Complainant (Saco)

v.

Respondent 1 (Framingham, MA)
Respondent 2 (Biddeford, ME)

I. COMPLAINANT'S CHARGE:

Complainant, alleged that that she reported improper and/or illegal conduct by her General Manager, resulting in a change in the terms and conditions of her employment. After eight years, her work schedule was changed and was unworkable due to having primary custody of two small children. She asserts that this discrimination also was due to her sex, and that the outcome was constructive discharge.

II. RESPONDENT'S ANSWER:

Respondent, , Inc. (hereinafter, Respondent 1) [1] stated that Ms. Complainant has failed to allege any causal connection between the activities she claims are protected and any adverse employment action.

III. JURISDICTIONAL DATA:

1) Date(s) of alleged discrimination: October 18, 2007 and January 11, 2008

2) Date complaint filed with the Maine Human Rights Commission: April 10, 2008 and Amendment on April 18, 2008.

3) Respondent1, , employs more than 500 employees and is subject to the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, the Whistleblowers' Protection Act as well as state and federal employment regulations.

4) Complainant is represented by Karen Wolfram, Esq. Respondent is represented by Cindy Westervelt, Esq.

5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution conference.

[1] The amended complaint named the individuals listed above as Respondents. Due to an administrative oversight, this investigation has proceeded only against the corporate Respondent, Respondent 1, Inc. Because the individual Respondents were not the focus of the investigation, a recommendation of "no reasonable grounds" is being made as to them.

IV. DEVELOPMENT OF FACTS:

1) The parties and issues in this case are as follows:

   a) Ms. Complainant, is a female who worked for Respondent 1 as an Associate from December 10, 1999 until January 11, 2008.

   b) Respondent 1 is an office supply and office equipment retail company with stores throughout the United States.

   c) Ms. Complainant alleged that that she reported improper and/or illegal conduct by her General Manager, resulting in a change in the terms and conditions of her employment. After eight years, her work schedule was changed and was unworkable due to having primary custody of two small children. She asserts that this discrimination was also due to her sex, and that the outcome was constructive discharge. Respondent, Respondent 1, stated that Ms. Complainant has failed to allege any causal connection between the activities she claims are protected and any adverse employment action.

   d) Biddeford General Manager, CS; Loss Prevention Manager, MA; District Manager, AR; Biddeford Operations Manager, JL; Corporate Human Resources Manager, LS; Licensed Private Investigator, JT; Full-time Associate 2, TS; Full-time Associate 3, BG.

   e) Respondent 1 stated that Ms. Complainant has failed to allege any causal connection between the activities she claims are protected and any adverse employment action.

2) Ms. Complainant discusses her childcare challenges, her two jobs and her requisite work schedule:

   a) "Because I have primary custody of two small children, and am a single parent, I held two jobs; I delivered newspapers in the early day (including weekends) and, after my children were dropped off at daycare, I went to my full-time job with Respondent 1."

   b) "I worked for Respondent 1 from December of 1999 in the South Portland store for about six years and then transferred to the Biddeford store to be closer to home. I transferred only after having been assured that I could continue to work full-time on a set weekly day shift schedule to ensure that I would be home for my two small children in the evenings and on weekends."

   c) "My children's daycare schedule was posted in the Biddeford General Manager's office, to inform him of when I was unavailable due to daycare holidays."

3) The following chronology establishes the relevant timeline for the issues dealt with in this case:

   a) Respondent 1 asserts that anonymous complaints were received on a toll-free tip hotline known as the "Ethics Line" with regard to the Biddeford Respondent 1 store in the fall of 2007.

b) On September 19, 2007, a caller reported the failure of Respondent 1' management to lock the door to where the high-end merchandise was located, in violation of Respondent 1' policies and procedures.

c) On or about September 21, 2007, an anonymous caller alerted Respondent 1 that Biddeford General Manager improperly told another associate what his management passcode was, in clear violation of company policy.

d) On October 18, 2007, there was a report made that store merchandise had been falsely claimed to have been donated to charity when in fact it remained in the store and some, if not all of it, was still being sold.

e) Respondent 1 claims that the three reports in the Fall of 2007 of improper and/or illegal conduct by Respondent 1 management in the Biddeford store were made anonymously and therefore, there could be no retaliation against Ms. Respondent for making the reports. Ms. Complainant, on the other hand, has claimed responsibility for reporting all three incidents of improper and/or illegal conduct by Respondent 1 management. Ms. Respondent agrees that the two September reports were anonymous, but that an October 18, 2007 report was made directly to Loss Prevention Manager.

