



Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330

Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711

www.maine.gov/mlrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT E14-0152

October 27, 2015

LaRay Davis (Sandwich, MA)

v.

Lighthouse Painting (South Portland, ME)

I. Complainant's Complaint:

Complainant LaRay Davis alleged that Respondent Lighthouse Painting ("Lighthouse") terminated his employment for engaging in protected activity, specifically making a complaint about not receiving overtime pay.¹

II. Respondent's Answer:

Lighthouse stated that Complainant was discharged after he was caught smoking marijuana on the job site.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: January 21, 2014.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): April 1, 2014.
- 3) Respondent has approximately 8 employees. Respondent is subject to the Maine Human Rights Act ("MHRA") and the Maine Whistleblowers Protection Act ("WPA"), as well as state employment regulations.
- 4) Complainant is represented by Sally Morris, Esq. Respondent is not represented by counsel.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" here.

IV. Development of Facts:

- 1) The parties in this case are as follows:

¹ Complainant's complaint did contain an allegation of disability discrimination as well, but that claim was administratively dismissed for lack of jurisdiction/failure to substantiate pursuant to 5 M.R.S. §4612(2) and the Commission's Procedural Rule 94-348 C.M.R. ch. 2, §2.02(H)(1-2).

- a) Mr. Davis worked as a painter from August 2013 until approximately January 21, 2014, when Lighthouse discharged him.
 - b) Lighthouse is a painting subcontractor.
- 2) Complainant provided the following in support of his position:
- a) In August 2013, Mr. Davis was denied overtime pay. Owner told Mr. Davis that he would never get overtime and threatened to fire Mr. Davis if he said anything to anyone about the overtime pay issue.
 - b) Mr. Davis needed his job so he left the issue alone.
 - c) Because Owner continued not to pay overtime, Mr. Davis contacted the Maine Department of Labor on January 15, 2014, to complain that he was not being paid overtime.
 - d) On January 16, 2014, Mr. Davis injured his ear while painting near a fire alarm that was tested at the time he was painting it. Mr. Davis received medical care for his injury. He was placed out of work for three days.
 - e) On January 21, 2014², Owner went to Mr. Davis's apartment – which he was renting from Owner – to get Mr. Davis's doctor's note, but then told Mr. Davis the note was fake. Mr. Davis asked Owner if he had workers compensation. Mr. Davis also told Owner that Owner knew that he was supposed to pay the workers "overtime all at once."
 - f) On January 23, 2014, Mr. Davis recorded an interaction with Owner in the apartment he was renting. *See Investigator's Note, infra at ¶ 4.*
 - g) Owner told Mr. Davis that he was not going to pay for his ear injury. Owner also stated that Mr. Davis did not have to worry about overtime and terminated his employment.
 - h) Owner also threw Mr. Davis out of the apartment he was renting from Owner.
 - i) Mr. Davis did not smoke marijuana on the job.
 - i. An individual who worked with a different subcontractor on the job Mr. Davis was working on for Lighthouse stated that she never saw him under the influence of any substances. This individual worked with Mr. Davis almost every day that Mr. Davis was employed to work on this specific project. She also hired Mr. Davis to work for her on other jobs.
 - j) Mr. Davis did not receive or sign any warnings related to his attendance during his employment.
- 3) Respondent provided the following in response to Complainant's allegations:
- a) Respondent does not have personnel policies related to an employee complaint process, progressive discipline, retaliation, or grounds for termination.

² During the investigation, Mr. Davis also provided that he was terminated on January 17, 2014.

- b) On January 10, 2014, Mr. Davis received a written warning because he was a no call/no show on January 8 and 9, 2014.
 - c) On January 18, 2014, Owner found Mr. Davis smoking marijuana on the job site. Owner told Mr. Davis that he cannot smoke onsite or during work hours. Mr. Davis became belligerent and walked off the job site. Owner told Mr. Davis not to return to the job site.
 - d) Mr. Davis was terminated because he was caught smoking marijuana on the job site.
- 4) Investigator's Note: Complainant's video of his interaction³ with Owner is summarized as follows:

Owner's demeanor during the 10 minute video was not hostile. Early in the recording, Owner asked Mr. Davis if he was going to move his car. Mr. Davis told him yes, he was going to get it towed. Towards the beginning of the video, Owner asked Mr. Davis why he called "the Labor" on him. Mr. Davis told Owner that he did not have anything to say to Owner.

