

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



Asplundh Tree Expert Company

DECISION OF THE HEARING OFFICER

Appearances: Nancy Quinlan, Esq., representing the claimant
Christopher J. Pyles, Esq., representing Asplundh Tree Expert
Company

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

Employer: Asplundh Tree Expert Company, 708 Blair Mill Road, Willow Grove, PA
19090-1301

Date of Hearing: June 20, 2012

Case No.: 43365

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant alleges that he was illegally terminated on December 27, 2011, because he reported to his employer that the employer's son, Cooper Cook, was using illegal drugs, specifically bath and sea salts, both on and off the job. He argues that the employer refused his request to transfer to another truck, away from Cooper Cook, which forced him to not show up to work on December 28, 2011. He requests, as relief in this action, back wages and attorney's fees.

Asplundh Tree Expert Company argues the claimant was not terminated. During the work day of December 27, 2011, the claimant traded texts with Cooper Cook indicating he would like to be returned to Cook's truck and would be speaking to Joel Cook, Cooper Cook's father and the General Foreperson for Asplundh Tree Expert Company, to make this request. The request was granted and the claimant asked Cooper Cook for a ride to work, as they had been riding together in the past. Cooper Cook refused, stating it was out of his way and he did not want to make the trip to pick up the claimant any longer. The claimant then spoke with Joel Cook, on December 27, 2011, in the evening, and made accusations that Cooper Cook was using illegal drugs at work.

The claimant was told to report to work on December 28, 2011. When the claimant asked Joel Cook to order Cooper Cook to give him a ride to work, the employer advised him that the employer was not required to provide transportation to work.

The claimant did not report to work on December 28, 2011 or at anytime thereafter. Per the employee handbook, the claimant's employment was terminated after three days of no show, no call, for job abandonment.

FINDINGS OF FACT

The claimant worked as a groundsman on a crew for the employer.

There were text communications between Cooper Cook and the claimant on the during the work day of December 27, 2011, in which the claimant indicated he would like to be returned to Cook's truck, as the claimant had been on a different assignment for the preceding work days. The claimant's request to transfer back to Cook's truck was granted by Joel Cook, Cooper Cook's father and the General Foreperson for Asplundh Tree Expert Company. The claimant texted Cooper Cook to ask for a ride to work as they had been riding together in the past and the claimant had paid Cook in advance for rides to work. Cooper Cook refused, stating it was out of his way and he did not want to make the trip to pick up the claimant any longer. The claimant then spoke with Joel Cook, on December 27, 2011, in the evening, and made accusations that Cooper Cook was using illegal drugs at work. The claimant had not made any reports of illegal drug use by Cooper Cook to the employer nor to the corporate office nor any legal officials, prior to this date.

The claimant was told to report to work on December 28, 2011. When the claimant asked Joel Cook to order Cooper Cook to give him a ride to work, the employer advised him that the employer was not required to provide transportation to work.

The claimant did not report to work on December 28, 2011 or at anytime thereafter. Per the employee handbook, the claimant's employment was terminated after three days of no show, no call, for job abandonment.

The claimant credibly testified he was not terminated by the employer when he made the allegations that Cooper Cook was using illegal drugs. He was aware his job was available and he was to report to work on December 28, 2011.

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 a co-worker was using illegal drugs) 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 fails to establish a prima facie case of illegal termination. He reported to the employer that a co-worker was using illegal drugs on December 27, 2011. He testified credibly he was not terminated by the employer when he made the allegations that Cooper Cook was using illegal drugs. He was aware his job was available and he was to report to work on December 28, 2011. The claimant was not terminated by the employer as he chose not to report to work. The Hearing Officer finds there is no causal connection, between his protected reporting and his choice to not return to work.

Even if the claimant had established a prima facie case, he suffered no actions by the employer as a result of his protected reporting of illegal drug use by a coworker. The claimant admitted in his testimony that he chose not to return to work, and was not terminated by the employer.

DECISION

Based on the testimony and evidence presented, as this Department finds that the claimant failed to prove by a preponderance of the evidence that 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: July 10, 2012

Original: Claimant
cc: Employer

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