Maine Human Rights Commission
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Amy M. Sneirson
Executive Director

John P. Gause
Commission Counsel

Memo

Date: May 3, 2012

To: Amy Sneirson, Executive Director

From: John Gause, Commission Counsel

Re: E12-0092,

The Chief Investigator has recommended that this complaint be administratively dismissed for failure to substantiate a claim under the Whistleblowers' Protection Act ("WPA"). Specifically, the issue is whether Complainant engaged in protected activity under the WPA when he reported to Respondent what he perceived to be unsafe and illegal activity by a coworker. A complaint may be administratively dismissed by the Executive Director for failure to substantiate the complaint of discrimination. *See* 94-348 C.M.R. ch. 2, §2.02(H)(2). For the following reasons, the complaint should not be administratively dismissed.

Complainant alleges that he was fired from his job as a refuse truck driver/collector with Respondent because he reported to Respondent that another employee (who apparently also worked as a refuse truck driver/collector) was using drugs while on the job, drove too fast, skipped stops, did not wear his seatbelt, and stole copper from a site that the two had serviced for Respondent. He characterizes his reports as being of unsafe conditions and practices and illegal activity.

The Maine Human Rights Act prohibits discrimination because of previous actions that are protected under the WPA. *See* 5 M.R.S. § 4572(1)(A). The WPA, 26 M.R.S. § 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 his 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 a 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 his "employer." 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." *See* 26 M.R.S.A. § 832(2). "Agent" is not defined by the WPA. Under the common law, "[a]gency 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." Restatement (Third) Of Agency § 1.01 (2006). Here, a refuse truck driver/collector employed by Respondent would undoubtedly be Respondent's "agent," at least for purposes of driving the truck and collecting refuse. Because this case does not involve Respondent's liability for the allegedly unsafe and illegal activity committed by Complainant's coworker, it is unnecessary to determine whether, e.g., that activity was authorized or committed within the course and scope of employment. *Compare* Restatement (Third) Of Agency § 7.03 (2006) (bases for principal liability). Complainant does allege that the activity occurred while the coworker was under Respondent's control (i.e., during work hours and while driving Respondent's truck). Accordingly, Complainant's report gave Respondent the "reasonable opportunity to correct that violation, condition or practice." 26 M.R.S.A. § 833(2). A finding that the reporting activity is protected is thus consistent with the Law Court's holding in *Costain*.

[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).