



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT

**MHRC Case No: E16-0054**

January 3, 2018

**Ethan Frasier (Auburn)**

v.

**Paine Products, Inc. (Auburn)**

### **I. Summary of Case:**

Complainant Ethan Frasier alleged that Respondent Paine Products, Inc. a manufacturer of balsam items, retaliated against him by discharging him following a coworker's report to management on his behalf of allegedly unlawful deductions from his pay. Respondent denied retaliation and stated that Complainant was discharged for performance issues. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, holding an Issues and Resolution Conference ("IRC"), and requesting additional information. Based upon all of this information, the Investigator recommends that the Maine Human Rights Commission ("Commission") find reasonable grounds to believe that Respondent unlawfully retaliated against Complainant for reporting illegal deductions from his paycheck.

### **II. Jurisdictional Data:**

- 1) Dates of alleged discrimination: June 5, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): February 3, 2016.
- 3) Respondent is subject to the Maine Human Rights Act ("MHRA"), the Maine Whistleblowers' Protection Act ("WPA"), and state employment regulations.
- 4) Complainant is represented by Sonia J. Buck, Esq. Respondent is not represented by counsel.

### **III. Development of Facts:**

- 1) Complainant provided the following in support of his claims:

Complainant noticed discrepancies in his paycheck and discussed them with his girlfriend ("Girlfriend"), who also worked for Respondent. Complainant learned that Respondent deducted time for taking coats off, getting coffee, and going to the bathroom. On behalf of Complainant, Girlfriend told Respondent that Complainant believed the deductions were illegal. Complainant and Girlfriend also contacted a state agency about their concerns in hopes that it would prompt corrective action by

Respondent. Complainant and Girlfriend were both discharged the following day and told they were no longer a good fit with the company. Complainant believes Respondent's reason for discharging him is pretextual and that the real reason for his discharge is his report of illegal deductions from his paycheck.

2) Respondent provided the following in support of its position:

Respondent spoke to Complainant several times about his aggressive and disrespectful behavior. Girlfriend spoke to Respondent concerning Complainant's belief that time deductions from his paycheck were illegal. Girlfriend walked out of the meeting and left with Complainant. Respondent claims Complainant and Girlfriend quit. Complainant was not a good fit for the company.

3) The Investigator made the following findings of fact:

- a) Complainant's supervisor ("Supervisor") alleged he spoke to Complainant about aggressive behavior and disrespect on several occasions. Complainant had never received formal discipline.<sup>1</sup> Respondent's President stated she never had any conflict with Complainant, and that he was "nothing but polite" to her. She also described him as "mild" and "very quiet".
- b) Respondent provides a paid 15-minute morning break for employees who start work by 7:00 am, and a 10-minute paid afternoon break for employees who work for at least four hours after lunch.<sup>2</sup> The lunch break is 30-minutes long, and is unpaid.
- c) Respondent uses a timeclock for employee check in/check out. There is a sign above the timeclock stating: "Late arrivals will be paid starting with the next quarter hour." Supervisor explained that check in times of 7:53 am and 8:01 am would both be considered 8:00 start times. Employees were expected to punch in when they arrived, but to use time before their scheduled start for things like chatting or smoking. By punching in when they walked past the clock, they would avoid having to return to that area just prior to starting their actual work tasks.
- d) Complainant said he noticed that his paychecks did not reflect his actual hours worked. He discussed this with Girlfriend, but he did not report it to other managers immediately.
- e) In February 2015, Complainant mentioned a discrepancy in his check to the President, and she said if there was a discrepancy it would be made up in the next paycheck. Complainant said he heard this from President many times in passing. Complainant did not say at this time that he thought Respondent was doing anything unlawful. Respondent stated that when an error was found, which was usually a mathematical error, it was corrected the next week.
- f) In April 2015, Complainant learned that Respondent was deducting for bathroom breaks, taking off coats, and making coffee. President stated that she explained the clock policy to Girlfriend and that Girlfriend said that she would explain it to Complainant because he is very "literal". President denied she told Girlfriend she deducted time as alleged by Complainant.
- g) On June 4, 2015, Girlfriend met with President to discuss missing hours in her own and Boyfriend's

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<sup>1</sup> Supervisor stated Respondent has a documented progressive discipline process but it is not described in the 2015 Employee Handbook.

<sup>2</sup> Complainant said she would often check out on the timeclock for breaks, even though she was not required to.

paychecks.<sup>3</sup> Complainant alleged President told Girlfriend Respondent docked time for “going to the bathroom”, “taking off your coat”, and “making coffee”. Respondent denied making the statements and stated she described company policy.<sup>4</sup> Girlfriend requested a copy of Complainant’s hours, which President provided. President alleged Girlfriend argued that they should be paid for every minute they are in the building. Girlfriend left the meeting, then returned after speaking with Complainant outside. Complainant alleged she asked if she and Complainant could take the remainder of the day off and that President approved it. President alleged Girlfriend did not “ask” to leave; Girlfriend stated that she and Complainant “have had enough, we need the afternoon to think”, and walked out. President believed that Girlfriend and Complainant had quit. Complainant denied that he quit.

