



Maine Human Rights Commission
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Amy M. Sneirson
Executive Director

John P. Gause
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Memo

Date: July 2, 2013

To: Amy M. Sneirson, Executive Director

From: John P. Gause, Commission Counsel 

Re: [REDACTED], [REDACTED] v. [REDACTED]

Respondent requests administrative dismissal of the above-referenced complaint on the bases of timeliness and lack of jurisdiction. The Executive Director may administratively dismiss a complaint for failure to file the complaint within 300 days of the allegedly discriminatory act or for lack of jurisdiction. *See* 94-348 C.M.R. ch. 2, § 2.02(H)(1, 3). For the following reasons, I recommend that parts of the complaint should be dismissed and parts should continue to be investigated.

The complaint alleges unlawful employment discrimination in violation of the Whistleblowers' Protection Act, 26 M.R.S. §§ 831-840 ("WPA"). Complainant was employed by Respondent as a dental hygienist until her termination on October 18, 2011. During her employment she reported health and safety hazards first to Respondent and then to OSHA. She alleges that Respondent retaliated against her for making those reports by issuing her unfounded warnings, terminating her employment, contesting her unemployment claim, and, after her termination, filing a complaint against her with the Maine Board of Dental Examiners ("the Board").

To be timely, a complaint must be filed within 300 days after the alleged act of unlawful discrimination. 5 M.R.S. § 4611. The complaint here was filed with the Commission on March 15, 2013. Counting back 300 days from then, the only timely allegations are those relating to events occurring after May 19, 2012. Complainant's employment was terminated on October 18, 2011, which makes that claim and the claims relating to the warnings untimely. Neither party has identified the precise dates of the alleged retaliation during the unemployment proceeding, which lasted until October 16, 2012. Because it is unclear which dates are at issue, that claim should not be dismissed as untimely at this time. The Board complaint was filed on May 23, 2012, making that claim timely.

Respondent's remaining argument for dismissal is that the Commission lacks jurisdiction because the Board complaint was filed after Complainant left Respondent's employment. It argues that the WPA only applies to discrimination against employees, not former employees. Complainant argues, in part, that the WPA should be read expansively to cover retaliation after employment.

Dismissal of the direct WPA claims is appropriate because the WPA only covers retaliation affecting the terms, conditions, location, or privileges of a then-existing employment relationship. The WPA states that "[n]o employer may discharge, threaten or otherwise discriminate against an employee *regarding the employee's compensation, terms, conditions, location or privileges of employment* because [the employee engaged in protected activity]." 26 M.R.S. § 833(1) (emphasis added). This limits coverage to discrimination in a contemporaneous employment relationship. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 18, 719 A.2d 509, 515 (holding that an employer's refusal to recommend an employee for future employment was not covered by the WPA because it

did not affect the terms, conditions, location, or privileges of “then existing employment”); *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20, 909 A.2d. 629, 636 (“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.’”). Because Respondent’s complaint to the Board did not discriminate against Complainant with respect to her then-existing employment with Respondent, the Commission lacks jurisdiction to hear the direct WPA claim with respect to the Board complaint.¹

Dismissal of the direct WPA claims does not mean, however, that the corresponding Maine Human Rights Act whistleblower claims should be dismissed as well. Complaints alleging retaliation for WPA-protected activity are processed by the Commission under both the WPA and the Maine Human Rights Act, 5 M.R.S. §§ 4551-4634 (“MHRA”). See *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, ¶ 14, n. 2, 58 A.3d 1083, 1090, n.2. By alleging employment discrimination for WPA-protected activity, the complaint invokes both the WPA and the MHRA.

The MHRA prohibits, in applicable part, an employer from discriminating against an employee because the employee engaged in WPA-protected activity. 5 M.R.S. § 4572(1)(A). The MHRA defines “employee” as “an individual employed by an

¹ Respondent does not argue that the direct WPA claim relating to the unemployment proceedings should be dismissed. Although unemployment is arguably a term, condition, or privilege of employment within the meaning of 26 M.R.S. § 833(1), that direct claim should be dismissed as well in light of the Law Court’s limitation of coverage to “then existing employment.” See *DiCentis v. Michaud*, 1998 ME 227, ¶ 18, 719 A.2d 509, 515.

employer.” 5 M.R.S. § 4553(3). The United States Supreme Court has held that an identical definition in Title VII is ambiguous and includes former employees, at least for purposes of retaliation. *See Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 847, 849 (1997) (interpreting 42 U.S.C. § 2000e(f)). The Court reasoned, in part, as follows:

The argument that the term “employed,” as used in § 701(f), is commonly used to mean “[p]erforming work under an employer-employee relationship,” Black's Law Dictionary 525 (6th ed.1990), begs the question by implicitly reading the word “employed” to mean “*is* employed.” But the word “employed” is not so limited in its possible meanings, and could just as easily be read to mean “*was* employed.”

Id. at 846-847 (emphasis in original). In light of the Law Court’s tendency to follow federal case law interpreting corresponding provisions in federal law when interpreting the MHRA, it is likely to hold that “employee” in the MHRA includes former employees.

