health care provider" means, in part, the following:

1. A nurse licensed under ch. 441.
2. A chiropractor licensed under ch. 446.
3. A dentist licensed under ch. 447.
4. A physician, podiatrist, perfusionist, physical therapist, or physical therapist assistant licensed under ch. 448.
5. An occupational therapist, occupational therapy assistant, physician assistant or respiratory care practitioner certified under ch. 448.
6. A dietician certified under subch. V of ch. 448.
7. An optometrist licensed under ch. 449.
8. A pharmacist licensed under ch. 450.
9. An acupuncturist certified under ch. 451.
10. A psychologist licensed under ch. 455.
11. A social worker, marriage and family therapist or professional counselor certified under ch. 457.
12. A speech-language pathologist or audiologist licensed under subch. II of ch. 459 or a speech and language pathologist licensed by the department of public instruction.
13. A massage therapist or bodywork therapist licensed under ch. 460.
14. An emergency medical services practitioner licensed under s. 256.15 (5) or an emergency medical responder.

These first fourteen "health care providers" provided for under Wis. Stat. § 146.997(1)(d) refer to individuals and are not applicable to the respondent. The statute thereafter lists the following six collective or institutional entities that are "health care providers":

15. A partnership of any providers specified under subds. 1. to 14.

16. A corporation or limited liability company of any providers specified under subds. 1. to 14. that provides health care services.
17. A cooperative health care association organized under s. 185.981 that directly provides services through salaried employees in its own facility.
18. A hospice licensed under subch. VI of ch. 50.
19. A rural medical center, as defined in s. 50.50 (11).
20. A home health agency, as defined in s. 50.49 (1) (a).

The respondent does not fall within subdivisions 15. through 19. because it is not a partnership, corporation or limited liability company that provides health care services by individuals referenced in subdivisions 1. through 14., a cooperative health care association, rural medical center or hospice. This leaves only subdivision 20., a home health agency as defined under Wis. Stat. § 50.49(1)(a), for analysis.

Under Wis. Stat. § 50.49(1)(a), a “home health agency” means an organization that:

1. Provides skilled nursing and other therapeutic services;
2. Has policies established by a professional group including at least one physician and at least one registered nurse to govern services, and provides for supervision of these services by a physician or a registered nurse; and
3. Maintains clinical records on all patients.

This statute is comprised of three parts. The first part is whether respondent provides “skilled nursing and other therapeutic services.” Wisconsin Admin. Code § DHS 133 was promulgated under the authority of Wis. Stat. § 50.49(2), to define and establish minimum standards for the “care, treatment, health, safety, welfare, and comfort of patients by home health agencies and for the maintenance and operation of home health agencies which, in the light of advancing knowledge, will promote safe and adequate care and treatment of such patients by home health agencies.”

Under Wis. Admin. Code § DHS 133.14, skilled nursing services must be provided by or under the supervision of a registered nurse. Respondent’s services to its clients include assistance with light housekeeping, food preparation, bathing and toileting, but these services are not provided under the supervision of a registered nurse. Respondent’s caregivers, including the complainant, were supervised by individuals within the company and the individual(s) within the home, such as the client, the client’s family or the client’s power of attorney. Respondent’s services do not constitute skilled nursing services contemplated by this administrative rule.

Therapeutic services are defined under Wis. Admin. Code § DHS 133.02(13) as “physical, occupational, speech or other therapy, medical social services, home health aide service, or any other medically oriented service, except skilled nursing care.” Here, the only relevant definition applicable to respondent is “home health aide services.” Home health aide services are defined under Wis. Admin. Code

§ DHS 133.02(5) as “personal care services which will facilitate the patient’s self-care at home and are necessary to prevent or postpone institutionalization, but do not require performance by a registered nurse or licensed practical nurse.”