- h) On June 4, 2015, Complainant and Girlfriend called a state agency and asked about Respondent’s alleged timeclock and pay practices. Complainant stated he was unsure if Girlfriend stated that the agency would investigate, but he was certain that they did not follow up on the call. Respondent said it was never contacted by the agency.
- i) On June 5, 2015, while getting ready for work, Girlfriend received a call from a coworker to inform them that Respondent had locked the doors, and directed that Complainant and Girlfriend not be allowed into the building. Respondent acknowledged that the building was secured because an employee had expressed safety concerns should Complainant and Girlfriend arrive before management.
- j) That day, President called and told Complainant that they were going “to go separate ways”. Complainant went to Respondent’s building later in the day and returned work product to Supervisor, without incident. Complainant said, “Here’s your product. Guess we’re done”. Supervisor responded, “Guess we are.”
- k) After his discharge, Respondent described Complainant as aggressive, disrespectful, accusatory, threatening and intimidating. Complainant denied this and stated that these allegations were new to him.

#### IV. Analysis:

- 1) The MHRA provides that the Commission or its delegated investigator “shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 Maine Revised Statutes (“M.R.S.”) § 4612(1)(B). The Commission interprets the “reasonable grounds” standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA prohibits retaliation against an employee because the employee, or someone acting on behalf of the employee, makes good faith reports of what they reasonably believe to be a violation of law. *See* 5 M.R.S. § 4572(1)(A); 26 M.R.S. § 833(1)(A).
- 3) To establish a prima-facie case of WPA retaliation,<sup>5</sup> Complainant must show that he, or someone acting on

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<sup>3</sup> Complainant was sitting in the car waiting to go to lunch break.

<sup>4</sup> Respondent stated she explained to Girlfriend that employees may check in a few minutes prior to the start of a shift to use the bathroom, taking off coats, or make coffee, but that paid time did not start until the scheduled start of the shift.

<sup>5</sup> In order to determine whether Complainant has met the reasonable grounds standard, the Commission must determine whether he has at least an even chance of succeeding *at trial*. Accordingly, *Brady v. Cumberland County*, 2015 ME 143,

his behalf, engaged in activity protected by the WPA, he was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; One way to prove the causal link is if the adverse job action happens in “close proximity” to the protected conduct. *Id.* at 1998 ME 227, ¶ 16, 719 A.2d at 514-15.

- 4) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA protected activity. *See Wyrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> Cir. 1995). Respondent must then “produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action.” *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry his overall burden of proving that “there was, in fact, a causal connection between the protected activity and the adverse employment action.” *Id.* In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant’s protected activity, although protected activity need not be the only reason for the decision. *See Maine Human Rights Comm’n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).
- 5) Here, Complainant established a prima-facie claim. Girlfriend reported on Complainant’s behalf what he reasonably believed were unlawful deductions from his paychecks, and he was discharged the next day.
- 6) Respondent provided a legitimate, nondiscriminatory reason for ending Complainant’s employment by explaining that it believed Complainant had quit, and that Complainant’s behavior with coworkers had become intolerable and that he was no longer a good fit for the company.
- 7) In the final analysis, Complainant has shown that he has at least an even chance of proving that the real reason for his discharge was whistleblower retaliation, with reasoning as follows:
  - a. It is undisputed that Complainant’s last day of employment was the day after Girlfriend spoke to President on his behalf. Complainant did not participate in the conversation and did not tell Respondent that he quit, nor did Respondent ask Complainant directly if he had quit. Respondent merely presumed from Girlfriend’s departure and its own supposition that she and Complainant had quit. Complainant denied that he quit and there is no evidence that Girlfriend stated that she or the Complainant “quit”.
  - b. Respondent’s argument that Complainant quit is not credible. Respondent argued that when Complainant and Girlfriend left for the day, it believed they had quit. Complainant was not part of the conversation between President and Girlfriend, and never made any statement even suggesting that he was quitting. Moreover, Respondent locked down its building the next day, which indicates that they expected Complainant to return. Further, if Complainant had quit, there would have been no need for President to tell him that Complainant was not a good fit for the company any longer.
  - c. Respondent’s arguments that Complainant was aggressive and disrespectful is contradicted by its own descriptions of Complainant as “polite”, “mild”, and “very quiet”. There is no written documentation of Complainant’s alleged behavior, despite Respondent stating that it has a progressive discipline policy.
  - d. Respondent also discharged Girlfriend, which further undermines Respondent’s argument that the reason for Complainant’s discharge was his behavior, which had nothing to do with Girlfriend.
- 8) Whistleblower retaliation is found.

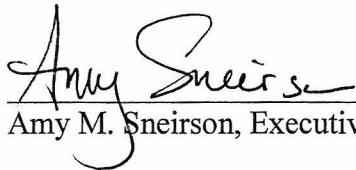
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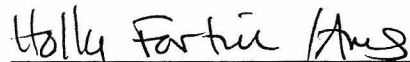
¶39 which holds that the burden-shifting analysis used here is unnecessary when a court is deciding a motion for summary judgment, is inapplicable. *Id.* at ¶ 39, n.9 (expressly not considering applicability of burden-shifting structure at trial).

**V. Recommendation:**

For the reasons stated above, it is recommended that the Commission issue the following finding:

There are **Reasonable Grounds** to believe that Paine Products, Inc. retaliated against Ethan Frasier in violation of the Maine Whistleblowers' Protection Act when it discharged him; and conciliation should be attempted in accordance with 5 M.R.S. §4612(3).

  
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Amy M. Sneirson, Executive Director

  
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Holly Fortin, Investigator