



Maine Human Rights Commission
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April 19, 2013

INVESTIGATOR'S REPORT
E12-0255

[REDACTED]

v.

[REDACTED]

I. Complaint:

Complainant [REDACTED] alleged that she was retaliated against after she engaged in protected activity under the Maine Whistleblowers' Protection Act. [REDACTED] alleged that Respondent Town [REDACTED] ("[REDACTED]" or the "Town") discriminated and retaliated against her for complaints about financial activities which she had reasonable cause to believe were unlawful, in violation of the Maine Human Rights Act and the Maine Whistleblowers' Protection Act.

II. Respondent's Answer:

[REDACTED] denied that it has discriminated or retaliated against [REDACTED] for any reason.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: February 29, 2012 and continuing action.
- 2) Date complaint filed with the Maine Human Rights Commission: May 30, 2012.
- 3) Respondent employs approximately 100 employees and is subject to the Maine Human Rights Act ("MHRA") and the Whistleblowers' Protection Act ("WPA"), as well as state employment regulations.
- 4) Respondent is represented by [REDACTED], Esq. Complainant is represented by [REDACTED] Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution Conference. 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) Complainant [REDACTED] began working for [REDACTED] in February 2010 as the Office Manager for the Public Works Department, and continues to work for the town.
 - b) Respondent [REDACTED] is a southern Maine town.
 - c) Important third parties: New Town Manager, [REDACTED]; Finance Director, [REDACTED]; Former Town Manager, [REDACTED] Supervisor Public Works Department, [REDACTED]
 - d) Complainant [REDACTED] alleged that [REDACTED] discriminated and retaliated against her for complaints about financial activities which she had reasonable cause to believe were illegal, in violation of the MHRA and the WPA. [REDACTED] denied that it has discriminated or retaliated against [REDACTED] for any reason.

- 2) The following is a summary [REDACTED] complaint:
 - a) I was hired in February of 2010 by [REDACTED] as the Office Manager for the Public Works Department with the understanding that I would work a full-time, forty-hour per week job. I was approached in July of 2011 by my superiors and asked if I would be interested in taking on additional duties in the Town Hall Financial Department processing accounts payable. I agreed and began to process accounts payable at the Town Hall and was given a raise for this additional duty. Subsequently, my superiors asked if I would be willing to help the Financial Department process payroll in addition to my duties at Public Works and Town Hall doing accounts payable. I agreed and took on additional duties processing the Town [REDACTED] payroll. I was given yet another raise for taking on this additional.
 - b) In December of 2011, Finance Director was hired as the new Financial Director for the Town of [REDACTED]. Immediately, my work load coming from the Financial Department increased from four to five hours per week to fifteen to twenty hours per week. I was asked to take on additional duties. Former Town Manager told Finance Director that too much Financial Department work was being placed on me and that some of the work was inappropriate considering my limited financial background. My boss, Supervisor Public Works Department, began to complain that my duties in the Financial Department were affecting my ability to complete my full-time job in the Public Works Department.
 - c) In early February of 2012 Former Town Manager was replaced by New Town Manager. At about this time, problems in the Financial Department began to increase greatly. Specifically, there were violations of the existing purchase policies by New Town Manager and Finance Director, child support payments had not been properly applied through payroll for weeks at a time, bills were not being paid on time, the town's contributions to retirement funds were not being made and 1099 tax statements were not being properly issued.
 - d) Former Town Manager spoke with Finance Director and told her that too much work was being placed on me. He explained that some of the work was inappropriate given my limited

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financial background. Supervisor Public Works Department complained to Finance Director that the duties in the Finance Department were affecting my ability to complete my full time work in the Public Works Department.

- e) On February 29, 2012, I wrote a letter to my direct supervisor, Supervisor Public Works Department, explaining and addressing my grave concerns about the above-described problems in the Financial Department. I described violations of the Town's purchase policy for expenditures and child support payments which were being garnished yet not appropriately distributed. I also reported missing retirement contributions and problems with the Town's system for issuing 1099 tax statements.
 - f) My objective in writing the February 29, 2012 letter was to protect the Town, but I was also mindful of the need to protect myself. After Finance Director was hired, I was assigned tasks which far exceeded my capabilities and training. I was simply not qualified to handle much of the work, which fell squarely within the purview of the Finance Director's job. I felt that it was my duty as an employee of the Town to report the problems in the Finance Department before serious harm occurred.
 - g) I believed that these issues in the Financial Department were violations of law which needed to be addressed. At this time, I had also become overburdened with the duties being placed on me by the new Finance Director. I no longer wanted to work in the Financial Department because of my concerns about the way it was being run. Accordingly, in my February 29, 2012 memo, I resigned from all my duties at the [REDACTED] Financial Department and returned to my original full-time position at the Department of Public Works. I understood that reducing my role to only my duties at the Department of Public Works would likely come with a decrease in my hourly wage.
 - h) Since writing my memo at the end of February 2012, I have been the subject of discriminatory actions and threats. Specifically, I have been threatened with complete termination from my employment with the [REDACTED]. I have been threatened with a reduction in my hours to as low as 25 hours per week because I resigned my duties in the Financial Department. My hours were temporarily reduced to 35 hours per week but were returned to 40 hours per week in late April.
 - i) Additional acts of discrimination include, but are not limited to, a refusal by the New Town Manager to approve my request for a cell phone stipend and being forced to use a time clock when co-workers were not required to do so.
 - j) I have experienced emotional pain, suffering, mental anguish and loss of enjoyment of life due to fears of losing my job and inaccurate and disparaging comments made about me by [REDACTED] officials to other staff, the community and me. I believe that these threats and acts of discrimination are the direct result of the memo I wrote on February 29, 2012.
- 2) [REDACTED] summarizes its position in the following manner:
- a) There is no evidence in the record to support a whistleblower claim. Even [REDACTED] can show that she was placed in an awkward and uncomfortable situation by being asked to do