Personal care services may include, but are not limited to:

- (a) Assisting patients with care of mouth, skin, hair, and bathing;
- (b) Assisting patients into and out of bed and assisting with ambulation;
- (c) Assisting with prescribed exercises which patients and home health aides have been taught by appropriate health personnel;
- (d) Preparing meals and assisting patients with eating;
- (e) Household services essential to health care at home;
- (f) Assisting patients to bathroom or in using bedpan;
- (g) Assisting patients with self-administration of medications;
- (h) Reporting changes in the patient’s condition and needs; and
- (i) Completing appropriate records.

Wisconsin Admin. Code § DHS 133.17(2).

While complainant may have performed some of the “personal care services” listed in Wis. Admin. Code § DHS 133.17(2), home health aide services are provided in accordance with a plan of care provided for under Wis. Admin. Code § DHS 133.20 and must be supervised by a registered nurse or, when appropriate, by a therapist. Further, this administrative rule requires a registered nurse to assign specific patients to home health aides and provide specific written instructions for patient care. These written instructions may also be provided by an appropriate therapist. Wis. Admin. Code § DHS 133.17(3). Finally, home health aide services are provided by a home health aide as defined under Wis. Admin. Code § DHS 133.02(4) as an individual who is on a registry maintained by the Department of Health Services, works under a contract under the supervision of a registered nurse and is required to have completed a course of training pursuant to Wis. Admin. Code § DHS 133.17.

Here, respondent’s caregivers do not provide services under a plan of care supervised by a registered nurse or therapist. Further, caregivers, such as the complainant, are not assigned patients by a registered nurse or given specific written instructions by a registered nurse or when appropriate, a therapist. Instead, the company’s manager makes assignments based on availability and experience. Also caregivers working for respondent are not required to complete a course of training referenced above. Further, any home health agency must obtain a license from the Department of Health Services, under Wis. Admin. Code § DHS 133.03. Respondent does not hold such a license. Therefore, it has not been established that respondent’s caregivers, including the complainant, provide “skilled nursing and other therapeutic services” as required under Wis. Stat. § 50.49(1)(a)1.

Additionally, respondent does not meet the remaining parts specified under Wis. Stat. § 50.49(1)(a)2. and 3. The respondent is not an organization that has policies established by a professional group including at least one physician and at least one

registered nurse, and it does not provide for supervision of these services by a physician or a registered nurse. The respondent's company manager establishes all its policies, and respondent's services to its customers are overseen by supervisors. Finally, respondent does not maintain clinical records on its clients. Because the respondent is not a home health agency within the meaning of Wis. Stat. § 50.49(1)(a) it does not meet the definition of a health care provider under Wis. Stat. § 146.977(1)(d).

In her petition for commission review, the complainant merely asserts respondent is a health care provider and her complaint should proceed under Wis. Stat. § 146.977(2). The record amply demonstrates that respondent is not a health care facility or health care provider under this statute and the complaint therefore cannot proceed under this statute.

Wisconsin Stat. § 16.009 Board on Aging and Long-Term Care

Pursuant to Wis. Stat. § 16.009(5)(d), an employee discharged, discriminated or otherwise retaliated against for contacting, providing information to or otherwise cooperating with any representative of the Board of Aging and Long-Term Care under Wis. Stat. § 16.009(5)(a) may file a complaint with the Division of Equal Rights under Wis. Stat. § 106.54(5).

This board's statutory duty is to implement a long-term care ombudsman program that includes investigating complaints, monitoring and evaluating programs involving long-term care facilities. Wis. Stat. § 16.009(2). A long-term care facility is defined under Wis. Stat. § 16.009(1)(em) as one of the following: (1) a nursing home, as defined in s. 50.01(3); (2) a community-based residential facility, as defined in s. 50.01 (1g); (3) a facility, as defined in Wis. Stat. § 647.10; (4) a swing bed unit in an acute or extended care facility, as specified under 42 USC 1395tt; (5) a hospice, as defined in s. 50.90 (1) (c); (6) an adult family home as defined in Wis. Stat. § 50.01(1); or (7) a residential care apartment complex as defined in s. 50.01 (6d).

