

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



STEVE'S LAWN CARE AND PROPERTY MANAGEMENT

DECISION OF THE HEARING OFFICER

Appearances: Megan Douglass Esq., Attorney for the Claimant
Mark D. Hanlon Esq., Attorney for the Employer

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

Employer: Steve's Lawn Care and Property Management, 12 Bunker Street, Farmington,
NH 03835

Date of Hearing: June 20, 2012 and July 30, 2012 (held open until August 7, 2012 for closings)

Case No.: 43523

BACKGROUND AND STATEMENT OF THE ISSUES

A complaint was filed with the Department of Labor on April 19, 2012. The notice was sent to the employer and there was an objection. The Notice of Hearing was sent to both parties on May 21, 2012. The claimant maintains that he was illegally terminated for protected reporting of violations of law. The claimant is seeking wages for the time out of work until he finds another job, attorney's fees and to be reimbursed for property sold for living costs.

The first hearing was continued because of a change in the claim. The parties also agree that the company and Stephen E. Hoage are one and the same.

The claimant testified that he worked for the employer from 2009 until April of 2012 when he was fired. The work was not continuous as the claimant was laid-off during the winter. The claimant testified that there were some medical issues within his family and this caused him to have a review of wages done. It was discovered by the claimant that there was too much money being deducted for Federal Income Tax and he brought this to the attention of the employer.

The claimant testified that the employer told him that he was upset with the claimant bringing this issue up and four or five days later the claimant was terminated. The claimant also stated that there was a problem with a certain job and this was discussed prior to the tax issue. The claimant also raised an issue about the reporting of hours on a current and past check. The employer called the claimant to discuss the various issues. The claimant felt that the discussion should be held on work time and not on the phone while the claimant was off.

The claimant said that the employer got upset and told him that if he didn't like the accounting system used by the employer, the claimant could turn in his gas card and the claimant felt that he was terminated. The claimant admits that there was a discussion over the job performance and the method used to do the job. The claimant said that he did it his way and was praised by the customer. He said that this process resulted in a "heated" conversation with the employer.

A witness for the claimant (Marie Cronier) testified that she raised the tax issue because of the cost of a certain medical test that she needed. A tax review showed that the claimant had extra taxes taken out and the claimant asked for an amended W-2 so the money could be sent back to the claimant. The witness said that she was there when a "heated" conversation took place over the phone, with her husband, and her husband was fired. The witness said that they received a corrected W-2 four or five days after the firing. The employer did pay the overpayment back to the claimant.

The employer testified that he took the information about the taxes to the accountant for the business. When it was determined that there had been too much taken out the employer adjusted the problem and a check was sent to the claimant. The employer said that the claimant was upset with the accountant and recommended that the employer terminated the service because of the age of the accountant.

The employer said that there was a problem with the claimant taking instructions. He at times would not follow the direction of the employer and do a job the way the claimant wanted to do this. This practice is what led to the "heated" discussion and the eventual termination of the claimant.

The employer asked the claimant to come in for a meeting and the claimant refused to go to a meeting. The employer said that if he did not go to the meeting he could turn in his gas card because it was then assumed that the claimant was done with his employment. The claimant did not show up for work on the next workday. The claimant called a few days later and asked what to do with the gas card and he was informed that it had been deactivated.

FINDINGS OF FACT

RSA 275-E:4 Rights and Remedies. –

- I. Any employee who alleges a violation of rights under RSA 275-E:2 or 3, and who has first made a reasonable effort to maintain or restore such employee's rights through any grievance procedure or similar process available at such employee's place of employment, may obtain a hearing with the commissioner of labor or a designee appointed by the commissioner. Following such hearing, the labor commissioner or the designee appointed by such commissioner shall render a judgment on such matter, and shall order, as the commissioner or his designee considers appropriate, reinstatement of the employee, the payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies.

Decisions rendered by the commissioner of labor under paragraph I may be appealed pursuant to RSA 541.

This is the part of the law that protects employees from reporting violations of law and then protecting their positions with the company if there is retaliation based on the reporting.

It is the finding of the Hearing Officer, based on the evidence presented for the hearing, the Closing Arguments and the testimony provided for the hearing, that the claim under RSA 275-E: 4 I is invalid. The claimant has the burden to show that any action taken was because of the reporting of a law violation. This burden was not carried by the claimant.

The testimony shows that the issue of taxes was confronted and resolved. The employer testified credibly that he reviewed the deductions with his accountant and the claimant received a check for the overpayment.

The employer was also credible in the testimony that there were work problems with the claimant. Both sides point out that the employer said that the claimant was a good employee for 90% of the time. Neither side brought up the fact that a 10% problem could play right into the hands of New Hampshire being a "free will" state. The employer can let an employee go at any time and an employee can quit at any time.

In this claim it is found that the claimant was not dismissed from employment because of protected reporting. The right to quit and/or be terminated are factors controlled by each party. There is no finding on the cause of the end of employment. However, it is found that the termination was not for protected reporting.

All Motions filed during the course of the claim are denied.

DECISION AND ORDER

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.

The claim under the Whistleblowers' Protection Act is invalid.

All Motions are denied.

Thomas F. Hardiman
Hearing Officer

Date of Decision: September 5, 2012

Original: Claimant
cc: Employer

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