



Maine Human Rights Commission
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INVESTIGATOR'S REPORT
E11-0117

December 18, 2012

v.

(Portland)

I. The Complaint:

Complainant [REDACTED] alleged that Respondents [REDACTED] and/or its owner [REDACTED] (hereinafter "[REDACTED]") terminated her employment and is attempting to deny her unemployment benefits, all in retaliation for her whistleblower activity while employed and in filing this complaint.

II. Respondent's Answer:

[REDACTED] denies any type of discrimination or retaliation against Complainant Ms. [REDACTED]. [REDACTED] position is that Ms. [REDACTED] employment was terminated because she made unacceptable demands as to how and when she would perform her job, and that its unemployment appeals were made for the same reasons.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: May 19, 2010 (termination); March 30, 2011 (retaliation).
- 2) Date complaint filed with the Maine Human Rights Commission: February 1, 2011; July 7, 2011.
- 3) Respondent, [REDACTED] is subject to the Maine Human Rights Act as well as state employment regulations. Respondent, [REDACTED] as the owner [REDACTED] is not individually liable under the Maine Human Rights Act as an "employer" for purposes of the allegation that Complainant was subjected to employment discrimination because she engaged in activity protected by the Whistleblowers' Protection Act. *See Fuhrman v. Staples*, 2012 ME 135, ¶¶ 32-35. Mr. [REDACTED] may be individually liable as a "person" for purposes of the claim that he retaliated against Complainant for filing a complaint with the Commission, however. *See 5 M.R.S. §§ 4553(7)* (defining "person" as including "one or more individuals"), 4633(1) (prohibiting retaliation by a "person").
- 4) Ms. [REDACTED] represents herself. [REDACTED] represents itself.

- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution Conference. [REDACTED] did not appear for the Conference, nor did it convey any intent not to appear. Based on this review, this complaint has been identified for a brief Investigator's report, which summarizes the allegations and denials in relationship to the applicable law, but does not fully explore the factual issues presented. 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.

IV. Development of Facts:

- 1) The parties and issues in this case are as follows:
- a) The Complainant [REDACTED] worked for [REDACTED] as the Office Manager/Bookkeeper from July 21, 2005 to May 19, 2010.
 - b) Respondent [REDACTED] [REDACTED] is a smack (a fishing boat used to transport the catch to market) located off the coast of Cliff Island in Casco Bay, as well as a wholesale and retail store on the Maine Wharf in Portland. Respondent [REDACTED] is the Owner [REDACTED] [REDACTED]. They are referred to collectively here as "Three Sons".
 - c) Ms. [REDACTED] alleged that [REDACTED] terminated her employment and is attempting to deny her unemployment benefits as retaliation for protected whistleblower activity, and retaliated against her for filing this complaint.
 - d) Important third party: Business Consultant, DH; Supervisor, CK.
- 2) Ms. [REDACTED] provided the following concerning her original claim, filed February 1, 2011:
- a) She was the Office Manager/Bookkeeper. Her job performance was satisfactory. She never had a specific job description, but her work included managing financial accounts for [REDACTED] [REDACTED]. She was never given any warnings.
 - b) On May 18, 2010, she sent Mr. [REDACTED] a lengthy email informing him that she no longer wished to participate in unethical and illegal business practices related to financial accounts. She further explained that his policies regarding financial management were preventing her from doing her job correctly.
 - c) On Wednesday, May 19, 2010, Mr. [REDACTED] called her while she was on her way to work in the morning and said, "Don't bother coming in anymore, we're done."
 - d) On Friday, May 21, 2010, she attempted to contact Mr. [REDACTED] by telephone and email. She asked if she could retrieve her belongings. He did not respond to her request.
 - e) When she applied for unemployment benefits, Mr. [REDACTED] claimed that she had been fired due to non-performance of her assigned job.

