Memo

Date: May 12, 2008

To: Barb Lelli, Investigator

From: John Gause, Commission Counsel

Re: [redacted]

At issue is whether the Commission has jurisdiction to investigate a Whistleblowers' Protection Act (WPA) claim that is independent from an employment discrimination claim under section 4572 of the Maine Human Rights Act (MHRA). I think that the Commission does have that jurisdiction, and the independent WPA claim should not be dismissed.

Complainant alleges that Respondents, the [redacted] and four of its board members, unlawfully discriminated against him by suspending his employment as Treasurer of the organization because he engaged in protected WPA activity. Respondent has requested dismissal because it is a fraternal organization employing one of its members and is therefore excluded from the definition of "employer" under the MHRA, 5 M.R.S.A. § 4553(4). Complainant responds that the WPA does not have the same exclusion for fraternal organizations and his claim is properly brought under the WPA. With respect to the MHRA claim, Complainant does not dispute that Respondent is covered by the exclusion in the definition of "employer."

A complaint should be administratively dismissed if the Commission lacks jurisdiction to investigate it. MHRC Procedural Rule § 2.02(H).

The section of the WPA that gives the Commission jurisdiction over WPA complaints states that "[a]n employee who alleges a violation of that employee's rights under section 833, and who has complied with the requirements of section 833, subsection 2, may bring a complaint before the Maine Human Rights Commission for action under Title 5, section 4612." 26 M.R.S.A. § 834-A. Section 833 is the section of the WPA that prohibits employment discrimination based on protected activity. It 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 [of protected activity]." 26 M.R.S.A. § 833. The WPA separately defines "employer" as "a person who has one or more employees. 'Employer' includes an agent of an employer and the State, or a political subdivision of the State. 'Employer' also means all schools and local education agencies." 26 M.R.S.A. § 832(2). There is no exception from the definition of "employer" in the WPA for fraternal organizations.

The exception for fraternal organizations in the MHRA definition of employer is applicable only to those parts of the MHRA where the term "employer" is used. *See, e.g.*, 5 M.R.S.A. § 4572. Section 4612 of the MHRA, which covers the Commission's authority to investigate complaints of discrimination, does not use the term "employer."

Pursuant to the plain language of 26 M.R.S.A. § 834-A, the Commission has jurisdiction to investigate a complaint alleging a violation of the WPA even if the claim is not also brought pursuant to section 4572 of the MHRA. Of course, complainants may bring claims pursuant to both the WPA and the MHRA (through 5 M.R.S.A. § 4572(1)), but they are not required to do so.

Although the Law Court has not decided this issue, it did recently interpret the WPA in such a way that reinforces this interpretation. In *LePage v. Bath Iron Works Corp.*, 2006 ME 130, the Court relied on the independent language in section 833 of the WPA in holding that "threats by an employer against the employee's status of employment may constitute discriminatory acts under the MWPA, without regard to whether or not the threats were actually acted upon." *LePage*, 2006 ME 130, ¶ 21. The language covering "threats" appears in the WPA and not the MHRA. The fact that the Law Court relied on this language in defining the scope of a WPA violation suggests that the Court would find an independent violation of the WPA.

The issue is not without some doubt, however. Section 4612 states that the Commission should investigate to determine whether "there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B) (emphasis added). "Unlawful discrimination" is a term of art in the MHRA that is defined in section 4553. The definition does not include a violation of the WPA that is separate from a violation of the MHRA. *See* 5 M.R.S.A. § 4553(10) (defining "unlawful discrimination"); 5 M.R.S.A. § 4572(1) (including WPA claims as part of MHRA employment discrimination claims).

Moreover, the remedies section of the MHRA does not seem to cover private party actions that are brought pursuant to the WPA but not the MHRA. Section 4613 of the MHRA provides that remedies are available "[i]n any action filed under this Act by the commission or by any other person." 5 M.R.S.A. § 4613(2) (emphasis added). A private action for an independent violation of the WPA would not be filed under the MHRA. Section 4613 also states that a court may award relief "[i]f the court finds that unlawful discrimination occurred. . . ." 5 M.R.S.A. § 4613(2)(B). Again, "unlawful discrimination" is a term of art that does not appear to cover independent WPA violations.

Prior decisions of the Law Court on the issue of the interaction between the WPA and the MHRA also create some uncertainty. In holding that complainants may bring WPA claims through the MHRA, the Law Court has used language that makes it unclear whether WPA claims may be brought separately from section 4572 of the MHRA. *See Currie v. Indus. Sec., Inc.*, 2007 ME 12, P12, 915 A.2d 400, 404 ("The MHRA prohibits

employers from discriminating against employees because of actions protected under the WPA.") (citing 5 M.R.S. § 4572(1)(A) (2005)); *Schlear v. Fiber Materials, Inc.*, 574 A.2d 876, 878-879 (Me. 1990) (dealing with collection of attorney's fees) *abrogated on other grounds DeMello v. Dep't of Envtl. Prot.,* 611 A.2d 985, 987 (Me. 1992) ("The 1988 repealer of section 835 came in connection with a comprehensive restructuring of the procedure for an injured party to obtain vindication under the Whistleblowers' Act. See P.L. 1987, ch. 782, §§ 5-6. By the new procedures the Maine Human Rights Commission provides counsel to prosecute any action the Commission finds reasonable to bring under the Act on behalf of the injured party. In spite of this provision, a complainant may still elect to bring a private action against the employer in the Superior Court.") (citing 5 M.R.S.A. §§ 4612(4), 4613(1), 4621 (1989)).

Nevertheless, given the language in 26 M.R.S.A. § 834-A and the Law Court's decision in *LePage v. Bath Iron Works*, I think that the Commission does have jurisdiction to investigate.

Cc: Patricia E. Ryan