Respondent is not a nursing home, a community-based residential facility, a swing bed unit in an acute or extended care facility, a hospice, adult family home or a residential care complex, leaving the only possibility that respondent may be a facility as defined in Wis. Stat. § 647.10.

Under Wis. Stat. § 647.10, a facility means one or more places in which a provider undertakes to provide a person with nursing services, medical services or personal care services, in addition to maintenance services, under a continuing care contract. Respondent does not provide medical services or nursing services as those services are statutorily defined under Wis. Stats. §§ 647.01(6) and (7) and respondent's services do not meet those statutory definitions. Instead respondent provides non-medical home care service.

Personal care services, maintenance services and continuing care contract are defined under Wis. Stat. §§ 647.01(8), (5) and (2), respectively. Personal care



services means “assistance with meals, dressing, movement, bathing or other personal needs or maintenance, or other direct supervision and oversight of the physical and mental well-being of a person.” Maintenance services means “food, shelter and laundry services.” And a continuing care contract means “a contract entered into on or after January 1, 1985, to provide nursing services, medical services or personal care services, in addition to maintenance services, for the duration of a person's life or for a term in excess of one year,” conditioned upon either: (1) an entrance fee in excess of \$10,000, or (2) the transfer of at least \$10,000 if the amount is expressed in dollars or 50 percent of the person's estate if the amount is expressed as a percentage of the person's estate to the service provider upon the person's death.

While it appears that the complainant may have performed personal care services and more clearly maintenance services within the statutory definitions, these services were not provided under a continuing care contract. There is no entrance fee associated with respondent's services and respondent may serve clients for less than a year where termination is not necessarily based on a client's death. The respondent is not a long-term facility under Wis. Stat. § 16.009(1)(em) subject to this statute.

Although not part of her complaint filed with ERD, complainant now asserts in her petition for commission review that she reported her allegations regarding the respondent to the state's Board on Aging and Long-Term Care and “found out that ombudsman cannot investigate.” Even if the commission could credit this assertion made for the first time on review, the complainant's admission that the ombudsman “cannot investigate,” supports, if anything, the conclusion that the respondent is not a long-term facility subject to the board's authority.

Wisconsin Stat. § 50.07 Prohibited Acts

Pursuant to Wis. Stat. § 50.07(3)(b), any employee discharged, discriminated or otherwise retaliated against in violation of Wis. Stat. § 50.07(1)(e) or (em) may file a complaint with ERD under Wis. Stat. § 106.54(5). Wis. Stat. §§ 50.07(1)(e) and (em) make it unlawful for a person to:

- Intentionally retaliate or discriminate against any employee for contacting or providing information to any state official, including any representative of the office of the long-term care ombudsman under Wis. Stat. § 16.009 (4), or for initiating, participating in, or testifying in an action for an authorized remedy authorized under this subchapter [care and service residential facilities].
- Intentionally retaliate or discriminate against any employee on whose behalf another person contacted or provided information to any state official, including any representative of the office of the long-term care ombudsman under Wis. Stat. § 16.009 (4), or initiated, participated in or testified in an action for any remedy authorized under this subchapter [care and service residential facilities].

Even though the complainant now asserts for the first time in her petition, that she complained to the ombudsman about the respondent, the respondent is not a care and service residential facility as defined under Wis. Stat. § 50.07(1), including a home health agency as defined under Wis. Stat. § 50.49(1)(a).

Wisconsin Stat. §§ 46.90 Elder Abuse Reporting System and 55.043 Adult-At-Risk Agency

Pursuant to Wis. Stat. §§ 46.90(4)(b) and 55.043(1m)(c), any employee discharged or otherwise discriminated against for filing a report under Wis. Stat. §§ 46.90 or 55.043 may file a complaint with ERD under Wis. Stat. § 106.54(5). These statutes prohibit discharge, discrimination, or other retaliation against persons who report elder abuse to a county department, elder-adult-at-risk agency, state or local law enforcements, the board of aging and long-term care or adult-at-risk agencies as designated by a county board.