f) On October 18, 2007, Ms. Complainant reported to security at Respondent 1, Inc. and then Loss Prevention Manager that store merchandise had been falsely claimed to have been donated to charity when in fact it remained in the store and some, if not all of it, was still being sold. She submitted a written report as she had been requested to do by security, describing the illegal and improper conduct. Further, Ms. Complainant provided photographs of the merchandise which had been claimed to have been donated to charity. Shortly after this report of illegal activity, Loss Prevention Manager and District Manager met with Biddeford's General Manager.

g) Each of these three abovementioned incidents was investigated by Loss Prevention Manager. The first 2 incidents resulted in written warnings.

h) On or about November 5, 2007, Ms. Complainant was called into the Biddeford General Manager's office and told that she was no longer allowed to have a set weekly schedule. She was told that she would need to work nights and weekends. Biddeford General Manager informed Ms. Complainant that he would need a response by the end of the week concerning her availability to work nights and weekends. Ms. Complainant explained that she would be forced to resign, because of her two children. She asked to work part-time, which was denied. Ms. Complainant asked the Biddeford Store Manager why this was happening and he responded that he was relaying what District Manager had instructed him to do. Operations Manager was also present during this meeting. No other employees at the Respondent 1 store in Biddeford were brought into Store Manager's office for a meeting about their schedule that day and none were informed that they could no longer have a set schedule.

4) Ms. Complainant offers the following regarding her tenure with Respondent:

a) "During my tenure with Respondent 1, I received positive performance appraisals, bonuses, I was certified to carry keys and as a manager on duty, I was encouraged repeatedly in the South Portland store to pursue a management position."

b) "It was my intention to have a lifetime career at Respondent 1, and to pursue a management track as soon as my children were older and more independent."

c) "My years of working a set schedule, 8a – 4p, Monday through Friday were never an issue for my employer until I reported what I believed to be improper and illegal conduct ."

5) Ms. Complainant describes the circumstances surrounding her reports to management at Respondent 1:

a) "Respondent 1 argues that neither the District Manager nor the Loss Prevention Manager had any indication as to the identity of the anonymous informant for the September, 2007 calls, which I had, in fact, made anonymously. I know for certain, however, that Loss Prevention Manager knew that I had reported the improper and illegal transactions regarding the items which had ostensibly been donated to charity. I talked to him on the phone, talked to him in the store and sent him a written statement about this. When I provided the details, I e-mailed evidence in the form of SKU numbers for the merchandise that was falsely claimed to have been donated and zeroed out of inventory on October 13, 2007. I sent photographs of this same merchandise which was still in the store to be sold after being falsely claimed by General Manager as being donated to charity. I explained in my e-mail to Loss Prevention Manager on October 18, 2007 that after these SKUs had been written off, I asked General Manager if we were going to have the clearance sale on the F-status chairs on the weekend which he had mentioned the week before. General Manager replied, 'we'll try to get to it this weekend, but we can't dig them out yet, because District Manager is coming tomorrow."

b) "I wrote an e-mail message to Loss Prevention Manager on Thursday, October 18, 2007 at 6:51 pm. In part, I said that all of the chairs were listed on the f-status donation eligible list. I explained that the information about inventory adjustments made to the chairs was never communicated to me, the only furniture associate in the store. I wrote my name at the close of the e-mail."

c) "For this reason, Respondent 1' assertion that my whistleblower retaliation claim must fail because my reports were made through anonymous channels is simply untrue."

6) Respondent 1 describes the "legitimate business reason" for changing Ms. Complainant's work schedule:

a) "Complainant refused to work on weekends or on school holidays during which her childrens' daycare was closed."

b) "Her schedule made her unavailable during the store's busiest times, creating additional strain on the company. Complainant's lack of availability consistently created problems for her managers, and Respondent 1 was more than justified in asking her to adjust her schedule in a manner compatible with Respondent 1' business needs."

c) "As explained at the July Issues and Resolution conference, no full-time associate in the store works a set schedule any longer, other than the Inventory Analyst, a unique position in the store that needs to work during set times when customers are not in the store). Two other full-time associates were taken off of their set schedules around the time Complainant was."

d) "Full-time Associate 2 worked full-time Monday through Friday, 8a – 4p for 7 years. After having been approached regarding a more flexible schedule in February, 2008, which proved to be unworkable for him, he resigned on April 3, 2008."

e) "Full-time Associate 3 also worked the same set schedule in the Biddeford store until she was told that she needed to work a more flexible schedule. Upon her resignation on April 24, 2009, she provided as her reason for leaving, *dissatisfaction with work hours*."

f) "Like Ms. Complainant, both these associates were valued employees with significant years of tenure. Unfortunately, business need, rather than employee preference, dictates work schedules. As the labor budget gets tighter, as it does in a slumping economy, set schedules make it difficult for managers to piece together the weekly schedule in an efficient manner."