- f) Complainant believes that she was terminated because she refused to participate in unethical and illegal business practices, and that [REDACTED] further retaliated against her by filing several appeals with the Unemployment Insurance Commission in an attempt to deny her unemployment benefits.
 - g) [REDACTED] became aware that Complainant had filed a claim for unemployment benefits by June 2, 2010. [REDACTED] actively opposed her claim for benefits on the grounds that she was terminated for misconduct. The claim for benefits was granted on June 11, 2010. [REDACTED] filed an appeal of the unemployment benefits on; on September 3, 2010 the appeal was denied and the grant of benefits to Complainant was upheld. [REDACTED] filed another appeal on September 17, 2010, and the unemployment matter was scheduled for hearing in Portland on March 30, 2011.
- 3) Complainant's complaint of discrimination was mailed to [REDACTED] on March 17, 2011.
 - 4) [REDACTED] did not respond to Complainant's Maine Human Rights Commission complaint from March 2011 to July 2011, at which time it and Complainant attended a hearing on Complainant's unemployment benefits. After that hearing, while leaving the building where the hearing was held, Complainant felt that a representative of [REDACTED] threatened her about her Maine Human Rights Commission complaint.
 - 5) Complainant filed an amended complaint with the Maine Human Rights Commission on July 7, 2011, as follows:
 - a) On Wednesday, March 30, 2011, she attended an Unemployment Commission hearing on Lancaster Street in Portland. While she was exiting the building, she was confronted by Business Consultant in the company of Mr. [REDACTED]. Business Consultant told her it would be in her best interest to drop her Human Rights Commission claim against Mr. [REDACTED] and [REDACTED] saying "... it would be a shame if Section 8 knew how much money you actually made."
 - b) She informed Business Consultant that she had not ever received Section 8 housing assistance and asked him to move out of the way of the exit so that she could leave. When Business Consultant pressed further, she looked at Mr. [REDACTED] and said, "I've given a lengthy statement - they pretty much know everything already. I'm not dropping it." She looked at Business Consultant and asked him to move out of her way once more and was able to leave the building.
 - 6) [REDACTED] filed a response in this matter on August 10, 2011, at which time it argued:
 - a) Complainant's Commission complaint was not timely made and she was not fired due to whistleblower activity.
 - b) Complainant's alleged concern regarding financial activity by Mr. [REDACTED] was never mentioned to him before she left her employment, and was raised for the first time as the parties litigated Complainant's unemployment benefits.

- c) Complainant kept important financial information from [REDACTED] due to her deceptive practices, and made unreasonable demands that Mr. [REDACTED] keep out of her bookkeeping. Her bookkeeping errors left the company in a shambles when she departed.
- d) [REDACTED] asked Complainant to leave because she accused Mr. [REDACTED] of unethical behavior and treated him rudely.

V. Analysis:

- 1) The Maine Human Rights Act requires the Commission to "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 this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The Complainant, [REDACTED] alleged that [REDACTED] terminated her employment and attempted to deny her unemployment benefits because of whistleblower retaliation, and that retaliated against her for filing this complaint.

Discharge for Whistleblower Activity

- 3) Maine's Whistleblower Protection Act ("WPA") prohibits employers from discharging, threatening or otherwise discriminating 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).
- 4) The Maine Human Rights Act provides, in part, that it is unlawful employment discrimination to discharge an employee because of previous actions protected under the WPA. 5 M.R.S.A. § 4572(1)(A).
- 5) 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.
- 6) 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 Respondents make 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.*

