Maine Human Rights Commission

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INVESTIGATOR'S REPORT
MHRC Case No. E17-0004
September 18, 2018

Holly B. Stover (Boothbay)

v.

State of Maine, Department of Health and Human Services (Augusta)

I. Summary of Case:

Complainant, who worked for Respondent as the Director of Violence Prevention, alleged that Respondent retaliated against her when it discharged her for reporting and refusing to engage in what she believed to be unlawful activity. Respondent, a state agency tasked with providing health care and social service support, denied retaliation and asserted that it discharged Complainant 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 this information, the Investigator recommends a finding that there are no reasonable grounds to believe Respondent unlawfully retaliated against Complainant because of protected activity.

II. Jurisdictional Data:

1) Dates of alleged discrimination: July 15, 2016.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): December 29, 2016.

3) Respondent has approximately 3,000 employees and is subject to the Maine Human Rights Act ("MHRA") and the Maine Whistleblowers' Protection Act ("WPA").

4) Complainant is represented by Jeffrey Neil Young, Esq. Respondent is represented by Kelly L. Morrell, Esq.

III. Development of Facts:

1) Complainant provided the following in support of her claims:

> Complainant worked for Respondent writing and submitting grants for approval and managing federal grant money used to fund domestic violence and sexual assault programs. In the Spring of 2015, Complainant told Respondent that a transfer of federal money she managed into another program would

be illegal "supplantation". Respondent, therefore, did not transfer the funds. Approximately two months later, Respondent discharged Complainant and gave no reason for the action. Complainant believes that she was discharged because she reported to her employer and refused to engage in activity she thought was a violation of law.

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

Respondent discharged Complainant because of her lack of leadership and management skills. Complainant continued spending on a grant that had been denied and failed to hold outside providers accountable. Furthermore, Complainant did not have reasonable cause to believe that the requested transfer was supplantation because that involves replacing state or local funds with federal funds.

3) The Investigator made the following findings of fact:

a) Complainant worked for Respondent in various positions for 23 years until she was discharged on July 15, 2016. Her position at the time of her discharge was Director of Violence Prevention, which involved writing and approving grants and managing federal block grant money.

b) Respondent managed federal grants from various funds including the Social Services Block Grant ("SSBG"), the Temporary Assistance to Needy Families Block Grant ("TANF"), and the Victim of Crime Act Block Grant ("VOCA"). Respondent maintained that it can move money from one federal grant to another as long as the funds are used for the purpose they were given.

c) Sometime in 2015, Respondent replaced funds from SSBG with funds from TANF. Complainant asked the Deputy Commissioner of DHHS ("Deputy Commissioner") and another member of that office if this transfer was illegal. They assured her that it was proper, and Complainant did not pursue that matter further.

d) In the Spring of 2016, Respondent planned to replace TANF funds with VOCA funds that Complainant managed. Complainant told the Director of the Office of Child and Family Services ("Director") that this would be illegal supplantation. Complainant recalls Director replying that they would therefore not do it. Ultimately, the funds were transferred in May 2017. The person performing Complainant's duties at the time submitted a statement expressing her belief that the transfer was lawful.

e) On May 25, 2016, a member of the finance office ("Finance") emailed Complainant inquiring as to why she believed the transfer would not be allowed. Ultimately, Complainant replied, "The issue around replacing the TANF with VOCA is supplantation. The VOCA regs[1] are very clear about this. I will send you the regs and a CA State VOCA audit[2] where they were caught and had to pay back funds."

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[1] It is unclear what "VOCA regs" Complainant was referring to in the email as the email does not specifically say and Complainant was unable to provide the information during the Commission's investigation. At the time the email was sent, a final rule on the relevant issue had yet to be codified in the Code of Federal Regulations. It appears that a proposed rule was published on August 27, 2013 in the Federal Register (78 FR 52877) and the last update to the final program guidelines was published in the Federal Register on May 16, 2001 (66 FR 27158).

