

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

X-TRA MART

DECISION OF THE HEARING OFFICER

Appearances: Frank E. Eastman Esq., Attorney for the Employer

Nature of Dispute: RSA 275 – E:2 I (a) illegal termination for protective reporting

Employer: Frank Eastman, Esq., X-tra Mart, 301 Edgewater Place, Suite 320, Wakefield, MA
01880

Date of Hearing: October 22, 2013

Case No. 46450

BACKGROUND AND STATEMENT OF THE ISSUES

A Request for Hearing was filed under the Whistleblowers' Protection Act on August 5, 2013. The claimant is alleging that she was illegally terminated for protected reporting. The report was made in September of 2012 and on July 19, 2013. The claimant states that she was terminated from her employment on July 24, 2013.

The claimant is seeking as a resolve to the claim, her position back with 100% pay and an apology for the wrongful termination. The Notice of Hearing was sent to both parties on September 26, 2013.

The claimant testified that the policies of the parent company required the employees to count cigarettes at the start of the shift and at the end of the shift. The claimant testified that she did do this.

The claimant also said that it was company policy to report any safety violations and she felt that the ladder used to count the cigarettes was not safe and she made this report.

The claimant testified that it was difficult to communicate with the Manager of the Store because the manager was seldom there and there was an over lap of shifts. The management of the company required the Store Manager to communicate verbally and not reduce everything to notes.

The claimant testified that the violations of law that she reported was the Manager stealing time and cigarettes. She said that there was no mention of a ladder in her reports. The

claimant said that the manager was putting in for 50 hours of work a week and was not working all that time. The claimant did say that she only worked three days a week in a part time position. The claimant also said that she witnessed the manager taking a couple of packs of cigarettes and did not pay for them. These were the reports she made and she feels she was terminated for reporting these violations of law.

The claimant did say that later on in her employment she made a complaint about a ladder that was unsafe. She used it for filling coolers.

The employer provided testimony from the Manager of the store. She stated that she had been the manager for five years and she was a salaried employee so she did not have a set schedule. There were problems with cigarette losses and so a closer checking system was put in place. Some of the employees did not like this system and some felt they were being blamed for the losses.

The witness stated that she never stole time because of her status as a salaried manager. She often worked during the various shifts. When complaints were made about her, they were discussed with management and where changes could be made they were. The witness also stated that she never stole cigarettes and there were never any charges by the employer against her.

In July of 2013 the claimant left a message about the danger and the hope that she did not fall off the ladder. The manager sent this to headquarters for review and the decision to terminate the claimant was made there. The manager had nothing to do with the termination.

The store supervisor testified that he was responsible for putting the cigarette checking system into place. There was a serious problem with shortages from the inventory. The manager implemented the system.

The supervisor stated that he was aware of the ladder issue and received a message from Human Resources that the claimant was to be terminated because of risk reasons. The claimant was never terminated for any reporting of law violations.

The Human Resource Supervisor testified that she was aware of the claimant's issues with her manager's style of operation. Any reports made to the company were addressed and suggestions made to correct perceived problems. There were no violations of law cited.

The reason for termination was concern over the claimant having an accident because of her written notice. To the best of the company's knowledge, the claimant had never filed any worker's compensation claims. It was just a risk to have the claimant continue to work after the perceived threat of an accident happening.

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 is the section of the Whistleblowers' Protection Act that protects an employee from adverse reaction by the employer when the employee makes a report that laws have been violated.

It is the finding of the Hearing Officer, based on the submissions and the testimony provided for the hearing, that the Claim is invalid. The claimant has the burden to shift the burden of proof to the employer or to establish her own position. The claimant did not do this.

The claimant provided testimony that the manager was stealing time and cigarettes. These were the violations of law cited in the Claim. These charges were addressed by the company as is required by the law. It must also be pointed out that the manager was a salaried employee and was responsible of all shifts. The manager could work the many or the few hours in a pay period and her work was reviewed by management and approved.

There is also no proof of any cigarettes being stolen by the manager. The claimant reported this as a violation of law and it was investigated without charges against the manager.

The employer provided credible testimony that the cause for termination was the note written by the claimant stating that she hoped she would not fall off the ladder. The employer felt that the claimant was a disgruntled employee and there was fear that an incident could take place. The employer exercised their right under New Hampshire Law to terminate an employee at any time for any reason.

The Whistleblowers' Complaint is unfounded.

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 meet her burden. The Claim is unfounded.

Thomas F. Hardiman
Hearing Officer

Date of Decision: November 13, 2013

Original: Claimant
cc: Employer

TFH/all