7) Respondent's position regarding the absence of a written policy on 'no set schedule:'

a) "Ms. Complainant implied that, since there is no written policy on the 'no set schedule' rule, it must not exist. While it is true that there is no policy explicitly stating this rule, it is implicit in our Hours of Work policy. This policy states, 'Scheduling of work hours will be based on efficiency in staffing stores to meet expectations.' This methodology, of scheduling around the customer rather than the associate, is not only documented in policy, but also ingrained in the retail management culture.' While the rule is not perfectly enforced throughout Respondent 1' 1,500 stores across the country, as explained at the July conference, Respondent 1 strives to uniformly enforce this rule. While Respondent 1 is not always 100% compliant with the policy against set schedules, Complainant has failed to produce any evidence that anyone else in the Biddeford store was allowed to work a set schedule."

8) Ms. Complainant has alleged sex discrimination, based upon the following:

a) "I feel like, since I had kids, and no one else there had kids, they used that to push me out."

b) "My schedule was posted. They knew what hours I could work. It seemed to be the easiest way to get me out of there, by saying that my schedule was unworkable."

9) Further investigation reveals:

a) Respondent 1 has repeatedly stated that Complainant fails to provide any evidence that she was retaliated against in violation of the Maine Whistleblower Act, yet Ms. Respondent reported what she believed to be improper and illegal activity, and two weeks later, she was told that she could no longer work the schedule which she had worked for years. She believed that she had a responsibility to the company to report this activity, which, since

there are tax implications with donations made by companies, could have caused serious problems for Respondent 1.

b) Respondent 1 argues that there were two other employees at the Biddeford Respondent 1 store whose set schedules were changed, demonstrating that they were similarly situated. Ms. Respondent argues that they were not similarly situated, because they were not called into the General Manager's office on November 5, 2007 and told that they could no longer work a set schedule. Their schedules were changed in February, 2008.

c) Ms. Complainant alleged that, during the last month of her employment, District Manager changed her attitude and manner towards Ms. Complainant when she spent time in the Biddeford store. Prior to Ms. Complainant's October 18, 2007 report about the donated goods, District Manager greeted her and spoke with her, but, after the report, she shunned and repeatedly ignored Ms. Complainant.

d) Ms. Complainant asserts that after her meeting with General Manager and Operations Manager on or about November 5, 2007, she called the Human Resources department and spoke with Corporate Human Resources Manager to determine whether management could unilaterally change her set schedule without notice, as had been done. She also informed Corporate Human Resources Manager that she was the only one talked to in the Biddeford store about there being no more set schedules and that she could not work a non-set schedule with two young children. She was informed that she should not have been the only person spoken to, but that Respondent 1 could change her schedule the way they did, "if it suits the store's business needs." Ms. Complainant was then told that a month's time to provide management an answer instead of 'until Friday' seemed more reasonable. At that time, Ms. Complainant informed General Manager of her conversation with HR about a month being more reasonable and he agreed, realizing that she would still be forced to resign.

e) Ms. Complainant was forced to resign her position on January 11, 2008 because she was unable to work a non-set schedule with two young children.

f) Ms. Complainant was the reporter of all three incidents of improper and/or illegal conduct by Respondent 1' management at the Biddeford store in the fall of 2007. Only the two September reports were anonymous. Despite her use of anonymous channels for the September reports, General Manager asked all of the store employees who "ratted" him out. As such, it was more than likely he knew from a process of elimination that Ms. Complainant made the September reports.

V. ANALYSIS:

1) The Maine Human Rights Act 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 M.R.S.A. § 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. More particularly, "reasonable grounds" exists when there is enough admissible evidence, or there is reason to believe that formal litigation discovery will lead to enough admissible evidence,

so that there is at least an even chance of Complainant proving in court that unlawful discrimination occurred. Complainant must prove unlawful discrimination in a civil action by a "fair preponderance of the evidence." 5 M.R.S.A. § 4631.

