



**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CATHERINE ANN STONE,)	
)	WD71813
Respondent,)	
v.)	OPINION FILED:
)	
MISSOURI DEPARTMENT OF)	August 17, 2010
HEALTH AND SENIOR SERVICES,)	
)	
Appellant.)	

**Appeal from the Circuit Court of Cole County, Missouri
Honorable Richard G. Callahan, Judge**

Before: Victor C. Howard, P.J., Thomas H. Newton, and Gary D. Witt, JJ.

The Missouri Department of Health and Senior Services (DHSS) appeals the circuit court's judgment reversing its decision to discipline Ms. Catherine Stone. DHSS received a complaint that Ms. Stone, a charge nurse, abused a resident in a long-term care facility. DHSS found that her treatment of the resident constituted abuse under section 198.070¹ and notified Ms. Stone that her name would be placed on the employee disqualification list (EDL) for eighteen months. Ms. Stone appealed the allegations to the Administrative Hearings Unit of DHSS, which affirmed the decision. Ms. Stone sought judicial review, arguing the evidence did not support DHSS's finding of abuse; she also argued that the notice related to the EDL violated

¹ Statutory references are to RSMo 2000 and the Cumulative Supplement 2009.

due process of law. The circuit court agreed with Ms. Stone and reversed DHSS's decision. We affirm the circuit court's judgment.

Factual and Procedural Background

On November 6, 2007, a dietary aide, Ms. Andrea Delinger, and a nursing assistant, Ms. Penny Foster, submitted written statements to the Director of Nursing (DON) alleging that Ms. Stone attempted to force feed medication in the dining room to a resident who suffered from dementia and was mentally disabled. At the DON's request, Ms. Stone and the other nurse present at the time submitted written accounts of the incident. Ms. Stone denied holding the resident's head back but admitted that she tried to feed applesauce that contained medication to the resident. The other nurse reported that she did not see anything. She only heard the resident refusing the medication, yelling a little louder than before, and cussing; she was not alarmed because that was the resident's normal behavior.

On November 8, the DON and the administrator interviewed the resident and concluded that the resident "ha[d] no apparent affects or injuries from the incident." However, Ms. Stone was terminated because she used restraint on "the resident creating safety, health possible harm." Thereafter, a separate investigation was conducted by the Department of Health and Senior Services (DHSS), and Ms. Stone was placed on the EDL.

At a pre-deprivation hearing, the DON testified via telephone that the resident had a history of being difficult with the staff and other residents including during the administering of her medicine; she would slap, hit, and curse. The DON also testified that, according to the resident's care plan, the staff was required to leave her alone and return later to attempt feeding again, or ask someone else to administer the medication.

Ms. Delinger testified via telephone that she left the kitchen area to investigate because the resident was screaming. She noticed Ms. Stone forcing medicine into the “[resident]’s mouth with her right hand and her left hand was on the [residents]’s forehead forcing her head back into the chair.” She further testified that the resident started swinging with her left arm, and Ms. Stone recruited Ms. Foster to hold the resident’s arm down while she continued to force medicine into the resident’s mouth. Ms. Delinger believed that the resident was scared because she was “screaming,” “crying,” and “being very combative.” She also believed that from where she was standing, fifteen feet away, Ms. Stone’s hand placement on the resident’s head was forceful as opposed to an attempt to “steady her head to give her medication.” She noticed no injuries and was able to calm down the resident by redirecting her.

Ms. Foster testified via telephone that the resident was “calm” some days and was “upset” on other days. She observed the resident being agitated before the dining room incident. She further testified that she held the resident’s arm at Ms. Stone’s request to prevent the resident from hitting Ms. Stone while she tried to administer the medicine. Ms. Foster observed the resident hit Ms. Stone several times as the resident jerked her head in an attempt “to kick and buck out the wheelchair.” Ms. Foster also observed Ms. Stone hold the resident’s head by placing her hand on the resident’s forehead. She denied Ms. Stone was pushing the resident’s head back while holding it. She opined that Ms. Stone’s actions did not upset the resident. But the resident was upset because she did not want to take her medicine; the resident was in a “bad mood.”

The DHSS investigator testified that she concluded Ms. Stone’s actions constituted abuse because Ms. Stone had held the resident inappropriately to give her medicine, even though Ms. Stone’s actions did not harm the resident. Finally, Ms. Stone presented evidence from another

nurse who stated that the resident was difficult to feed, and that some restraints had to be used against her.

At the end of the hearing, DHSS decided that Ms. Stone used minimal restraint on the resident in her “attempt to forcefully medicate,” although the resident’s rejection of the medicine was clear. It cited certain Missouri Code of Regulations addressing the rights of residents to refuse treatment and to be free from restraint and coercion. It further determined that the resident “experience[ed] emotional harm and distress” because she elevated her yelling, voiced a refusal, spat, and “attempted to fight off” Ms. Stone and Ms. Foster. It concluded that Ms. Stone should have known her actions were inappropriate based on experience and the resident’s care plan. Finally, it affirmed the decision to place Ms. Stone on the EDL; the circuit court reversed DHSS’s decision. DHSS appeals.