To be covered under either Wis. Stat. §§ 46.90(4)(ab) or 55.043(1m), the person filing the report must be the following:

1. An employee of any entity that is licensed, certified, or approved by or registered with the department [of health services].
3. A health care provider, as defined in s. 155.01 (7).
4. A social worker, professional counselor, or marriage and family therapist certified under ch. 457.

Complainant is not a social worker, professional counselor, or marriage and family therapist. She is also not an employee of an entity that is licensed, certified, approved or registered with the Department of Health Services.

The only relevant analysis remaining is whether complainant is a health care provider within the meaning of Wis. Stat. § 155.01(7). Under this statute, "health care provider" means a "nurse licensed or permitted under ch. 441, a chiropractor licensed under ch. 446, a dentist licensed under ch. 447, a physician, physician assistant, perfusionist, podiatrist, physical therapist, physical therapist assistant, occupational therapist, or occupational therapy assistant licensed under ch. 448, a person practicing Christian Science treatment, an optometrist licensed under ch. 449, [or] a psychologist licensed under ch. 455... ." The complainant is not any of the practitioners listed in Wis. Stat. § 155.01(7).

Because the complainant is not covered under Wis. Stat. §§ 46.90(4)(ab) and 55.043(1m)(c) as a protected person permitted to file a report, these statutes are not applicable.

cc: Complainant  
Respondent – Office of Legal Affairs  
Respondent's Attorney, Peter Plaushines

**STATE OF WISCONSIN  
DEPARTMENT OF WORKFORCE DEVELOPMENT  
EQUAL RIGHTS DIVISION**

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Ruzica Kuzmanovic  
3221 S Ridge Crest Ct  
New Berlin, WI 53151

Complainant,

v.

**DECISION AND ORDER ON APPEAL OF  
PRELIMINARY DETERMINATION  
ERD CASE #CR201600029**

Visiting Angels  
1033 Quail Ct, Ste 100  
Pewaukee, WI 53072

Respondent.

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In a complaint filed with the Equal Rights Division of the Department of Workforce Development on January 22, 2016, the complainant alleged that the respondent retaliated against the complainant for engaging in conduct protected under one or more of the Wisconsin Elder Abuse/Health Care Worker Laws, found at sec. 16.009, 46.90, 50.07, 55.043, 146.997 Stats.

On March 20, 2018, the Equal Rights Division ("ERD") issued four separate Amended Preliminary Determinations dismissing the complainant's complaint for lack of jurisdiction. Each Preliminary Determination dealt with a different statute: 50.07, 146.997, 16.009(5)(d), and 55.043. The complainant filed a timely appeal of the Preliminary Determination dealing with sec. 55.043, Stats. by sending in a written appeal and attaching the Preliminary Determination that dealt with sec. 55.043, Stats. The matter was sent to this Administrative Law Judge (ALJ) for a decision on the appeal. However, because the Preliminary Determinations were issued on the same day and it is possible the Complainant meant to appeal *all* the Preliminary Determinations, rather than just the one she attached (and indeed the Respondent's response to the appeal treated her appeal as appeal of all four Preliminary Determinations), all four of the March 20, 2018 Preliminary Determinations will be here addressed.

**Section 16.009. Wisconsin Statutes**

Wisconsin Statute Section 16.009 provides protection from termination or retaliation for employees who provide information to the State board on aging and long-term care. Wis. Stat. § 16.009 (Sa) (2015-16). The statute only protects individuals who work in a long-term care facility. Wis. Stat. § 16.009 (Sa) (2015-16). The statute defines a long-term care facility as one of the following: (1) a nursing home; (2) a community-based residential facility; (3) a facility; (4) a swing bed in an acute care facility or extended care facility; (5) a hospice; (6) an adult family home; or (7) a residential care

apartment complex. Visiting Angels does not fall under the definition of nursing home, community-based residential facility, a swing bed in an acute care facility or extended care facility, a hospice, adult family home, or residential care apartment complex.

