Memo

Date: May 1, 2006

To: Patricia Ryan, Executive Director

From: John Gause, Commission Counsel

Re: [redacted] E05-0329, E06-0005, E05-0328, E06-0004

With respect to the issues raised in Respondents' March 13, 2006 requests for administrative dismissal, I recommend that the complaints not be dismissed with reasoning as follows:

(1) The complaints against [redacted] were timely, and the complaints against [redacted] should relate back to the [redacted] filing date;

(2) Complainants are protected by the Whistleblowers' Protection Act (WPA) because the season passes were "remuneration" within the meaning of the definition of an "employee" under the WPA; and

(3) The complaints adequately allege violations of the WPA.

Timeliness

With respect to the six-month filing deadline, Respondents seek administrative dismissal of all four complaints because (a) the amended complaints against [redacted] state that (at ¶ 5) Complainants' terminations were "confirmed" (meaning Complainants were told before then) on January 15, 2005, and the [redacted] complaints were filed on July 15, 2005; and (b) the amended complaints that included [redacted] were not filed until January 3, 2006.

On the first of these two issues, the charges against [redacted] are timely on their face.[1] A more reasonable (and broad) construction of the amended charge is that Complainants did not receive final notification of their dismissal until January 15th. Complainants have clarified (see [redacted]'s April 18, 2006 letter) that they were not told definitively that their services with the [redacted] would be terminated until January 15, 2005. Accordingly, the charges should not be administratively dismissed

[1] It is not clear to me when the original charges were filed. There is a July 12, 2005 letter from [redacted] Esq., stating that two charges were enclosed. The letter is date-stamped "received" by us on July 14, 2005 in [redacted] file and July 12, 2005 in [redacted]'s file. I'm not sure why the difference. The charges were later refiled on July 15, 2005 (they added a second signature), but that should not affect the filing date pursuant to Procedural Rule 2.02(F).

on this basis, although the Investigator assigned to the case should explore this issue (when Complainants received final, definite notification).

With respect to the second timeliness issue, [redacted] was not added until after the six-month deadline had passed. Our Procedural Rule § 2.02 (F) does not explicitly address the issue of adding parties. It states as follows:

> Complaints may be amended to cure technical defects or omissions, including failure to swear to the complaint under oath before a Notary Public, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful practices related to or growing out of the subject matter of the original complaint will relate back to the date the complaint was first received.

The EEOC uses the identical language in its procedural rule. *See* 29 C.F.R. § 1601.12(b). Courts interpreting the EEOC provision have held that amendments to add additional parties do not relate back to the original filing date. *See Rivera v. Department of Justice*, 821 F. Supp. 65, 70 (D.P.R. 1993); *Dobbs v. American Nat'l Bank, N.A.*, 1990 U.S. Dist. LEXIS 11595 (D. Mo. 1990). Accordingly, I do not think that Complainants can rely on § 2.02 (F) to add [redacted] and have the filing date of the [redacted] complaint apply.

Nevertheless, there is a question of whether [redacted] is truly a new party for purposes of the filing deadline. The United States District Court for the District of Maine has held that the failure to name a defendant in an administrative charge of discrimination before the MHRC will be excused if there is a "substantial identity" between the party who was not named and the named party. *See Lemerich v. Int'l Union of Operating Eng'rs*, 2002 U.S. Dist. LEXIS 43, 17-18 (D. Me. 2002). Here, Complainants allege that [redacted] and [redacted] are an "integrated enterprise." *See* [redacted] April 18, 2006 letter at note 1; [redacted] October 14, 2005 letter at page 2. The test for whether multiple entities constitute an "integrated enterprise" examines four factors, "(1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership," *Romano v. U-Haul Int'l*, 233 F.3d 655, 662 (1st Cir. 2000), the most important of which being centralized control of labor relations. *See id.* at 666. If [redacted] and [redacted] are an "integrated enterprise" based on these factors, the filing date for the [redacted] charge should relate back to the filing date for the [redacted] charge, making the [redacted] charge timely. Accordingly, the charges should not be dismissed on this basis, and the investigation should cover this issue (whether [redacted] and [redacted] were an "integrated enterprise").

Coverage

Respondents also argue that the WPA does not apply because Complainants were "volunteer" ski patrol members and there was no "contract of hire." The WPA defines a covered "employee," in relevant part, as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, expressed or implied. . . ." 26 M.R.S.A. § 832(1). Here, Complainants received a free ski pass (a $1100 value, according to them), which would certainly constitute "remuneration" within the meaning of the WPA. Further, the agreement to provide the ski pass in exchange for

Complainants' ski patrol services, together with the other various conditions (see [redacted] April 18, 2006 letter at pages 3-4), would be a "contract of hire, written or oral, expressed or implied. . . ." 26 M.R.S.A. § 832(1). Therefore, Complainants are covered by the WPA.

Elements of the WPA Claim

Finally, Respondents request administrative dismissal because Complainants have not met the various elements of a WPA claim. Specifically, they claim that Complainants have not shown that they complained about a current (as opposed to future) violation of law, that they acted in good faith, or that they provided [redacted] with an opportunity to correct the alleged violation. *See* [redacted] March 13, 2006 letters, page 5. Complainants dispute these points. *See* [redacted] April 18, 2006 letter at 4-6. The complaints themselves adequately allege a violation of the WPA and should not be administratively dismissed. The arguments raised by Respondents should be addressed in the context of the investigation.

With respect to the issue of whether it is protected conduct for an employee to report what she believes will be a future (as opposed to a current) violation of law, the WPA protects an employee who reports "what the employee has reasonable cause to believe is a violation of a law . . . ." 26 M.R.S.A. § 833(1)(A). This provision has been construed broadly to not require reports of violations of law by the employer at issue, *see Green v. Maine Sch. Admin. Dist. 77*, 52 F. Supp. 2d 98, 110 (D. Me. 1999), but the future violation issue is one of first impression in Maine. The Ohio whistleblowers' protection act (which similarly refers to a reasonable belief in "a violation of any state or federal" law) has been construed to only apply to suspected current violations. *See Grubb v. Ryan Int'l Airlines, Inc.*, 1996 U.S. Dist. LEXIS 22532, *17-18 (D. Ohio 1996). Given the fact that our WPA refers to reporting what is reasonably believed to be "a violation of a law" as opposed to "a future violation" or "a potential violation," it is likely that the WPA will be construed to only apply to a reasonable belief in a current violation. Therefore, the investigation should focus on the extent to which Complainants reasonably believed that a violation had already occurred.