

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

KOLLSMAN INC.

DECISION OF THE HEARING OFFICER

Appearances: Karyl R. Martin Esq., Attorney for the Employer

Nature of Dispute: RSA 275-E: 4 I Whistleblowers' Protection Act

Employer: Kollsman Inc., 220 Daniel Webster Hwy, Merrimack, NH 03054

Date of Hearing: March 6, 2013

Case No. 44733

BACKGROUND AND STATEMENT OF THE ISSUES

A claim under the Whistleblowers' Protection Act was filed with the Department of Labor on October 5, 2012. The claimant filed under the Act because of the following charges against the employer. The claimant alleges that there was harassment at the workplace, threats and intimidation, interference with work, retaliation and a wrongful termination.

The claimant is seeking any health damages that have occurred because of the work situation and all back pay lost because of the termination.

The claimant stated that he asked the supervisor and the company to review the situation and hopefully resolve it. His testimony was that it just got worse. The Human Resource Department said that the problem(s) were attributed to a personality conflict.

The employer said that they set up some review programs for the claimant to participate in and try to get the work flow moving along. The claimant said that he still had problems with his direct supervisor and felt that the supervisor was discriminating against a Chinese person. The claimant did ask Human Resources to review this allegation.

The claimant said that he was terminated and it took a month for him to get unemployment compensation.

The direct supervisor testified that he started to work for the employer in 2005. The claimant came under his supervision in 2007. The supervisor said that there were problems

with the claimant on a particular project and the claimant would not work from his desk but would go to labs to fix the difficulties. The claimant was asked to do weekly reports and these fell behind.

The claimant expressed some distrust with the supervisor and he was told he could request a representative from Human Resources to sit in on any meeting. The supervisor finally put a progress plan into place. The supervisor said that the problems continued with the claimant and at a certain time the claimant took leave time off that was not approved.

The employer said that there were many levels of review of the claimant's work performance. It came out that the claimant was a good employee but there were issues in technical skills, communication and productivity. The person over the direct supervisor stated that the supervisor was tough but fair in fact he was one of the best supervisors in the company. If there was a problem it was that the claimant was not performing to expectations.

The Engineering Director did say that he reviewed the performance evaluations for the claimant and that there was no complaint about age or race discrimination from the claimant. However, the claimant did ask to be transferred or to be laid-off.

The employer said that the claimant was let go after several chances to show improvement, and there was no improvement.

The claimant said that he was fired after reporting the illegal acts of age and race discrimination and the employer used a "work plan" as retaliation instead of investigating. He feels that the work he was asked to do, was nearing completion when he was terminated.

FINDINGS OF FACT

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. she engaged in an act protected by the statute;
2. she suffered an action proscribed by the statute (discrimination/termination); and
3. there was a causal connection between the protected act she engaged in (her report of late pay and her mention of the Department of Labor) and the action she suffered as a result of that protected act (discrimination and 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 her 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 her protected act.

In this Whistleblowers' Claim the claimant never established a *prima facie case*. The claimant did have issues at work and he reported them. It is found by the Hearing Officer that the employer investigated the claims and found no wrongdoing. In fact, the employer went out of their way to see that the claimant was comfortable in the working environment.

The claimant found a situation occurred when a new supervisor made demands that he was not use to or able to meet to the satisfaction of the supervisor. The claimant did reach several problem areas that bordered on insubordination. The employer exercised their right under the New Hampshire "at will" position to release an employee at any time.

There is no finding that the employer retaliated because of protected reporting or a violation of law.

DECISION

The claim under the Whistleblowers' Protection act is invalid.

Thomas F. Hardiman
Hearing Officer

Date of Decision: April 2, 2013

Original: Claimant
cc: Employer

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