2) Complainant, alleged that that she reported improper and/or illegal conduct by her General Manager, resulting in a change in the terms and conditions of her employment. After eight years, her work schedule changed and was unworkable due to having primary custody of two small children. She asserts that this discrimination was also due to her sex, and that the outcome was constructive discharge.

3) Respondent, Respondent 1, stated that Ms. Complainant has failed to allege any causal connection between the activities she claims are protected and any adverse employment action.

Whistleblowers' Protection Act

4) The Maine Whistleblowers' Protection Act provides, in part, as follows:

No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because . . . The employee, acting in good faith, or a person acting on behalf of the employee, reports orally or in writing to the employer or a public body what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States.

26 M.R.S.A. § 833(1)(A).

5) The Maine Human Rights Act prohibits discharge or discrimination with respect to terms, conditions or privileges of employment because of previous actions that are protected under the WPA. *See* 5 M.R.S.A. § 4572(1)(A).

6) 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 employment action. *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). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *See DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.

7) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA 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 employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*

8) Complainant is able to establish a prima facie case of retaliation in violation of the

Whistleblowers' Protection Act in that:

i. She provided specifics of the October 18, 2007 report to Loss Prevention Manager, in which she reasonably believed violations of law with respect to charitable donations had occurred.

ii. The set schedule which she had worked for eight or nine years was suddenly unavailable to her very soon after she reported illegal activity to Loss Prevention Manager.

iii. As required by statute, she first brought the violations to management's attention, to allow for corrective action.

iv. She suffered retaliatory/adverse action in the terms and conditions of her employment as a result of such "whistleblowing" – her set schedule, which had been workable for eight or nine years, was suddenly no longer available very soon after she made the October 18, 2007 report to Loss Prevention Manager about the merchandise which had been falsely claimed as donated goods.

9) Complainant is able to demonstrate a causal connection between her Whistleblower Protected activity and her schedule change which occurred two weeks after her report.

10) The need for Respondent 1' change of a set schedule, in such close proximity to her October 18, 2007 report was pretextual, invalid, trumped up, and not supported by the facts of what actually occurred.

11) Although it is true that other Biddeford store employees left 5 months later, because of dissatisfaction with their schedules, Ms. Complainant was singled out in the late fall of 2007, clearly in reaction to her report. Respondent 1' management in Biddeford knew very well that she could not leave two small children home alone evenings, weekends and holidays while she went to work.

Unlawful Whistleblower discrimination is found.

Sex Discrimination

1) The Maine Human Rights Act also prohibits employment discrimination because of sex. 5 M.R.S.A. § 4571(1)(A).

2) Because there is no direct evidence of sex discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).

3) To establish a prima facie case of discrimination based upon his sex, Complainant must establish the following: (1) she is a member of a protected class, (2) was qualified for the position she held, (3) suffered an adverse employment action, (4) in circumstances giving rise to an inference

of discrimination. *See Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). *Cf. Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1st Cir. 2002).

4) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262.

5) After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. *See id.* Complainant's burden may be met either with affirmative evidence of pretext or by the strength of Complainant's evidence of unlawful discriminatory motive. *See City of Auburn*, 408 A.2d at 1262, 1267-68.

6) In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.

7) Here, Complainant was unable to establish a prima facie case of sex discrimination with respect to the abrupt change in her set work schedule. There were no circumstances presented that would support an inference of sex discrimination.

VI. RECOMMENDATION:

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

1) There are **Reasonable Grounds** to believe that the Respondent, Respondent 1, Inc., retaliated against Complainant, due to whistleblower activity; resulting in her constructive discharge from employment, and

2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).

3) There are **No Reasonable Grounds** to believe that the Respondent, Respondent 1, discriminated against Complainant, due to sex; and

4) That aspect of the complaint be dismissed in accordance with 5 M.R.S.A. § 4612(2).

5) Because this investigation has focused only on Respondent 1, Inc. and not the individual Respondents, there are **No Reasonable Grounds** to believe that the individual Respondents, discriminated against Complainant, due to whistleblower activity or sex; and

6) That aspect of the complaint be dismissed in accordance with 5 M.R.S.A. § 4612(2).

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Patricia E. Ryan, Executive Director Michèle Dion, Investigator