

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

Robert Lopilato

V

Tri Wire Engineering Inc

DECISION OF THE HEARING OFFICER

Appearances: Robert Lopilato, claimant
Mark Danielson, Human Resource Manager, Tri Wire Engineering Inc
Scott Van Asch, Supervisor, Tri Wire Engineering Inc

Nature of Dispute: RSA 275-E:2 I (a), illegal termination for protected reporting

Claimant: Robert Lopilato, [REDACTED]

Employer: Tri Wire Engineering Inc., 890 East St., Tewksbury, MA 04073

Date of Hearing: August 11, 2014

Case No.: 47868

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant alleges that he was illegally terminated in January 2014 because he reported to his employer that it was illegal for the employer to require employees to purchase tools for their job and to “strong arm” them to take a loan from the company to pay for the tool. He also reported that it was illegal for the employer to make deductions from his wages for personal use of a cell phone. He testified he notified Mr. Van Asch, Eric Vasquez, and Chris Chapman, all supervisor and managers, of these issues, and that he confided in one supervisor, Mr. Vasquez, that he was going to contact the New Hampshire Department of Labor. Shortly thereafter, the employer began writing him up for being tardy and performance issues with his work.

He testified that on January 29, 2014, he was he was called into a meeting and notified he was being transferred to the Woburn MA office. He told Mr. Van Asch he could not go that day, but would report the next day. He went home. The employer arrived at his home and took the company vehicle. He was not told why he was terminated.

He requests, as relief in this action, one year’s salary.

The employer argued that the claimant was not terminated for reporting any illegal activities.

Mr. Van Asch testified that he was unaware that the claimant had threatened to go to the New Hampshire Department of Labor. Metrocast requires the use of a particular meter for their work. Previously, the claimant was not required to use a meter with the work he was doing. He was advised he needed to obtain a meter. If he was unable find or purchase one himself, the company ordered meters and allowed employees to take a legitimate loan to purchase the meter and pay the company back. He was vaguely aware the claimant was unhappy with buying the meter.

He testified that the claimant has some performance issues and was being given time to correct them.

He further testified that January is a slow time for the business. The claimant was not treated any differently than any other technician. The claimant was moved to the Woburn MA office because of the lack of work in the pipeline at the current location. He met with the claimant and told him to report to the Woburn MA office that day. He stated the claimant agreed to report to Woburn, but then the claimant chose to go home, rather than report to the Woburn MA office and was terminated for that action. If he had reported to the Woburn MA office as instructed, he would still be employed today.

FINDINGS OF FACT

The claimant worked as a technician for the employer. On behalf of the employer, he performed services for Metrocast.

In the fall or winter of 2013, the claimant was advised he needed to obtain a meter. Metrocast requires the use of a particular meter for their work. Previously, the claimant was not required to use a meter with the work he was doing. If he was unable find or purchase one himself, the company ordered meters and allowed employees to take a legitimate loan to purchase the meter and pay the company back. He was vaguely aware the claimant was unhappy with buying the meter.

The claimant was transferred to the Woburn, MA, office in a meeting on January 29, 2014. He was told to report to the office that day. The parties disagree as to what happened next. The claimant argues he advised them he could not go that day, but would report the following day; the employer argues he agreed to report to Woburn that day, but instead drove home.

The employer tracked the vehicle to the claimant's home. They arrived at his home to retrieve the vehicle and the claimant was terminated for failing to report to the Woburn office.

DISCUSSION AND CONCLUSIONS

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive analysis" on the evidence presented. Because of the circumstantial nature of the evidence alleged by the claimant, the analytical framework of a "pretext analysis" is appropriate. Under this analytical framework, the claimant has the initial burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. he engaged in an act or acts protected by the statute;
2. he suffered an action proscribed by the statute (termination); and
3. there was a causal connection between the protected acts he engaged in (his report that the truck he was required to drive was not inspected, and his protected refusal to drive a truck that would not pass the pre-trip inspection because of a broken speedometer) and the action he suffered as a result of that/those protected act/s (termination).

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). This burden of proof is only one of production. The claimant retains the burden of proof to persuade. In response to the employer's rebuttal, the claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that his assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to his protected act/s.

The claimant establishes a *prima facie* case of illegal termination. He reported to the employer that he believed that it was illegal for the employer to require employees to purchase tools for their job and to "strong arm" them to take a loan from the company to pay for the tool. He also reported that he thought it was illegal for the employer to make deductions from his wages for personal use of a cell phone. He testified credibly and that he informed three different supervisors. The claimant was fired by the employer. There is a causal connection, between his protected reporting, to his termination.

The employer effectively rebuts the claimant's assertions with evidence that they terminated the claimant for legitimate, non-retaliatory reasons. The claimant had previous performance issues. The claimant had been moved between offices prior because of the lack of work. He was given a direct order to report to the Woburn, MA, office. He did not. The employer terminated the claimant for failing to follow a direct order to report to the Woburn, MA, office.

The claimant has the burden to persuade in this matter. He failed to carry that burden as his testimony was only as credible, not more credible, than the employer.

The claimant fails to show that the proffered legitimate, non-retaliatory reasons for this termination or not the true reasons for this termination, or that his assertion was the true reason for the termination. The claimant, therefore, fails to prove by a preponderance of the evidence that he was terminated in retaliation for his protected reporting.

DECISION

Based on the testimony and evidence presented, as this Department finds that the claimant failed to prove by a preponderance of the evidence he was terminated in retaliation for his protected reporting, it is hereby ruled that the Whistleblower's Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: August 28, 2014

Original: Robert Lopilato
cc: Tri Wire Engineering Inc

MJD/klt