Memo

Date: April 29, 2010

To: Barbara Lelli, Chief Investigator

From: John Gause, Commission Counsel

Re: E09-0502, v.

Complainant alleges that Respondent violated the Maine Human Rights Act for failing to prevent and correct sexual harassment by the owner of a daycare business where she worked and terminating her employment for reporting the sexual harassment. Respondent was a court-appointed receiver of the daycare business at the time of the alleged discrimination, and the receivership has since ended.

Respondent has asked for administrative dismissal because (1) any suit against it requires permission of the Superior Court, which Complainant has not received; (2) the receivership has terminated, and claims, such as this one, against receivers can only be brought during the existence of the receivership; (3) it is immune from liability as an officer of, and by order of, the Superior Court; and (4) it was not Complainant's employer. For the following reasons, the complaint should not be administratively dismissed.

Taking the last issue first, Complainant's allegations against Respondent are covered by the language of the Maine Human Rights Act. Respondent appears to have been a covered "employer" under the Act in that it was a "person acting in the interest of any employer, directly or indirectly." 5 M.R.S.A. § 4553(4).[1] The order appointing Respondent as the receiver for the daycare business states, in part, that it was appointed receiver "for a limited purpose, specifically, to manage the financial aspects of the Daycare Business and to liquidate the assets of the Daycare Business pursuant to the Referee's Report." Order, dated November 30, 2007. This appears sufficient to find that Respondent was acting at least indirectly in the interest of the daycare business, Complainant's employer.[2]

Moreover, even if a court were to determine that Respondent were not an "employer," Respondent could be liable under the provision in the Act (not limited to employers) that defines "unlawful discrimination" to include "[a]iding, abetting, inciting, compelling or coercing another to do any of such types of unlawful discrimination." 5 M.R.S.A. § 4553(10)(D). It could also be liable

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[1] The Act specifically defines the term "person" to include receivers. 5 M.R.S.A. § 4553(7).

[2] Presumably, Respondent was acting directly in the interest of the creditors of the daycare business. In doing so, however, its actions would indirectly benefit the daycare business' interest by maximizing the extent to which the daycare business could meet its obligations with existing assets.

under the general anti-retaliation provision in the Act, which states that "[a] person may not discriminate against any individual because that individual has opposed any act or practice that is unlawful under this Act or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this Act." 5 M.R.S.A. § 4633(1) (emphasis added).

With respect to whether court permission is required, the case cited by Respondent, *Chalmers v. Littlefield*, 69 A. 100 (Me. 1907), holds that permission is required prior to filing "suit," and it involves a court action. This complaint is not a "suit" but an administrative investigation. Unlike a suit filed in court, the Commission's investigations do not adjudicate parties' rights, and the Commission does not have the authority to award damages. *Cf.* Tomer v. Maine Human Rights Com'n, 2008 ME 190, ¶ 14, 962 A.2d 335, 340 (finding an administrative dismissal did not affect the legal rights, duties, or privileges of a party to a Commission action). *Chalmers* is thus not controlling, and there does not appear to be a policy reason for requiring prior court approval. *See Anes v. Crown Partnership, Inc.*, 932 P.2d 1067, 1070 (Nev. 1997) ("The purpose of the rule is to accommodate all claims possible in the receivership action under the supervision of the appointing court, and to render the receiver answerable solely to that court."); 75 C.J.S. Receivers § 416 ("Ordinarily, the rule [requiring court permission prior to filing suit] does not apply where the action does not affect the custody and control of receivership property. . . ."). In any event, this claim is for personal liability against Respondent (as opposed to a claim against it in its official capacity, in which case the assets of the daycare business would be at stake), and prior court approval for even a court action against a receiver in its individual capacity is unnecessary. *See Anes v. Crown Partnership, Inc.*, 932 P.2d at 1070.

Respondent next argues that the termination of the receivership rendered it no longer subject to a legal claim because any judgment against the receiver would attach to the assets of the daycare business, not to the receiver. *See, e.g., Wood v. Comins*, 21 N.E.2d 977, 978 (Mass. 1939) ("an action cannot be maintained against a receiver, even for the purpose of establishing the validity of the claim, after he has been discharged and has ceased to hold any relation to the fund out of which alone payment can be secured"). Complainant here, however, alleges personal liability on the part of Respondent, not liability in its official capacity. The rule barring actions against a receiver after the receivership is terminated is applicable only to claims against receivers in their official capacity. *See* 65 Am. Jur. 2d Receivers § 404 ("A receiver who has been discharged is relieved from all official liabilities and is neither a necessary nor a proper party to an action on any such liability.") (emphasis added).

Respondent finally argues that it is immune from a claim against it in its personal capacity based on its status as an officer of, and by order of, the Superior Court. Pursuant to common law, a "receiver who acts in good faith and with appropriate care and prudence is immune from personal liability for losses." *See, e.g.*, 65 Am. Jur. 2d Receivers § 295. This immunity is recognized in the language of the order appointing Respondent as receiver. *See* Order at page 5, ¶ 5 ("The Receiver shall not be liable for any action, in any capacity under this Order, taken or omitted in good faith and reasonably believed by it to be authorized within the discretion or rights or powers conferred upon it in accordance with this Order."). The order, however, also states, in relevant part, that Respondent "shall have no liability for any action taken by it in any such capacity in good faith in accordance with the advice of counsel, accountants, appraisers and other professionals retained by it, provided, however

that this shall not relieve it from any liability for any actions or omissions arising out of its gross negligence, willful misconduct or knowing violation of law." (Emphasis added.)[3] Accordingly, the Order recognizes that Respondent may be personally liable to the extent that it acted in bad faith, with gross negligence, willful misconduct, or knowing violation of law.[4]

In sum, the complaint should not be dismissed. On the first aspect of the claim (sexual harassment), if the investigation finds that Respondent, acting as Complainant's "employer," would otherwise be liable for the alleged unlawful sexual harassment, the next step would be to determine if it acted with bad faith, gross negligence, willful misconduct, or knowing violation of law. If so, Respondent is not immune from liability; if not, Respondent is immune. On the second aspect of the claim (retaliatory termination), again, after assessing the merits of Respondent's liability under the Maine Human Rights Act, Respondent would be immune unless it acted with bad faith, gross negligence, willful misconduct, or knowing violation of law.

Cc: Patricia E. Ryan, Executive Director

[3] Following this sentence, the Order also states, "None of the provisions of this Order shall require the Receiver to expend or risk its own funds or otherwise incur personal financial liability in the performance of any of its duties hereunder or in the exercise of any of its rights and powers."

[4] Complainant also asserts that Respondent is liable for acting outside the scope of its authority as receiver. The order, however, in addition to listing specific powers with respect to the financial management of the daycare business, states that Respondent had the power to "take such other actions as may be necessary to prevent waste or loss of the Daycare Business. . . ." Order at page 3, ¶ 8. Respondent argues that any successful suits against the daycare business would have been paid out of the daycare business' assets. Accordingly, Respondent would have reasonably believed that it was acting within its authority in managing a sexual harassment claim or the discharge of an employee who complained of sexual harassment. *Cf.* Order at page 5, ¶ 5 (referencing reasonable belief).