Owner left the apartment with another individual who was presumably also staying in the apartment. Owner came back a few minutes later and told Complainant that he would be back at the apartment tomorrow at 3:00. Mr. Davis told Owner that he would have his clothes and stuff out by the time Owner comes by. Owner then stated that, "it was not [a] nice thing for you to call Labor." Mr. Davis stated that he did not call and he did not want to argue. Owner stated that he was not arguing, he was just talking. Owner asked Mr. Davis to look into his eyes. Mr. Davis stated that he did not want to look at Owner.

The individual who left with Owner came back into the apartment and said something that was inaudible about being fired. Mr. Davis told this individual that Owner might fire him again and evict him tomorrow. Mr. Davis restated that Owner may fire this individual because the individual told Owner that Mr. Davis was not [at the apartment].

- 5) *Investigator's Note:* Lighthouse did not provide a copy of the written warning it gave to Mr. Davis. Lighthouse stated that the original warning "may have been sent to Mr. Davis's attorney," and that Owner only had a computer copy.

V. 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 discharging an employee because of previous actions that are protected under the WPA. See 5 M.R.S. § 4572(1)(A). The WPA protects an employee who "acting in good faith . . . reports orally or in writing to the employer . . . 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. § 833(1)(A).

³ On the recording, Mr. Davis stated that the date was January 23, the time was 5:43 p.m., and he had been talking for about 10 minutes.

- 3) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that he 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; *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.
- 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 (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 his overall burden of proving that “there was, in fact, a causal connection between the protected activity and the adverse action.” *Id.* Complainant must show that he would not have suffered the adverse action but for his 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); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).
- 5) Here, Complainant has established a prima-facie case of WPA retaliation. Complainant has shown that he engaged in protected activity. He made at least one complaint with Respondent in August 2013 about unpaid overtime and subsequently contacted the Maine Department of Labor in January 2014 when Respondent did not take any action on his complaint. Complainant was discharged, and there is a causal connection between his discharge and his protected activity due to the closeness in time of the two events.
- 6) Respondent has articulated a legitimate, nondiscriminatory reason for its decision to terminate Complainant's employment, namely that Owner caught Complainant smoking marijuana on the job site.
- 7) At the final stage of the analysis, Complainant has shown that he has at least an even chance of success in a lawsuit, and that he would not have been terminated but for his protected activity, with reasoning as follows:
 - a. Complainant stated that he called the Maine Department of Labor about Respondent on January 15, 2014, and that on either January 17 or 21, 2014, he was discharged. The close proximity in time between when Complainant contacted the Maine Department of Labor and his discharge supports a finding that Complainant's complaint to the Maine Department of Labor influenced his termination.
 - b. Respondent stated that he had given Complainant a written warning about attendance issues on or around January 10, 2014, but Complainant denied receiving any type of warning and Respondent did not provide a copy of the warning as part of the investigation, as requested. Respondent further stated that he caught Complainant smoking marijuana on the job site on January 18, 2014, which is what led to his discharge. Complainant denied that he smoked marijuana at the job site. Complainant further stated that a third party who worked with another subcontractor on the job he was doing for Respondent provided that she never saw him under the influence of any substance. The third party witness also hired Complainant to complete work for her on other jobs.
 - c. The fact that Complainant was discharged within days of his call to the Maine Department of Labor is strong evidence of a causal connection between the two events. Furthermore, during Complainant's video recording, Owner can be overheard twice discussing the fact that Complainant called the Maine

Department of Labor, including saying that it was not a "nice" thing for him to have done. The recording was taken within a week of Complainant's discharge.

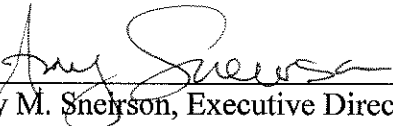
d. While Respondent would have had legitimate reasons for terminating Complainant's employment if he was caught smoking marijuana, Complainant has disputed this fact and shown that he has at least an even chance of success in a lawsuit. Owner mentioned Complainant contacting the Maine Department of Labor twice during their subsequent conversation on his own with no prompting from any of the individuals in the room. Owner was obviously aware that Complainant had contacted the Maine Department of Labor. Additionally, a third party witness stated she had never seen Complainant under the influence which supports Complainant's allegation that he was not smoking marijuana on the job site.

8) Discrimination in violation of the WPA is found.

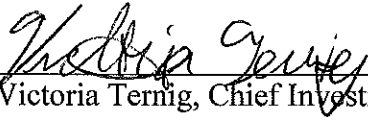
VI. Recommendation:

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

There are **Reasonable Grounds** to believe that Respondent Lighthouse Painting terminated Complainant LaRay Davis's employment because he engaged in protected activity in violation of the MHRA; and conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).



Amy M. Snerison, Executive Director



Victoria Ternig, Chief Investigator