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more work than she had time to do, and more complex work than she had been trained for, none of that would support a whistleblower claim.

- b) Finance Director was extremely concerned that Complainant was unqualified to perform the Accounts Payable work entrusted to her, and wrote a memorandum to New Town Manager on February 27, 2012, outlining her concerns.
 - c) New Town Manager developed policies for uniform timekeeping and standards for the issuance of cell phones based upon need.
 - d) ██████ claims that the Town Council improperly discussed terminating her employment in executive session on March 6, 2012 without giving her an opportunity to be present. Even if this is true, an improper discussion by a political body in an executive session which resulted in no action being taken against the employee is not an "adverse job action" upon which a retaliation claim can be based.
 - e) Finance Director urged the Town Council, at their March 29, 2012 meeting, to reduce ██████ hours to 25 per week to allow the savings to be used for a Finance Director Assistant. This did not occur ultimately, and did not result in "adverse action" against ██████. Finance Director's actions in this regard cannot be said to have been motivated by ██████. February 29, 2012 memo because Finance Director had already stated in her February 27, 2012 memo that she believed that ██████ should be removed from the Finance Department and replaced by a new hire.
 - f) ██████'s hours were reduced from 40 to 35 "for a time." The reason for the temporary reduction in hours was that New Town Manager believed that ██████ refused to keep track of her hours and the Town assumed that she was taking a one-hour unpaid lunch break each day she worked. After ██████ agreed to use the time clock the Town paid her for every hour she claimed to have worked.
- 3) Further investigation reveals:
- a) The parties disagree about ██████ timing and motivation for writing her February 29 letter. According to ██████ she was unaware of the February 27, 2012 memo prepared by Finance Director when she wrote her February 29 letter. According to ██████ ██████ only wrote her February 29 letter because she learned that Finance Director had written the February 27 memo expressing her concerns about ██████. ██████ was credible during the Issues and Resolution Conference when she asserted that she had never seen Finance Director's memo until she had filed the charge with the MHRC. The content ██████ February 29 letter supports this version of events as well. ██████ February 29 letter referenced problems with the town's purchase policy and child support issues, items not mentioned at all in Finance Director's February 27 memo.
 - b) ██████ also credibly described an encounter which occurred during this time with Finance Director, when Finance Director directed her to print checks and a "no data available" message error appeared on the computer. In response to the problem, Finance Director stated "stupid people do stupid things." She then went on with accusation in her voice that "You had to have

hit the wrong key . . .” [REDACTED] felt that the comment was demeaning and an insult to her intelligence.

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 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 WPA prohibits discharging, threatening, or otherwise discriminating against an employee because the employee, acting in good faith, reports 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 [or] is a condition or practice that would put at risk the health or safety of that employee or any other individual. 26 M.R.S. § 833 (1)(A, B).
- 3) The WPA provides, in part, that it is unlawful, based on protected activity, to “discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment. . . .” 26 M.R.S. § 833(1).
- 4) The phrase “terms, conditions, . . . or privileges of employment” is broad and not limited to discrimination that has an economic or tangible impact. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (interpreting Title VII of the Civil Rights Act of 1964); *King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992) (interpreting 5 M.R.S.A. § 4572(1)(A)). “An 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.’” *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20 (citations omitted). An abusive reprimand may also be actionable. *See King*, 611 A.2d at 82 (telling an employee who had requested a smoke-free environment as a reasonable accommodation that “she should look for another job if she couldn't stand the smoke”).
- 5) Threats against an employee’s status of employment may constitute discriminatory acts regardless of whether the threats are carried out. *LePage*, 2006 ME 130, ¶ 21.
- 6) 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.
- 7) 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 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 employment action.” *Id.*