Facility is defined as "one or more places in which a provider undertakes to provide a person with nursing services, medical services or personal care services, in addition to maintenance services, under a continuing care contract." Wis. Stat. § 647.01(4) (2015-16). Visiting Angels does not provide nursing services or medical services. Nursing services refer to "those services pertaining to the curative, restorative and preventive aspects of nursing care that are performed by or under the supervision of a nurse licensed under ch. 441, but does not include nursing services provided only on an emergency basis." Wis. Stat. § 647.01 (7) (2015-16). Medical services refer to "those services pertaining to medical or dental care that are performed on behalf of patients by or at the direction of a physician licensed under ch. 448 or a dentist licensed under ch. 447." Wis. Stat. § 647.01 (7) (2015-16). Visiting Angels is a non-medical home care service. None of its services are performed by or under the supervision or direction of a nurse or physician. Accordingly, this statute may only apply if it is determined that Visiting Angels provides personal care services under a continuing care contract.

Visiting Angels provides personal care services; however, Visiting Angels does not provide said services under a continuing care contract, as required by statute. A continuing care contract is conditioned on the payment of an entrance fee in excess of \$10,000 or the transfer of at least \$10,000 if the amount is expressed in dollars or 50% of the person's estate if the amount is expressed as a percentage of the person's estate. Wis. Stat. § 647.01(2) (2015-16). There is no entrance fee associated with Visiting Angels' services. Rather, clients receive invoices in specified increments, typically weekly. Although some clients may pay \$10,000 or more than 50% of their estate for Visiting Angels' services, a continuing care contract also requires said care occur in excess of one year or for the duration of the client's life. *Id.* Visiting Angels serves clients for less than year whose termination of Visiting Angels' services is not due to their death. Accordingly, as Visiting Angels does not meet the definition of a continuing care contract, it does constitute a facility and thus Wisconsin Statute Section 16.009 does not apply to the case at hand.

Even if the Respondent were a long-term care facility, the Complainant has made no claim in her complaint or supporting documentation that she ever had any communication with the Board on Aging and Long-Term Care.

#### § 50.07

Wisconsin Stat. § 50.07 prohibits any individual representing a nursing home, community based residential facility, adult home, residential care apartment complex or home health agency from retaliating against employees that contact any state official, including any representative of the office of long-term care ombudsman, provides any information to any state official, and/or initiates, participates in, or testifies in any proceeding authorized under this statute.

The Complainant has made no claim in her complaint or supporting documentation that she ever had any communication whatsoever with "any state official, including any representative of the office of the long-term care ombudsman." Wis. Stat. § 50.07. Therefore, she does not qualify for protection under the Retaliation for Reports Regarding Residential Care Facilities Law.

**§ 55.043**

Wisconsin Stat. § 55.043 prohibits employers from retaliating against employees of health care providers or an entity licensed by the department, social workers, professional counselors, and/or marriage and family therapists making reports under the statutes. It prohibits retaliation against an individual who files a report with "the county department, the adult-at-risk-agency, a state or local law enforcement agency, the department or the board on aging and long-term care." Wis. Stat. § 55.043

The Complainant has made no claim in her complaint or supporting documentation that she ever had any communication whatsoever with any of the entities listed in the law. Therefore, she does not qualify for protection under the Adult-at-Risk Agency law prohibiting retaliation.

**§ 146.997**

Wisconsin Stat. § 146.997(2)(a) provides employees with a mechanism to report information regarding violations of laws or regulations or standards established by law, regulations or clinical or ethical standards that may pose a potential risk to public health or safety. Reports to officers, directors, or employees of the health care facility or health care provider are sufficient to gain protection under this statute. However, this statute only governs employees who are employed by a "health care facility" or a "health care provider."

