



Maine Human Rights Commission
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Amy M. Sneirson
Executive Director

John P. Gause
Commission Counsel

Memo

Date: July 22, 2013

To: Amy M. Sneirson, Executive Director

From: John P. Gause, Commission Counsel 

Re: 

Respondent,  (" ) has requested administrative dismissal of the above-referenced complaint on the grounds of lack of jurisdiction and failure to substantiate. The Executive Director may administratively dismiss a complaint for either reason. *See* 94-348 C.M.R. ch. 2, § 2.02(H)(1, 2). For the following reasons, I recommend that the complaint should not be administratively dismissed.

Complainant worked at  Wiscasset facility as the Site Project Manager. He asserts that he was employed by a different entity, G4S Secure Solutions (USA), Inc. ("G4S"), which is named in a separate Commission complaint (E12-0620), but that much of the terms and conditions of his employment were actually controlled by . The complaint alleges that  acquiesced in the decision to terminate his employment because he engaged in activity protected by the Maine Whistleblowers' Protection Act, namely, that he had questioned the legality of   disallowing another employee to return to his former position following an FMLA-qualifying leave of absence.

██████████ requests dismissal on the grounds of (1) lack of jurisdiction because ██████████ was not Complainant’s employer; and (2) failure to substantiate because the complaint alleges only that ██████████ “acquiesced” in the termination decision, which is insufficient to show that it was the “but for” cause of Complainant’s termination. Complainant asserts that ██████████ is a proper respondent because it was his “joint employer.” In his submissions responding to ██████████ request for dismissal, Complainant also clarifies that he alleges that ██████████ not only “acquiesced” in his termination but “consented to and had to approve the decision to terminate” Complainant’s May 3, 2013, submission at page 4, n. 3.

The Whistleblowers’ Protection Act (“WPA”) prohibits discrimination because an 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. § 833(1)(A). The Maine Human Rights Act (“MHRA”) makes it “unlawful employment discrimination” for an “employer” to discharge an “employee” because of previous actions taken by the employee that are protected by the WPA. *See* 5 M.R.S. § 4572(1)(A). ██████████ does not dispute that Complainant engaged in WPA-protected activity.

The definitions of “employer” and “employee” in the MHRA are unhelpful in determining whether ██████████ is covered. It defines “employer” in applicable part circularly as “any person in this State employing any number of employees. . . .” 5 M.R.S. § 4553(4). “Employee” is defined in applicable part simply as “an individual employed by an employer.” 5 M.R.S. § 4553(3). The Supreme Court has described identical terminology in federal law as being “completely circular and explains nothing.”

Nationwide Mut. Ins. Co. v. Darden, 112 S.Ct. 1344, 1348 (1992) (interpreting Employee Retirement Income Security Act of 1974).

There are no Law Court decisions addressing whether joint employment exists under the MHRA. The Law Court has recognized joint employment under the Maine Workers' Compensation Act of 1992. It held that a second employer may be liable under the Workers' Comp Act if "(a) the employee has made a contract of hire, express or implied, with the second employer; (b) the work being done is essentially that of the second employer; and (c) the second employer has the right to control the details of the work." *Doughty v. Work Opportunities Unlimited/Leddy Group*, 2011 ME 126, ¶ 17, 33 A.3d 410, 414 (quoting 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 67.01 [1], [2] (2011)). A different test will likely apply to the MHRA, however, because the MHRA has a different definition of "employee" from the Workers' Comp Act, compare 5 M.R.S. § 4553(3) (quoted above) with 39-A M.R.S. § 102(11)(A) ("every person in the service of another under any contract of hire, express or implied, oral or written..."), and the policy implications are different between the two laws. Cf. *id.* ¶¶ 18-29 (discussing the definition and policy). Moreover, by suggesting that the plaintiff in *Doughty* would have a cause of action under the MHRA where one did not exist under the Workers' Comp Act, the Law Court appears poised to recognize a different test for joint employment under the MHRA. *See id.* ¶ 29.