[2] Respondent provided a copy of what it believed to be the audit Complainant was referring to in her email. The audit states in relevant part, "In our review of these re-allocations, we determined that state funds for victim's services were not fully expended prior to the use of federal funds."

f) On July 15, 2016, Respondent discharged Complainant without explanation. Respondent later listed the reasons for discharge as an inability to hold outside providers accountable and her spending a grant that was not approved by the Governor. Respondent did not provide any information showing that they had informed Complainant of these issues before her discharge.

g) At some point during her time with Respondent, Complainant received training on the rules governing the use of grant funds, including supplantation, and attended industry training[3] where the issue was discussed. At the IRC, the Complainant stated that her belief that the transfer was unlawful was also informed by federal guidelines issued by the Department of Justice ("DOJ").

h) The 2015 DOJ Grants Financial Guide states in relevant part under the heading "Supplanting": "Federal funds must be used to supplement existing State or local funds for program activities and must not supplant those funds that have been appropriated for the same purpose". The Guide's glossary defines the term as follows: "Supplanting is to deliberately reduce State or local funds because of the existence of Federal funds. For example, when State funds are appropriated for a stated purpose and Federal funds are awarded for that same purpose, the State replaces its State funds with Federal funds, thereby reducing the total amount available for the stated purpose."

i) In her complaint, Complainant referred to the replaced funds as "federal" multiple times. At the IRC, Complainant maintained that the replacement of funds would have been unlawful regardless of whether the new funds were replacing state or federal funds. In her final submission, Complainant argued that the replacement of funds would be unlawful because funds that were originally federal, but then allocated for in the state budget, were replaced with new federal funds.

IV. Analysis:

1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

2) The MHRA prohibits retaliation against employees who, pursuant to the WPA, acting in good faith, make reports of what they reasonably believe to be a violation of law or refuse to carry out a directive to engage in unlawful activity. *See* 5 M.R.S. § 4572(1)(A); 26 M.R.S. § 833(1)(A&D).

3) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse action, which may be proven by a "close proximity" between them. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991).

4) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. *See also Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there

[3] Respondent believes this training would have been the annual training sponsored by the National Association of VOCA Assistance Administrators. Neither party was able to provide any specifics about relevant information that may have been taught or discussed at the training.

was, in fact, a causal connection between the protected activity and the adverse action." *Id.* Complainant must show that she would not have suffered the adverse action but for her protected activity, although the protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII).

5) Complainant has not met her burden to show that she reported to her employer, or refused to engage in activity, that she had reasonable cause to believe was a violation of law, with reasoning as follows:

   a. Complainant has not shown that she reported to her employer, or refused to follow a directive to engage in activity,[4] that she had *reasonable* cause[5] to believe was a violation of law.

   b. One way to show one had reasonable cause to believe something was a violation of law is by showing that it was *in fact* unlawful. Another way would be to clearly explain what informed the belief and why, even if reasonably mistaken. Ultimately, it is Complainant's burden to show that she had reasonable cause for her belief.

   c. In her submissions to the Commission, Complainant simply maintained that she believed the transfer would be illegal supplantation (or, more vaguely, an illegal replacement of funds) and was basing that belief on guidelines and training. Complainant's argument in her final submission tends to contradict her previous position and is also unsupported by the DOJ Guidelines. In the end, the information in the record is insufficient to suggest that supplanting occurs other than when *state or local* funds are replaced with federal funds or that Complainant had reasonable cause to believe it did.

6) Discrimination on the basis of unlawful retaliation is not found.

V. <u>Recommendation:</u>

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

There are **No Reasonable Grounds** to believe that the State of Maine/Department of Health and Human Services retaliated against Holly Stover because of protected activity and the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).

Amy M. Sneirson, Executive Director

Joseph H. Hensley, Investigator

[4] It is disputed that Complainant would have been the one actually doing the transfer; if she was not, she could not have refused any directive to transfer the funds. For purposes of the analysis, it will be assumed that Complainant was, in some way, refusing a directive.

[5] The phrase "reasonable cause" is not present in the refusal-of-a-directive WPA subsection (26 M.R.S. § 833(1)(D)) as it is in the reporting WPA subsection (26 M.R.S. § 833(1)(A)), which suggests that in order to be covered by the WPA, the directive refused must be a directive to actually violate the law (as opposed to what the employee has reasonable cause to believe is a violation of a law). Furthermore, to be protected, the refusal must be after the employee has "sought and been unable to obtain a correction of the illegal activity", 26 M.R.S. § 833(1)(D), which does not appear to be the case here; there is nothing in the record to suggest that Respondent requested that Complainant complete the transfer after she brought up its suspected illegality, if at all.