Moreover, unlike the WPA, the nondiscrimination requirement in the MHRA is not limited to discrimination in the employment relationship itself. The MHRA makes it “unlawful employment discrimination,” in part, for an employer, because of WPA-protected activity, to “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. § 4572(1)(A) (emphasis added). The latter phrase is not limited to the employment relationship itself; rather, it is reasonably construed to include external matters that relate to the employment relationship.

Of course, this must be reconciled with the requirement that plaintiff show an “adverse employment action” in a MHRA whistleblower claim. *See, e.g., Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, ¶ 15, 58 A.3d 1083, 1090. Unlike in its decisions interpreting a direct WPA claim under 26 M.R.S. § 833(1), however, the Law Court has not held that an “adverse employment action” under the MHRA must

affect the employment relationship itself. Although there are very few cases interpreting “adverse employment action” under the MHRA, the Law Court has read the language in 4572(1)(A) broadly to cover an abusive reprimand. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992).

Federal case law is also instructive on this issue. The United States Supreme Court has interpreted the antiretaliation provision in Title VII as extending “beyond workplace-related or employment-related retaliatory acts and harm.” *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2411-2414 (2006). Title VII makes it unlawful “for an employer to *discriminate* against any of his employees” for engaging in protected activity. 42 U.S.C. § 2000e-3(a) (emphasis added). In *Burlington Northern*, the Supreme Court contrasted this language with the core antidiscrimination provision in Title VII, which, similar to the WPA, makes it unlawful, based on protected-class status, “*to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.*” *Id.* at 2411 (quoting 42 U.S.C. § 2000e-2(a)) (italics in original). The Court noted that the italicized words “explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the antiretaliation provision.” *Id.* at 2411-2412. *Burlington Northern* is instructive because it highlights the importance of giving effect to different language. Here, the language in the WPA is narrower than the language in the MHRA.

Other courts have held that Title VII extends to post-employment retaliation, including pursuing criminal charges against a former employee and reviving state proceedings for revocation of a teaching certificate. *See, e.g., Berry v. Stevinson*

Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3rd Cir. 1994); *Beckham v. Grand Affair of N.C., Inc.*, 671 F.Supp. 415, 419-420 (W.D.N.C. 1987). In *Berry v. Stevinson Chevrolet*, the United States Court of Appeals for the Tenth Circuit reasoned that, given that Title VII covers former employees as well as current employees, “[i]t would be illogical to define a section 704(a) employee liberally to include former employees and to simultaneously define an adverse employment action narrowly by limiting it to those formal practices linked to an existing employee/employer relationship.” *Id.* at 986.

In light of *Robinson v. Shell Oil Co.* (defining “employee” to include former employees), the broader language in the MHRA than in the WPA, and the Tenth Circuit’s reasoning, we should construe the MHRA to cover post-employment discrimination that relates directly or indirectly to employment. In this case, Respondent’s complaint to the Board alleged that Complainant, a dental hygienist, engaged in theft and was working outside of the scope of her license when she treated a patient in Respondent’s office. The complaint to the Board was a matter “directly or indirectly related to employment” in that it alleged that Complainant engaged in the misconduct in the course of her employment with Respondent.

Respondent argues that the Law Court’s decision in *Costain v. Sunbury Primary Care, P.A.*, 2008 ME 142, 954 A.2d 1051, prevents coverage here. *Costain* held that a plaintiff only engages in protected activity under the WPA by reporting unlawful activity by defendant if she is employed by defendant at the time that she makes the report. *Id.* at ¶ 7, 1053 (“The sole issue in this case is whether the first element was met by Costain’s participation in the investigation of the doctor, *i.e.*, whether the participation was an activity protected by the WPA.”). Here, there is no dispute that Complainant engaged in

protected activity by making the health and safety reports to Respondent and OSHA while she was still employed. *Costain* did not address the question here, which is whether defendant's discrimination against plaintiff for engaging in WPA-protected activity is covered if plaintiff is no longer employed by defendant at the time of the discrimination.

Respondent also relies on *Lehoux v. Pratt & Whitney*, 2006 WL 346399 (D.Me. 2006). In *Lehoux*, Magistrate Judge Kravchuk held that the antiretaliation provision in the federal False Claims Act did not extend to post-employment retaliation. *Id.* at *2-3. The statutory language in the False Claims Act is materially different, however, from the above-quoted language in the MHRA. The False Claims Act protects “[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the *terms and conditions of employment* by his or her employer because of [protected activity].” *Id.* at *1 (quoting 31 U.S.C. § 3730(h)) (emphasis in opinion). Again, the MHRA, by contrast, prohibits discrimination with respect to “any other matter directly or indirectly related to employment.” 5 M.R.S. § 4572(1)(A). Because of the difference between the False Claims Act and the MHRA, *Lehoux* is not persuasive authority here.

For the foregoing reasons, the claims relating to Complainant's warnings and termination should be administratively dismissed as untimely. The MHRA whistleblower claims relating to the unemployment proceedings and the Board complaint should be investigated. The direct WPA claims relating to the unemployment proceedings and the Board complaint should be administratively dismissed for lack of jurisdiction.