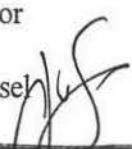


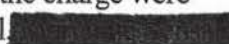





Memo


Date: April 26, 2006
To: Patricia Ryan, Executive Director
From: John Gause, Commission Counsel 
Re: 


806-0216

You asked whether it would be appropriate to dismiss the above-referenced charge of discrimination based on a lack of jurisdiction. I think that the complaint should be dismissed as it is written. I also think, however, that the WPA aspect of the case could proceed if the charge were amended to substitute the corporation, , for the individual, , as Complainant.

The complaint alleges violations of the Maine Human Rights Act, 5 M.R.S.A. § 4572(1), the Whistleblowers' Protection Act (WPA), and the Code of Fair Practices and Affirmative Action (CFPAA).

With respect to the MHRA claim, the complaint alleges that , an independent contractor, has been awarded a small number of contracts by  because it is owned by a woman. Complainant is the owner and president of .

The MHRA, § 4572(1), states that it is unlawful employment discrimination “[f]or any employer to fail or refuse to hire or otherwise discriminate against any *applicant for employment* because of . . . sex. . . .” (emphasis added). Although the term “applicant for employment” is not defined, the MHRA defines “employee” as “an individual employed by an employer.” 5 M.R.S.A. § 4553(3). It is reasonable to construe the term “applicant for employment” as being limited to potential “employees.” Therefore, § 4572(1) only applies to *individuals* who are applying for employment, as opposed to, for example, corporations. Because the complaint alleges that Respondent is discriminating against Complainant by failing to contract with , which is not an individual, the MHRA does not apply.

Moreover, even the MHRA did include corporations as “employees,” the MHRA would not apply here because  is (admittedly) an independent contractor. The MHRA definition of an “employee” (“individual employed by an employer”) is the same as that in federal law, which has been interpreted by courts to apply to master-servant relationships and not to independent contractors. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 327 (1992) (ERISA); *Alberty-Velez v. Corporacion de P.R. para la Difusion Publica*, 361 F.3d 1, 6 (1st Cir. 2004) (Title VII); *Birchem v. Knights of Columbus*, 116 F.3d 310, 313 (8th Cir. 1997) (ADA).

The complaint also alleges a violation of the WPA. Specifically, the complaint states that Complainant, [REDACTED] filed suit against Respondent in October 2005 alleging "violations of her rights to appeal the [REDACTED] negative contract award decision." This related to [REDACTED] refusal to place [REDACTED] on a contractor list. Complainant alleges that, as a result of the suit, the [REDACTED] has brought "numerous, unwarranted and unprecedented enforcement actions against her and her company," withheld any contracts, and has made disparaging remarks about her and her company.

First, with respect to the issue of whether a corporation can be an "employee," the WPA defines "employee" as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, expressed or implied, but does not include an independent contractor engaged in lobster fishing." 26 M.R.S.A. § 832(1). "Person" is defined as "an individual, sole proprietorship, partnership, corporation, association or any other legal entity." 26 M.R.S.A. § 833(3). Accordingly (as surprising as it may be), a corporation can be an "employee" under the WPA.

In addition, it is unclear whether the WPA applies to "independent contractors." Courts that have excluded independent contractors under federal law have relied on the absence of a meaningful statutory definition of an "employee" ("individual employed by an employer"). The WPA definition of "employee" is different, however, and it may be that an independent contractor could be "a person who performs a service for wages or other remuneration under a contract of hire. . . ." 26 M.R.S.A. § 832(1). The fact that the definition explicitly excludes only "an independent contractor engaged in lobster fishing," could mean that the legislature intended other independent contractors to be covered. Because of this uncertainty, I would recommend that we allow a charge to go forward at this time on behalf of Guerin Associates LLC against Respondent, subject to later arguments by the parties with respect to coverage.

The corporation, however, has not been named as Complainant. Rather, Complainant is an individual, [REDACTED]. A claim under the WPA is limited to retaliation against an "employee." See 26 M.R.S.A. § 833(1) ("No employer may discharge, threaten or otherwise discriminate against an employee. . .") (emphasis added). Here, the "employee" of Respondent was (arguably) the corporation, [REDACTED], not [REDACTED]. Accordingly, I would recommend dismissal of the complaint by [REDACTED]. To prevent the charge from being dismissed entirely, however, perhaps we could first give Complainant an opportunity to amend the charge to include [REDACTED] then dismiss as to [REDACTED].

Finally, the complaint alleges that the conduct also constitutes a violation of the CFPAA. With respect to the Commission, the CFPAA states, in part, that "Complaints of discrimination based on . . . sex . . . should be made to the Maine Human Rights Commission." 26 M.R.S.A. § 789. The Law Court has interpreted this provision to extend the Commission's powers and duties "only to affirmative action programs involving state employment opportunities [as opposed to other governmental action]." *Jackson v. State*, 544 A.2d 291, 297 (Me. 1988). The section of the CFPAA dealing with employment refers to promoting "personnel," 26 M.R.S.A. § 783, which plainly would not include independent contractors or corporations. Accordingly, the Commission's power to investigate under the CFPAA does not extend to the failure of a state agency to award contracts to an independent-contractor corporation, and the CFPAA aspect of the charge should be dismissed.