

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



V

**BJ's WHOLESALE CLUB**

**DECISION OF THE HEARING OFFICER**

**Appearances:** Ann Kinnane Esq., Counsel for the Employer

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

**Employer:** BJ's Wholesale Club, 25 Research Drive, Westborough, MA 01581

**Date of Hearing:** April 4, 2013

**Case No.** 45133

**BACKGROUND AND STATEMENT OF THE ISSUES**

The Whistleblowers' Protection Act Claim was filed on January 22, 2012. The claimant is seeking all back pay and an additional \$50,000.00. The claimant maintains that he was discharged for protected reporting under the law.

The employer maintains that the complaints filed by the claimant were addressed and that the termination was for other issues.

The claimant stated that he had turned in other employees for stealing food. He was working in the security area of the back room where merchandise came through. The claimant said that his problems began with a new supervisor and the reporting of the wrongdoings. Prior to that, the claimant had received good reviews from his supervisor.

The claimant was informed that there were "black out" periods where no leave time would be granted. The claimant asked for leave during a "black out" period. The leave was denied. It was finally worked out that the claimant could have one of the days requested. The claimant took the day and went to visit a family member in West Virginia and was caught in a weather situation on the way home. He got home and worked that Friday and the following week and was terminated.

The claimant believes that he was terminated because of the reporting he did on other employees and because of the new supervisor.

The employer stated that the claimant was not the first to report the incidents with the taking of unused or out dated food products. The investigation was done and the situation was corrected. The claimant did not follow the internal grievance procedure after reporting the violations of the internal policies.

The employer also stated that the claimant had a history of problems with the use of leave time. The claimant has received "corrective action notes" about the leave time in the past. The claimant asked for leave time during a "black out" period when the business operates at full capacity and all employees are needed. The time off request was denied and there was one day that was granted. The problem came about where because of the claimant's location he was caught in a severe weather condition. He called in and returned on a Friday. The employer said that the problem with this is that the claimant got all of the time off that he had originally requested and it was a "black out" period. This also continued a pattern of leave problems with the claimant. It was also the reason he was terminated.

The claimant said that others had "black out" time off and the employer said that they would review the situation. The claimant also said that he felt "corrective action notes" only lasted for 90 days but the employer answered that they remained in an employees' personnel file.

### **FINDINGS OF FACT**

RSA 275-E: 2 I (a) No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location or privileges of employment because: (a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States;

This part of the law protects an employee when the employee reports a violation of law.

It is the finding of the Hearing Officer, based on the submissions and the testimony presented for the hearing, that the claim is invalid. The claimant has the burden to show that there was protected reporting and that the reporting led to his discharge. The claimant did not bear this burden and he did not shift the burden of proof to the employer.

The employer was credible in reporting that the situation reported by the claimant had been reported before and that corrective action was taken to stop the practice(s). The employer holds that only internal policy was reported and this was followed up on.

The employer was also credible that the claimant's work record, in regards to leave time, was the determining factor in the discharge. It was the employer's position that the claimant had been warned of leave practices and yet he continued to violate them. If other employee's were involved, this will be investigated. However the action of the claimant was the determining factor.

The claim under the Whistle Blowers' Protection act is invalid.

**DECISION**

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive" analysis because of the direct evidence presented. Under this analytical framework, the claimant has the initial burden of persuasion. If the claimant meets this burden, the burden of persuasion shifts to the employer to show that despite the retaliatory animus, it would have made the same adverse employment decision for legitimate, non-retaliatory reasons. As long as the claimant can meet the evidentiary burden required by the "mixed motive" analysis, the burden of persuasion remains with the employer.

The claimant did not shift the burden to the employer. The claim is invalid.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: April 16, 2013

Original: Claimant  
cc: Employer

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