

MAINE HUMAN RIGHTS COMMISSION

Memo

Date: April 7, 2011
To: Patricia E. Ryan, Executive Director
From: John P. Gause, Commission Counsel
Re: E10-0589,

The above-referenced complaint should be administratively dismissed for failure to substantiate pursuant to MHRC Procedural Rule 2.02(H)(2).

Complainant alleges a violation of the Whistleblowers' Protection Act (WPA). She alleges that she was terminated for sending an email to Respondent's outgoing Executive Director complaining about a disciplinary letter that she had received from her supervisor. The letter had reprimanded Complainant for asking a coworker to swipe her timecard when she was not in the office and for accessing social networking sites for personal use while at work. In the email, after quoting the letter for the Executive Director, Complainant stated:

I need some help, as I am not sure what to do.

First, let me say that I have tried and want to have a good working relationship with . . . I thought things were going fairly well. . . is a very quiet person and never says much, so you just never know. At any rate, at this point my job and (quite possibly, my home are at risk).

My issue, is without causing further aggravation and risk – is what to do now and still stand up for myself. This letter is unfair, inaccurate, and illegal. I am not sure who or how to address this. I love . . . and want to continue working here for the long term, but clearly, I am being unfairly treated and need assistance.

Thank you.

In response, the Executive Director stated:

I'm not sure I'm the best person to help with this, given my position. As far as I can tell, there is nothing "illegal" about the letter. If you

feel it is unfair and inaccurate, that is your position, and I can't take that away from you. I'm not sure what else I can do.

Respondent states that it decided to terminate Complainant's employment because it felt that she was unable or unwilling to understand that her behavior was inappropriate, was unwilling to take responsibility for her actions, and did not demonstrate sound judgment.

Respondent requests dismissal because Complainant did not engage in protected activity under the WPA. It asserts that Complainant (1) did not describe how she felt the disciplinary letter was illegal; (2) did not make a report in "good faith"; and (3) did not have reasonable cause to believe that anything illegal occurred. Letter from _____ Esq., dated February 1, 2011, at 4-6. The complaint should be dismissed for the third reason.

To be protected under the applicable prong of the WPA, an employee must have, "acting in good faith, [reported] 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)(emphasis added). This requires employee to prove both that she had a subjective belief that the employer was acting illegally and that a reasonable person might have had the same belief. *See Stewart-Dore v. Webber Hospital Ass'n*, 2011 ME 26, ¶ 11; *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 155 (Me. 1991).

Here, Complainant's attorney suggests that Complainant subjectively believed that she was the victim of sex discrimination. Letter from _____, Esq., dated March 28, 2011, at 3-4. Complainant has not substantiated, however, that a reasonable person might have reached the same conclusion. A claim of sex discrimination requires an adverse action or hostile work environment be because of sex. *See* 5 M.R.S.A. §4571(1)(A). Neither the complaint filed with the Commission nor its attachments mention of any facts indicating bias, prejudice, motivation, or discrimination because of sex. The complaint does contain references to unfair treatment and harassment, ¶¶ 7, 10-12, but there is no indication that it was motivated by Complainant's sex. For example, there is no indication that Complainant was targeted because of her female sex, that similarly situated men were treated more favorably, or that she ever complained about sex discrimination during her employment. The concern in the email does not reflect that Complainant felt that her supervisor was targeting her because of her sex: "*First, let me say that I have tried and want to have a good working relationship with _____ I thought things were going fairly well. _____ is a very quiet person and never says much, so you just never know.*" Similarly, Complainant's March 28, 2011, letter does not point to any facts that would support such a reasonable belief.

Because there is no indication that Complainant's belief that she had been subjected to sex discrimination was reasonable, the complaint should be dismissed for failure to substantiate.