



Maine Human Rights Commission

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INVESTIGATOR'S REPORT E14-0365

July 1, 2016

Julie Ivey (Houlton)

v.

Addison Point Agency¹ (Houlton)

I. Complaint:

Complainant alleged that Respondent retaliated against her in violation of the Maine Whistleblowers' Protection Act ("WPA") by terminating her employment after she complained of illegal activity.

II. Respondent's Answer:

Respondent denied retaliation and alleged that Complainant was discharged because of her insubordination and inappropriate behavior.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: February 24, 2014.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 23, 2014.
- 3) Respondent employs 143 people and is subject to the Maine Human Rights Act ("MHRA"), the WPA, as well as state and federal employment regulations.
- 4) Complainant is represented by John Gause, Esq. Respondent is represented by Terrence Harrigan, Esq.
- 5) Investigative methods used: A thorough review of the materials submitted by the parties, interviews. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

¹ Complainant named "Addison Point Agency" as the respondent here. Respondent provided that its proper legal name was "Addison Point Specialized Services, Inc. d/b/a Addison Point Agency". As Complainant did not amend her complaint to that effect, the name used in the complaint (or "Respondent") is used here.

IV. Development of Facts:

- 1) The relevant parties, issues, documents, and facts in this case are as follows:
 - a) Complainant worked for Respondent as Program Supervisor from October 3, 2011 until February 24, 2014.
 - b) Respondent is a non-profit agency that provides behavioral health services to children and adults. The care services the agency provides are often funded by MaineCare via the Maine Department of Health and Human Services ("DHHS").
 - c) "Coworker" is a Program Supervisor who worked with Complainant.
 - d) "CEO" is Respondent's Chief Executive Officer and "CFO" is its Chief Financial Officer.
 - e) On February 20, 2014 a staff meeting was held during which Complainant and Coworker made reports that they believed Respondent was improperly billing DHHS for services that were not actually provided to clients.
 - f) Complainant alleged that she and Coworker discovered the improper billing while looking for progress notes during an audit of the agency. They discovered that many progress notes (which are used to bill for services rendered to clients) were missing even though Respondent had billed DHHS for the services. Complainant alleged that she and Coworker believed that Respondent was billing DHHS for supervisions (weekly meetings held by program supervisors), which are not direct-care services that can be billed for. Complainant alleged that she believed this to be fraudulent billing, that Respondent was billing MaineCare for more direct-care services than the agency as actually providing. Respondent alleged that it did not bill for supervisions, and that Complainant was made aware of this but refused to accept this fact.
 - g) Complainant alleged that when she and Coworker brought up their concerns regarding improper billing during the February 20th meeting, the Quality Assurance Manager and the Director for Children's Services stated that the agency could in fact bill for supervision and that CFO had stated that this was acceptable. Respondent denies that Quality Assurance Manager made this statement, but acknowledges that Director for Children's Services stated that he believed the agency was allowed to bill for supervision (because he was unaware of billing practices). Complainant stated during this meeting that she had contacted DHHS about billing for supervision and was informed that this was not allowed.
 - h) On February 21, 2014 Complainant participated in a conference call with CEO and CFO to discuss issues raised at the February 20th meeting. During the call, CFO informed Complainant that Respondent did not bill for supervision, and confirmed that supervision was not billable to DHHS. Instead, CFO said, Respondent was "span billing" – lumping all units together for a period of time and that the state would not know which clients were served on which specific dates. Complainant disagreed that this was acceptable, and CEO, Complainant and CFO continued to discuss the issue.
 - i) On February 24, 2014 Complainant's employment was terminated.
 - j) Complainant received no disciplinary action leading up to her discharge. Both Complainant and Respondent acknowledge that there were no problems with Complainant's job performance.

- k) Coworker's employment was terminated on February 25, 2014, one day after Complainant's discharge. Coworker had no disciplinary action leading up to her discharge. Complainant alleged that both she and Coworker were discharged for their joint reports of unlawful activity.

2) Complainant provided the following:

- a) Complainant was discharged due to her reports of improper billing, which she believed to be unlawful. Complainant did not cause disruptions in the workplace by spreading unsubstantiated rumors or telling coworkers that the agency was being "investigated" as opposed to audited, or was committing "fraud". Complainant brought forth legitimate concerns of unlawful billing practices by Respondent.
- b) During the February 20 staff meeting, Complainant did not call Respondent a "dirty agency" or say that the agency was committing fraud. Complainant did not call CFO a liar or state that he was committing fraud, or tell CFO that he had "not been caught yet" regarding billing for supervision as Respondent alleged.
- c) On February 21, 2014, in preparation for a call with Complainant, CEO and CFO called program managers to discuss the phone conference they were about to have. During that call, CEO told a program manager that Complainant was "stirring the pot".
- d) Complainant was not disrespectful during the February 21, 2014 conference call and mainly asked questions about billing due to her concerns. Complainant disagreed with CFO's explanation of his billing methods during the call and told him that she "respectfully disagreed." CEO was loud and defensive during the call.
- e) On February 24, 2014, CEO told her that she was discharged because the agency could no longer move forward with her and that it was not in her job description to make allegations about improper billing. The fact that her allegations were brought up during this call shows direct evidence of retaliation.