The United States Court of Appeals for the First Circuit has utilized the following factors to analyze "joint employer" status under corresponding federal antidiscrimination law: "supervision of the employees' day-to-day activities; authority to hire, fire, or discipline employees; authority to promulgate work rules, conditions of employment, and work assignments; participation in the collective bargaining process; ultimate power over

changes in employer compensation, benefits and overtime; and authority over the number of employees.” *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 163 (1st Cir. 1995). The focus is on whether the second entity exercised “sufficient control over employees to constitute a joint employer.” *Rivas v. Federacion de Asociaciones Pecuarrias de Puerto Rico*, 929 F.2d 814, 820-821 (1st Cir. 1991).

This is consistent with the following Maine common-law test to determine whether there is an employee-employer relationship as opposed to that of an independent contractor:

(1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

Taylor v. Kennedy, 1998 ME 234, ¶ 8, 719 A.2d 525, 527 (quoting *Murray's Case*, 130 Me. 181, 186, 154 A. 352, 354 (1931)). Control is the most important factor, which “includes the rights both to employ and to discharge subordinates and the power to control and direct the details of the work.” *Legassie v. Bangor Publ. Co.*, 1999 ME 180, ¶ 6, 741 A.2d 442, 444.

Applying the common law test here, Complainant has substantiated that [REDACTED] [REDACTED] had sufficient power to control and direct the details of his work to constitute his joint employer. [REDACTED] and G4S submit the following:

- G4S hired Complainant.
- Complainant was a G4S employee.

- The terms and conditions of Complainant’s employment were not controlled by [REDACTED] but were agreed upon as a part of the security contract between G4S and [REDACTED] including Complainant’s wage rate; vacation, sick, and personnel time benefits; 401k matching contribution; and group insurance benefits.
- G4S made all personnel decisions concerning Complainant, including on discipline and termination.
- Personnel decisions made by G4S did not need to be approved by [REDACTED] but G4S informed [REDACTED] of personnel decisions as a professional courtesy and due to strict security and access requirements at a nuclear facility.
- Complainant reported directly to the G4S Vice President.

Conversely, Complainant submits the following to show that [REDACTED] controlled the terms of his employment:

- The fact that Complainant’s wage rate; vacation, sick, and personnel time benefits; 401k matching contribution; and group insurance benefits were negotiated in the contract between G4S and [REDACTED] shows that they at least jointly determined important terms of employment.
- There is evidence that [REDACTED] would dictate the G4S staffing levels at [REDACTED] as is evidenced by G4S stating that it received “client authorization” to furnish a second assistant project manager position.
- [REDACTED] required G4S to give three G4S employees raises.
- The complaint states that Complainant participated in a meeting between [REDACTED] Vice President and Operations Manager in which they

stated that they would not be willing to reinstate an employee who took the FMLA leave to his former position.

- [REDACTED] and G4S jointly determined who would replace that employee and insisted that the replacement employee be paid a higher wage.
- [REDACTED] participated in the decision to place another employee on a performance improvement plan.
- [REDACTED] required that G4S employees wear a uniform.
- The “Report of Investigation” relating to Complainant, written by the G4S Director of Quality Assurance, indicates that the decision to temporarily remove Complainant from his position during the investigation was made during a meeting between G4S Director of Quality Assurance, the [REDACTED] [REDACTED] Operations Manager, and the G4S Vice President. The Report states that the G4S Vice President was “notified of the findings and of the recommendation to remove [Complainant] from the site pending completion of the investigation and review by both G4S and 3 Yankee Management [meaning [REDACTED]] At a minimum, this statement indicates that both G4S and [REDACTED] would review the results of the investigation after its conclusion.
- Complainant’s Employee Termination Review form states, “Completed review with (3Yankees) [meaning [REDACTED] 7/9.”
- Complainant requests further investigation by the Commission to determine the role [REDACTED] played in his termination and whether its approval was necessary before Complainant could be terminated.

Taken together, the information submitted shows that [REDACTED] exercised sufficient control over Complainant to constitute his joint employer. G4S consulted with [REDACTED] on important employment decisions, including Complainant's termination. If Complainant's assertions concerning [REDACTED] involvement in other G4S employee actions are true, [REDACTED] does not merely participate in but (at least jointly) dictates certain personnel decisions. Additional investigation is necessary to determine the nature of [REDACTED] involvement in Complainant's termination.

Because Complainant has substantiated that [REDACTED] was his joint employer, the complaint against [REDACTED] should not be administratively dismissed.