Standard of Review

We review DHSS’s decision rather than the circuit court’s judgment. *Klein v. Mo. Dep’t of Health & Senior Servs.*, 226 S.W.3d 162, 164 (Mo. banc 2007) (citing section 536.140.2). Our review is limited to a determination of whether DHSS’s decision was “supported by competent and substantial evidence upon the whole record and was otherwise authorized by law.” *Id.* We defer to DHSS’s factual findings, but review any “interpretation, application, or conclusion of law . . . *de novo.*” *Id.*

Legal Analysis

In the first point,² Ms. Stone contests DHSS’s decision to place her on the EDL , arguing that it erroneously declared and applied the law in finding she had abused a resident. Specifically, she argues that DHSS failed to show the following to prove abuse occurred: “(1)

² Because we review DHSS’s decision and DHSS ruled against Ms. Stone, we address Ms. Stone’s points of alleged error.

actual infliction of emotional injury or harm; (2) affirmative evidence with respect to what constitutes the applicable standard of care; and (3) affirmative evidence that a person has acted knowingly.”

A person is placed on the EDL when it is determined that he or she has “knowingly or recklessly abused or neglected a resident” while employed in a facility. § 198.070.13. Abuse is defined as “the infliction of physical, sexual, or emotional injury or harm.” § 198.006. Here, we must decide whether the finding of emotional injury or harm was supported by competent and substantial evidence. The statutes do not define emotional injury or harm. Nor is the phrase as used in section 198.006 interpreted in our case law.

Ms. Stone argues that because the resident was already noncompliant and combative without provocation, evidence of the resident behaving consistently with these conditions while Ms. Stone attempted to administer medicine was not sufficient to support a finding of emotional injury or harm. Rather, Ms. Stone argues, expert testimony was needed to substantiate that the resident’s further noncompliance and combativeness during the administering of medicine was an expression of emotional harm or injury. DHSS asserts that expert testimony was not needed because, according to *Klein*, there is a low threshold for establishing infliction of “emotional injury or harm” such that a layperson’s opinion could substantiate a finding the resident suffered “emotional injury or harm.” DHSS specifically claims that the resident’s combativeness and elevated screaming were a result of “emotional injury or harm” under the circumstances of Ms. Stone forcing the “[resident]’s head back into her wheelchair.” We disagree with DHSS.

In *Klein*, the Missouri Supreme Court stated that “injury or harm” were common terms that should be given their plain meaning. 226 S.W.3d at 164. It held that the specific act of striking a resident “necessarily involves physical injury or harm . . . in the nature of physical

pain.” *Id.* It further held that the statute does not require “a physical manifestation of injury or harm.” *Id.* Finally, it concluded that because there is a “low threshold for establishing the infliction of physical injury or harm,” the evidence of striking the resident was sufficient evidence of abuse. *Id.* Because it involved an incident in which the Supreme Court concluded that the nursing home employee’s actions necessarily resulted in the infliction of some degree of physical injury or harm, however, *Klein* does not address whether expert testimony may be required where the existence of harm or injury may not be within the common experience of the fact-finder. Thus, *Klein* is inapplicable to this situation.

Whether someone has sustained emotional harm may be established by his or her reaction to the situation. *See State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. banc 2006) (stating that expert testimony is not needed to establish damages for “emotional distress of a generic kind—that is the kind of distress or humiliation that an ordinary person would feel in such circumstances”); *see also White v. Moore*, 58 S.W.3d 73, 77 (Mo. App. W.D. 2001) (stating that Missouri courts permit fact finders to determine a person’s mental or emotional condition from a person’s actions and behaviors). Thus, expert testimony is generally not required to establish emotional harm. *See White*, 58 S.W.3d at 78. The emotional harm of an ordinary person is usually in the fact finder’s common experience. *See Cunningham*, 182 S.W.3d at 568.

DHSS found that the resident was harmed based on the resident’s response to Ms. Stone’s attempt to force feed the medication. The record would support such a finding had this been an ordinary person. However, the record shows that the resident was mentally disabled and had dementia. Dementia includes “the loss of thinking, remembering, and reasoning so severe that it interferes with an individual’s daily functioning, and may cause symptoms that include changes

in personality, mood, and behavior.” *See* § 198.006(8). The record also shows that the resident was already aggressive when she entered the dining room. She continued this behavior during the attempted giving of the medication, except that her screams escalated; this lasted for a couple of minutes. Determining whether a mentally disabled resident with dementia sustained emotional harm from the feeding incident was beyond the common experience of the fact finder.

The only witness who opined the resident sustained emotional harm from Ms. Stone’s actions was non-medical personnel. The nursing assistant who held the resident’s arm believed that the resident behaved that way because she did not want to take her medication. Another nurse described the resident’s behavior as normal despite the elevated screaming. Moreover, no evidence was shown that the resident had a substantial change in her behavior immediately after the incident; she continued in her aggressive behavior. Although expert testimony is not needed in all cases to establish emotional injury or harm, the particular circumstances of this case and the mental condition of the resident required expert testimony to establish whether the resident’s reaction during the forced medication incident was a manifestation of an emotional injury or harm. Ms. Stone’s first point is granted.

Finally, Ms. Stone presents a second point alleging violation of her right to due process. However, our disposition of the first point makes this point moot.

Conclusion

We affirm the circuit court’s judgment.

Thomas H. Newton, Judge

Howard, P.J., and Witt, J. concur.