Memo

Date: May 12, 2010

To: Patricia E. Ryan, Executive Director

From: John P. Gause, Commission Counsel

Re: E09-0158, v.

At issue is whether the complaint should be administratively dismissed for failure to substantiate pursuant to Procedural Rule § 2.02(H)(2). Specifically, the issue is whether Complainant engaged in protected activity under the Whistleblowers' Protection Act ("WPA"). For the following reasons, the complaint should not be administratively dismissed.

Complainant asserts a violation of the WPA. She alleges that she was retaliated against for reporting to Respondent, her employer, that she was threatened, abused, and harassed by a manager employed by Respondent after she broke off an intimate relationship with the manager. She alleges that the manager sent her text messages conveying, in part, the following: "fuck off your cousin was nothing and neither are you"; "not scared of you. Watch your back. South Portland Police do nothing"; and "do what you gotta do asshole. I'll bury you and your kids." Complainant states that the manager was a high-ranking employee but does not assert that he was a supervisor with immediate or successively higher authority over her.

The Maine Human Rights Act prohibits discrimination because of previous actions that are protected under the WPA. *See* 5 M.R.S.A. § 4572(1)(A). The WPA, 26 M.R.S.A. § 833(1), provides, in relevant part, as follows:

> No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because:
> A. The 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;
> B. The employee, acting in good faith, or a person acting on behalf of the employee, reports to the employer or a public body, orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual. The protection from discrimination provided in this section specifically includes school personnel who report safety concerns to school officials with regard to a violent or disruptive student. . . .

The Law Court has interpreted section 833(1)(A) (reporting a violation of law) as being limited to "(1) employees (2) who report to an employer (3) about a violation (4) committed or practiced by that employer." *Costain v. Sunbury Primary Care, P.A.*, 2008 ME 142, ¶ 8, 954 A.2d 1051, 1054. Accordingly, a complainant's reporting of a violation of law by someone other than her employer is not protected. In reaching this conclusion, the Court relied on the existence of the provision of the WPA that limits protected activity to those circumstances in which "the employee has first brought the alleged violation, condition or practice to the attention of a person having supervisory authority with the employer and has allowed the employer a reasonable opportunity to correct that violation, condition or practice." 26 M.R.S.A. § 833(2).[1] The Court appears to have reasoned that this provision only makes sense if protected activity is limited to illegal conduct committed by complainant's employer; otherwise, there would be no reason to give complainant's employer an opportunity to correct the violation. Although the Law Court has not expressly decided whether section 833(1)(B) (reporting health or safety risk) is similarly limited to a health or safety risk committed or practiced by complainant's employer, the Court is likely to hold that it is so limited based on *Costain*.

The question here is thus whether Complainant reported illegal or unsafe conduct by her "employer." She did so because the WPA definition of "employer" includes not only "a person who has one or more employees" (the Respondent) but also "an agent of an employer" (the manager). *See* 26 M.R.S.A. § 832(2). Although "agent" is not defined by the WPA, under the common law, a manager employed by Respondent would be one of its agents. *See* Restatement (Third) Of Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

Because Complainant alleges that she reported illegal and unsafe activity by her "employer," which includes the manager as an "agent" of Respondent, the complaint should not be administratively dismissed for failure to substantiate.

[1] The provision also states that "[p]rior notice to an employer is not required if the employee has specific reason to believe that reports to the employer will not result in promptly correcting the violation, condition or practice." 26 M.R.S.A. § 833(2).