

Memo

Date: March 15, 2011
To: Patricia E. Ryan, Executive Director
From: John P. Gause, Commission Counsel
Re: E10-0401, v.

Respondent has requested administrative dismissal of the complaint for "failure to state a claim." Respondent states that the complaint alleges only a threat to terminate Complainant, which Respondent claims is not an "adverse employment action" covered by the Maine Human Rights Act. Complainant did not respond to the dismissal request.

A complaint may be administratively dismissed by the Executive Director for lack of jurisdiction or a failure to substantiate the complaint. MHRC Procedural Rule § 2.02(H).

Complainant alleges that she received a written warning for excessive absences and that the warning was related to her sex by virtue of her needing to take time off from work due to a domestic abuse incident. The "Written Improvement Warning" Complainant received cites three absences and nine occurrences in which Complainant was late for work or left early. Under "Improvement (Behavior) Expected," the Warning states that "Unscheduled absences will not exceed our policy (48 hours in a rolling 12 months)" and "Be on time for scheduled shifts." It states that "Failure to improve performance or correct behavior immediately [emphasis in original] will result in the following consequences: Up to and including termination."

The Maine Human Rights Act provides, in relevant part, that it is unlawful, based on sex, to "discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S.A. § 4572(1)(A). In *King v. Bangor Federal Credit Union*, 611 A.2d 80 (Me. 1992), the Maine Law Court held that an abusive reprimand may constitute actionable discrimination in a condition of employment. *Id.* at 82. King, who worked as a teller, was given an abusive reprimand by her supervisor when she left her work station to recover from an uncooperative customer's cigarette smoke. King's doctor had previously told her to avoid smoke due to a disability. In reprimanding King, the head teller stated that King "should look for another job if she couldn't stand the smoke." *Id.* at 82, n.5. The Superior Court imposed a \$200 civil penalty under the Maine Human Rights Act for the reprimand. On appeal, citing the above-quoted language from section 4572(1)(A), the Law Court rejected defendant's argument that the reprimand was not unlawful discrimination under the Act

because it did not affect the "hiring or firing" of plaintiff. The Law Court held that the quoted language was "not so limited." *Id.* at 82.

Subsequently, analyzing the Whistleblowers' Protection Act claim, the Law Court has seemed to suggest that an "adverse employment action" should be interpreted more narrowly, but it has not overruled *King*. In *LePage v. Bath Iron Works Corp.*, 2006 ME 130, the Law Court held that "[a]n employee has suffered an adverse employment action when the employee has been deprived either of 'something of consequence' as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld 'an accouterment of the employment relationship, say, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.'" *Id.* at ¶ 20 (citations omitted).

Some courts have held that a threat of termination or other covered adverse job action may itself constitute an actionable "adverse job action" under federal anti-discrimination law. *See, e.g., Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F.3d 840, 847 (9th Cir. 2004); *Siddiqi v. New York City Health & Hospitals Corp.*, 572 F.Supp.2d 353, 370 (S.D.N.Y. 2008). Others have reached the opposite conclusion. *See, e.g., Vachon v. R.M. Davis, Inc.* 2004 WL 1146630, *11 (D.Me. 2004) (Cohen, Magistrate J.); *Valles-Hall v. Center For Nonprofit Advancement*, 481 F.Supp.2d 118, 144 (D.D.C. 2007).

Here, in light of the Law Court's holding in *King*, the Commission may find that the written warning Complainant received, which threatened her with termination if she did not improve her attendance, constitutes actionable unlawful discrimination in a condition of employment. Accordingly, the complaint should not be administratively dismissed.