- 7) In order to prevail, Complainant must show that Respondents 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).
- 8) Here, Complainant established a prima-facie case that she was terminated in violation of the WPA and MHRA by providing a sworn statement that she sent her employer a lengthy email informing him that she no longer wished to participate in unethical and illegal business practices, and was terminated the following day.
- 9) The fact that Complainant was terminated so soon after she complained about illegal business practices provides a very strong inference that [REDACTED] termination was motivated by whistleblower retaliation.
- 10) [REDACTED] did not produce any probative evidence to demonstrate a nondiscriminatory reason for terminating Complainant, such as a statement by Mr. [REDACTED]. Its argument to this Commission was as follows:
 - a) [REDACTED] alleged that Complainant's never mentioned her concerns about financial activity by Mr. [REDACTED] before she left her employment, and raised it for the first time as the parties litigated Complainant's unemployment benefits. Given the evidence provided by Complainant, and the lack of evidence provided by [REDACTED] this is not found to be credible.
 - b) [REDACTED] claimed that Complainant kept important financial information from [REDACTED] due to her deceptive practices, and made unreasonable demands that Mr. [REDACTED] keep out of her bookkeeping. Given the evidence provided by Complainant, and the lack of evidence provided by [REDACTED] this is not found to be credible.
 - c) [REDACTED] claimed that it asked Complainant to leave because she accused Mr. [REDACTED] of unethical behavior and treated him rudely. Given the evidence provided by Complainant, and the lack of evidence provided by [REDACTED] it does seem to be true that Complainant accused Mr. [REDACTED] of unethical behavior, and that this was indeed the reason for her termination.
- 11) [REDACTED] positions before this Commission are in many cases contradicted by its positions in its Unemployment Commission litigation with Complainant. In that forum, [REDACTED] first it claimed that Complainant was not terminated at all, but rather that she chose to leave her employment by making unacceptable demands upon her employer. It then reframed her separation from employment as a termination based on misconduct in its filings with the Unemployment Commission. [REDACTED] simply is not found to be credible.
- 12) Without any credible evidence provided by [REDACTED] related to the Complainant's termination, the only conclusion to draw is that the actions were taken because Complainant engaged in whistleblower activity.

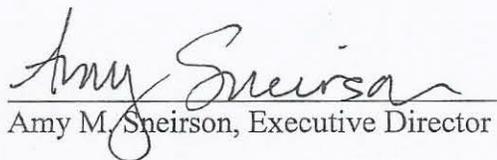
Continuing Retaliation

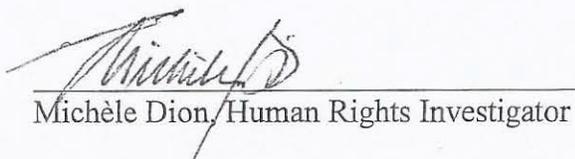
- 13) The MHRA further states that "[it] is unlawful for a person to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted or protected by this Act or because that individual has exercised or enjoyed, or has aided or encouraged another individual in the exercise or enjoyment of, those rights. 5 M.R.S.A. § 4633(2).
- 14) In her amended complaint, Complainant alleged that [REDACTED] agent and business consultant D.H. tried to coerce, intimidate, threaten or interfere with her because she filed this complaint of discrimination with the Maine Human Rights Commission. Specifically, Complainant provided a sworn statement that on Wednesday, March 30, 2011, following a contested Unemployment Commission hearing, Mr. [REDACTED] and D.H. blocked her from exiting the building and insinuated that [REDACTED] would interfere with her ability to collect social welfare benefits if she did not drop her charge of discrimination.
- 15) [REDACTED] denied the allegations of retaliation in its August 10, 2011 filing, with D.H. stating (in an un-notarized statement) that he had no knowledge of any conversation with her about that. This unsworn response on [REDACTED] behalf is not sufficient to contradict Complainant's sworn statement.
- 16) Complainant's complaint that [REDACTED] attempted to coerce, intimidate and threaten her because she filed a complaint with the Commission is found to be credible, and she established a violation of the Maine Human Rights Act.

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 [REDACTED] [REDACTED] retaliated against Complainant [REDACTED] in violation of the Whistleblowers' Protection Act by terminating her employment and attempting to deny her unemployment compensation benefits;
2. There are **Reasonable Grounds** to believe that [REDACTED] [REDACTED] and [REDACTED] violated the Maine Human Rights Act by attempting to coerce, intimidate and threaten Complainant for having filed this complaint of discrimination with the Commission; and
3. Conciliation should be attempted on these claims in accordance with 5 M.R.S. § 4612(3).
4. There are **No Reasonable Grounds** to believe that [REDACTED] retaliated against Complainant [REDACTED] in violation of the Whistleblowers' Protection Act by terminating her employment and attempting to deny her unemployment compensation benefits.
5. This claim should be dismissed in accordance with 5 M.R.S. § 4612(2).


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