Prima-Facie Case of Retaliation

- 8) The first element required for ██████ to establish a prima-facie WPA/retaliation claim is whether she actually did “report[] 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.” Here, ██████ February 29, 2012 letter was written in good faith and attempts to report what she reasonably believed to be violations of financial rules and law to her direct supervisor. The letter was not copied to New Town Manager and Finance Director because the four outstanding issues which concerned her most would have directly implicated these two ██████ officials and she sought to inform other Town officials of the imminent problems before lasting damage occurred.
- 9) The next question is whether ██████ was subjected to an adverse employment action after her protected activity. In this case, she was. Her February 29, 2012 letter was widely discussed in ██████ Town government and, before long, threats about ██████ continued employment surfaced.
 - a) The concerns ██████ raised in her February 29 letter were significant enough that she and New Town Manager discussed them in meetings on March 16, April 11, April 23, April 25, May 16, and May 30 (*see* Complainant’s October 25, 2012 Reply to the Commission).
 - b) After ██████ wrote her February 29, 2012 letter, New Town Manager and Finance Director utilized their positions within the Town structure to sabotage her in any way possible.
 - c) Termination ██████ employment was discussed during the Town Council’s executive session on March 6, 2012, a fact that was shared with ██████ soon thereafter. New Town Manager further discussed the possibility of termination with ██████ on March 16, 2012.
 - d) Her hours were reduced for a short time, then re-instated. She was denied reimbursement for a cell phone. For the first time, she had to start punching a time clock when others did not. There was suddenly discussion about whether her breaks were going to be paid or not.
 - e) Finance Director urged the Town Council, at their March 29, 2012 meeting, to reduce ██████ hours to 25 per week to allow the savings to be used for a Finance Director Assistant; this would have deprived ██████ of her health benefits.
 - f) New Town Manager refused to approve of the addition of Complainant’s position to the union contract.
- 10) Although it is true that ██████ employment was not terminated, after she wrote her memo, New Town Manager and Finance Director took actions that impacted the terms and conditions of her

employment. They applied pressure, in less than subtle ways, in an overt attempt at encouraging ██████ to leave her position, all of which would dissuade a reasonable employee from bringing a complaint. Her day to day existence was made difficult and she endured the anxiety and uncertainty associated with the fear of loss of livelihood. Others were not treated in this manner. New Town Manager and Finance Director created a hostile work environment, and a constant threat of termination, which Complainant reasonably perceived as an adverse employment action.

- 11) There was a distinct causal link between ██████ February 29, 2012 letter and the adverse employment actions taken by the Town.

Respondent's Nondiscriminatory Reasons

- 12) Against this rebuttable presumption that ██████ retaliated against Complainant for engaging in WPA protected activity, the Town alleged that ██████ was unqualified for her position and did not properly manage some of the financial matters entrusted to her. Finance Director's February 27, 2012 memo refers to the fact that ██████ "does not take initiative to learn about MUNIS [financial software is designed to handle public sector needs] or Accounts Payable and does not prioritize the work." These criticisms ██████ are unfounded, as the Town knew she had no training in MUNIS or Accounts Payable when it asked her to take on that work. It also was patently unfair to criticize ██████ for not prioritizing the Accounts Payable work, as she already had a full-time job at Public Works to get done. Finance Director also faulted ██████ for not understanding the function of the International City/County Management Association, which advances professional local government worldwide to create excellence in local government. ██████ had no familiarity or training about ICMA, which was known when she was asked to help out with Accounts Payable in addition to her job as Manager for the Public Works Department.
- 13) The Town further alleged that its actions related to the time clock, the cell phone reimbursement, the unpaid lunch hours, and the union position refusal were all completely neutral attempts to bring ██████ employment into line with employee policies. ██████ asserts that its imposition of new time clock and unpaid lunch hour policies were merely part of a larger effort to establish consistent policies. However, the Town's new policies seemed to apply to ██████ alone. As noted above, the Town did not submit any evidence of its attempts to apply consistent policies on these topics to any other employees at this time.
- 14) Finance Director urged the Town Council, at their March 29, 2012 meeting, to reduce ██████'s hours to 25 per week to allow the savings to be used for a Finance Director Assistant. The Town explains its attempt to reduce ██████ to 25 hours/week by saying that her position did not require a full-time position. According to counsel for ██████ Former Town Manager disagrees (*see* Complainant's October 25, 2012 Reply to the Commission). The Town's position on this point also is not strengthened by the fact that it hired a full-time Accounts Payable staffer in March 2012.
- 15) New Town Manager refused to approve of the addition of Complainant's position to the union contract. According to ██████ this was because the terms of the union contract prohibited the addition. This is not what the union itself believes, as it affirmatively requested that New Town Manager approve including Complainant's position in the union bargaining unit for the next bargaining term (*see* Complainant's October 25, 2012 Reply to the Commission).

- 16) Respondent's nondiscriminatory reason for its adverse employment actions against [REDACTED] are not convincing.

Causal Connection

- 17) Ms. [REDACTED] must carry overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." Here, there is unusually strong evidence of the causal connection.
- 18) One week after [REDACTED] sent her February 29 letter to her supervisor, the idea of terminating her employment was discussed during the Town Council's executive session on March 6, 2012. Town Council members told [REDACTED] that the discussion was the result of her February 29 letter.
- 19) The evidence presented in this case, including [REDACTED] own credible presentation at the IRC, supports a finding of reasonable grounds to believe that [REDACTED] was discriminated and retaliated against for engaging in protected WPA activity.

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 Respondent [REDACTED] discriminated and retaliated against Complainant [REDACTED] for engaging in protected whistleblower activity; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Amy M. Sneirson, Executive Director



Michèle Dion, Investigator