Wisconsin Stat. § 146.997(1)(c) defines a "health care facility" as "a facility, as defined in s. 647.01 (4), or any hospital, nursing home, community-based residential facility, county home, county infirmary, county hospital, county mental health complex or other place licensed or approved by the department of health services

A "home health care provider" may be a "home health agency" as defined in Wis. Stat. § 50.49(1)(a). Under this statute, a home health agency is defined as "an organization that primarily provides skilled nursing and other therapeutic services; has policies established by a professional group including at least one physician and at least one registered nurse to govern services, and provides for supervision of these services by a physician or a registered nurse; and maintains clinical records on all patients."

Wisconsin Admin. Code § DRS 133.02(3) defines a "home health agency" as an organization that "primarily provides both skilled nursing and other therapeutic services to patients in their homes." Therapeutic service is defined as "physical, occupational, speech or other therapy, medical social services, home health aide service, or any other medically oriented service except skilled nursing care," pursuant to Wis. Admin. Code § DRS 133.02(12).

Home health aide services, are in turn defined, pursuant to Wis. Admin. Code § DRS 133.02(5) as "personal care services which will facilitate the patient's self-care at home and are necessary to prevent or postpone institutionalization, but do not require performance by a registered nurse or licensed practical nurse." Under Wis. Admin. Code § DRS 133.17(2), these types of personal care services may include, but are not limited to:

- (a) Assisting patients with care of mouth skin, hair, and bathing;

- (b) Assisting patients into and out of bed and assisting with ambulation;
- (c) Assisting with prescribed exercises which patients and home health aides have been taught by appropriate health personnel;
- (d) Preparing meals and assisting patients with eating;
- (e) Household services essential to health care at home;
- (f) Assisting patients to bathroom or in using bedpan;
- (g) Assisting patients with self-administration of medications;
- (h) Reporting changes in the patient's condition and needs; and
- (i) Completing appropriate records.

The services the complainant performed on behalf of the respondent may constitute "other therapeutic services" as contemplated by Wis. Stat. § 50.49 (1) (a). However, the respondent is not an organization that has policies established by a professional group including at least one physician and at least one registered nurse to govern services and provides for supervision of these services by a physician or a registered nurse and maintains clinical records on all patients, pursuant to this statute. Although the Complainant alleges in her appeal that a nurse worked for the company for a "short period of time", she does not allege that she provided supervision of services. Moreover, the Respondent denies emphatically that a nurse ever worked for the company.

Therefore, the Respondent is not a home health agency under Wis. Stat. § 146.997.

**Relationship between Petra's Living Assistance, LLC and Visiting Angels**

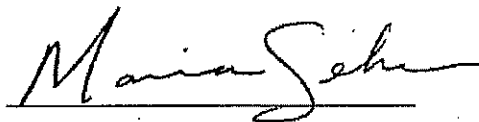
The Respondent, Visiting Angels, is perhaps more accurately named by its corporate entity, Petra's Living Assistance, LLC, which is registered with the State of Wisconsin. Visiting Angels appears to be a nation-wide franchisor by the name of Living Assistance Services, Inc. According to its website, Visiting Angels is a national, private duty network of franchised home care agencies that provides in-home care, respite care, senior personal care, elderly care, companion care, and elder care services. Petra's Living Assistance, LLC appears to be a franchisee of Living Assistance Services, Inc. Neither Petra's Living Assistance nor Living Assistance Services, Inc. appear to be supervised by a physician or registered nurse, therefore they are not subject to Wis. Stat. § 146.997.

For the reasons discussed above, the Administrative Law Judge issues the following:

**ORDER**

That the Preliminary Determinations and Orders in this matter are affirmed.

Dated at Milwaukee, Wisconsin \_\_\_\_\_ JUN 22 2018



Maria Selsor  
Administrative Law Judge

cc: Complainant  
Respondent - ATTN: Office of Legal Affairs  
Peter Plaushines, Attorney for Respondent