



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/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT

E15--0313

March 11, 2016

Timothy A. Mercado Gatlin (Windsor)

v.

HS Builders, LLC (Waterville)

I. Complainant's Complaint:

Complainant Timothy A. Mercado Gatlin alleged that Respondent HS Builders, LLC retaliated against him when it terminated his employment after he reported unlawful activity in the workplace.

II. Respondent's Answer:

Respondent had notice of, and declined to provide any written response to, Complainant's allegations.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: May 26, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): June 29, 2015.
- 3) Respondent has fewer than 15 employees. 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 Chad T. Hansen, 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:
 - a) Complainant was employed as a laborer by HS Builders on two occasions, once in November 2014 and once again from April to May 2015.

- b) HS Builders is a residential building or home improvement company located in Waterville.
 - c) Important third parties: Owner I and Owner II co-own HS Builders.
- 2) Complainant provided the following in support of his position:
- a) Mr. Mercado Gatlin worked for HS Builders for approximately three weeks in April and May 2015. Mr. Mercado Gatlin was paid for only one of these weeks.
 - b) During the week of May 18, 2015, Owner I told Mr. Mercado Gatlin that he might not be paid until May 23 or 26, as Owner had to be paid for the job they were working on.
 - c) On May 26, 2015, Mr. Mercado Gatlin called Owner I multiple times to complain that he had not been paid and to demand his paycheck. Owner I would not answer the phone.
 - d) When Owner I finally answered the telephone, he yelled at Mr. Mercado Gatlin and said he would have the money by May 29. During that call, Owner I then terminated Mr. Mercado Gatlin's employment.
 - e) Mr. Mercado Gatlin then contacted the Maine Department of Labor ("MDOL") to report that he had not been paid for hours worked. MDOL advised Mr. Mercado Gatlin to go to HS Builders and demand the money in person.
 - f) Mr. Mercado Gatlin went to HS Builders. While he was waiting to be paid, his dog was hit by a car.
 - g) Owner II provided a letter stating the alleged reason for Mr. Mercado Gatlin's discharge. The letter stated: "an unfortunate accident happened with his family's dog jumping out the car window and getting run over. This left Mr. Gatlin in the area when my husband returned. Mr. Gatlin started a heated argument with my husband that resulted in officers being called. Mr. Gatlin received a NO TRESPASS order that would become criminal trespass should he not leave. Mr. Gatlin at that point became no longer employed due to his actions that day and the NO TRESPASS order...."
 - h) This reason is false, as Mr. Mercado Gatlin's employment was terminated during a telephone call with Owner I on May 26, 2015. HS Builders discharged Mr. Mercado Gatlin because he reported in good faith what he reasonably believed to be a violation of federal and State wage and hour laws.
- 3) Respondent did not respond to Complainant's allegations:
- a) The Commission sent notification of this complaint to Respondent via U.S. Mail on August 19, 2015. The address used for Respondent is the same as the address maintained by the Maine Secretary of State's Bureau of Corporations, Elections and Commissions for Respondent's Clerk/Registered Agent. The notification letter was not returned to the Commission, raising a presumption that it was received.
 - b) The Commission sent correspondence to Respondent again at the same address, via certified mail, on November 10, 2015. This later correspondence was returned to the Commission as "unclaimed / unable to forward".
 - c) Respondent is presumed to have had notice and to have declined to provide any written response to Complainant's allegations.

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 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 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 514-15.
- 4) 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 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.* In order to prevail, 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 established a prima-facie case of WPA retaliation. Complainant repeatedly asked Respondent for overdue wages; after further delays, Complainant called Respondent and spoke to him about not being paid. Respondent – in that same conversation – immediately discharged him. Complainant then appeared at Respondent's place of business to demand payment, after speaking with MDOL to report that he had not been paid. Owner II wrote a letter falsely claiming that it was Complainant's reaction to his dog being killed that prompted his discharge. These uncontested facts create a causal connection between reports of unpaid wages (illegal activity) and adverse employment action (termination).
- 6) Respondent has chosen not to respond or controvert any of the claims Complainant raised in his Commission complaint. Since Respondent has not refuted or in any way responded to the allegations contained in Complainant's sworn Commission complaint, all material facts in his complaint are presumed to be true, since it is reasonable to draw the presumption that Respondent would have provided exculpatory or explanatory evidence if any were available. This also means that Respondent has not produced any probative evidence to demonstrate a nondiscriminatory reason for Complainant's discharge.

- a. To the extent Respondent's letter stating that Complainant was discharged because of his interaction with Owner I after his dog was killed might be considered a nondiscriminatory reason for Complainant's discharge, this reason is rejected as pretextual, in light of Complainant's sworn statement that he had been discharged several days earlier.

7) Retaliation in violation of the WPA is found in this case.

VI. Recommendation:

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

1. There are **Reasonable Grounds** to believe that HS Builders, LLC terminated Timothy Mercado Gatlin's employment in retaliation for protected activity under the WPA; and
2. Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneinson, Executive Director



S. Audrey Gillespie, Investigator