3) Respondent provided the following:

- a) Complainant was not discharged due to her reports of unlawful activity or due to any job performance issues. Complainant was discharged for gross insubordination toward CFO during the conference call on February 21, 2014, and for making the statement during the February 20th staff meeting that Respondent was a "dirty agency" and was committing fraud.
- b) During the February 21, 2014 call, Complainant was loud and disrespectful and told CFO that he was a liar. CFO, who is the only employee responsible for billing and with any knowledge of billing, told Complainant that the agency did not bill for supervision, but Complainant refused to believe him and accept his explanation about billing practices.
- c) Complainant caused disruptions in the workplace by telling other employees that the agency was being "investigated" rather than audited. This caused distress among employees. On February 21, 2014, CFO and CEO called all of the supervisors involved in the February 20th meeting to discuss any concerns they had about what Complainant and Coworker had raised during the meeting. Several supervisors asked whether the agency was going to lose funding or whether employees were

going to lose their jobs. CFO could tell that people were stressed and that the office was disrupted because of what they were saying.

- d) Respondent also discovered after Complainant's discharge that Complainant and Coworker were holding secret meetings during work and conducting their own investigation into the billing dispute rather than focusing on their work. Respondent would have issued Complainant progressive discipline had Respondent been aware of this at the time. Respondent did not have a chance to issue Complainant discipline because it was determined that she should be discharged after her behavior during the February 21st conference call.

V. Analysis:

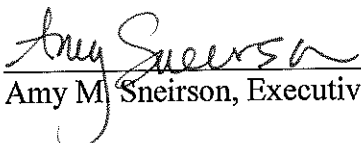
- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA prohibits employers from discharging or otherwise discriminating against an employee in the terms and conditions of employment because of previous actions that are protected under the WPA. *See* 5 M.R.S. § 4572(1)(A). The WPA, in turn, protects an employee who "acting in good faith...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. §§ 833(1)(A).
- 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 an 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 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.*
- 5) 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).
- 6) Here, Complainant establishes a prima-facie case of retaliation in violation of the WPA by showing that she reported what she had reasonable cause to believe was unlawful activity by Respondent, she was discharged, and she was discharged in close proximity to her report (within 4 days).
- 7) Respondent was unable to provide probative evidence to show that Complainant was discharged for a nondiscriminatory reason and not due to her protected activity. Reasoning is as follows:

- a) Respondent alleged that Complainant was discharged due to her insubordinate and disrespectful behavior toward CFO during the February 21, 2014 conference call. Complainant denies making the statements alleged by Respondent and there were no formal documents or records from the time to corroborate the details of the conversation. It is not in dispute, however, that Complainant raised her allegations of improper billing (specifically by CFO) during this call, and that she was discharged following the call.
 - b) Even if Complainant made the statements that Respondent alleged were insubordinate, Respondent could not reasonably show why it would discharge Complainant solely for statements on a conference call with only CEO and CFO on it rather than follow its own progressive discipline policy, especially absent prior disciplinary action. It is undisputed that there were no issues with Complainant's work performance and she was not issued progressive discipline prior to her discharge. Respondent has a policy of progressive discipline in place that it did not follow with Complainant. It is more likely that Respondent discharged Complainant due to the content of Complainant's comments on the conference call – continuing to state that she felt that Respondent was acting unlawfully – than it did due to her manner in speaking on the call. Complainant established that were it not for her reports of unlawful activity, it is at least as likely as not that she would not have been discharged from employment.
 - c) To the extent that Complainant disrupting the workplace was a factor considered in her discharge, Respondent produced no evidence to show that Complainant's work performance had deteriorated or that her actions actually had any impact on other employees. Respondent alleged that other employees were distressed as a result of Complainant vocalizing issues with the agency, but provided no evidence to support this; Respondent also acknowledged that Complainant would have been issued a warning (not discharged) had the February 21st conversation not taken place. Respondent alleged that Complainant and Coworker held meetings at work with others to do their own investigation of the billing issue, but acknowledged that this was discovered after Complainant was discharged and therefore could not have been a factor in Complainant's discharge.
 - d) Coworker was also discharged around the same time as Complainant and similarly had no progressive discipline leading up to her discharge. The fact that both reported what they believed was unlawful activity, and were both discharged shortly after bringing forward their reports, adds further plausibility to Complainant's claim of retaliation.
- 8) Retaliation in violation of the WPA was found.

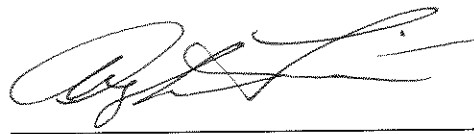
VI. Recommendation:

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

There are **Reasonable Grounds** to believe that Respondent Addison Point Agency retaliated against Complainant Julie Ivey in violation of the WPA and MRHA by terminating her employment, and conciliation of the charge should be attempted in accordance with 5 M.R.S. § 4612(3);



Amy M. Sneirson, Executive Director



Angela Tizón, Investigator