

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

SAU 56 Somersworth School District

DECISION OF THE HEARING OFFICER

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

Employer: SAU 56 Somersworth School District, 51 West High St.,
Somersworth, NH 03878

Date of Hearing: January 20, 2015 and February 11, 2015

Case No.: 49088

BACKGROUND AND STATEMENT OF THE ISSUES

The Department scheduled this hearing for January 20, 2015, at 9:00am. All parties received proper notification of the scheduled date. The claimant did not immediately appear at 9:00am. The hearing commenced at 9:17am, pursuant to Lab 203.04 Failure to Appear (f) In hearings other than for workers' compensation, the hearing shall proceed in the absence of any party who, after due notice of hearing, fails to be present or fails to obtain a continuance. The hearing shall begin 15 minutes after the scheduled start time if a party to the hearing has not arrived and has not contacted the department as to the reason for being late.

The claimant arrived at 9:26am, believing the hearing had been scheduled for 10:00am. She was in possession of the Notice of Hearing showing the scheduled time for 9:00am. The hearing continued at that time.

The claimant alleges that she was illegally discriminated against for advocating for a special needs student. She filed a grievance with her employer on September 2, 2012, alleging that Pamela MacDonald had taken inappropriate actions against her because she advocated for her student. The claimant alleged that Ms. MacDonald had not appropriately handled a particular student.

The claimant withdrew this grievance from the employer on September 12, 2012, because a colleague advised that her job would be in jeopardy if she continued with the grievance. The grievance had also been denied by the principal on the same day.

On March 22, 2013, the claimant received a written warning for failing to follow directives from the employer, which were discussed during a December 2012, meeting regarding a particular student.

On April 1, 2013, the claimant filed a second grievance with the employer, alleging the employer put false allegations and inaccurate statements in her personnel file on March 22, 2013, because she had filed the grievance in 2012. The false allegations and inaccurate statements included, “you are duly warned that your failure to abide by directives and to meet your performance obligations, such as ensuring students with disabilities participate in state-wide assessments, is not acceptable and future incidents will lead to termination.”

The claimant again withdrew this grievance from the employer on April 17, 2013, because she feared her job would be in jeopardy if she continued with the grievance.

On March 10, 2014, the claimant received a written reprimand from the employer stating that she had violated DNA laws stemming from an incident in which she had her school identification badge and a coffee cup tested to see if both had the same DNA on their surfaces. The claimant’s school identification badge had the appearance of having been bitten and she suspected a subordinate of having done this. The subordinate used the claimant’s coffee cup, which was then left out in the open. The claimant then had both items tested. The outcome of that test is irrelevant to this matter.

On March 12, 2014, the employer provided notification to the claimant that she was being transferred to a new position at a different school, Maplewood, within the district because this incident disrupted the students and faculty at the current school. The transfer had an effective date of March 17, 2014. The claimant did not report to the Maplewood as the transfer required, instead she utilized the maximum leave available under FMLA and then reported to the Maplewood for approximately six days prior the end of the school year in June 2014. She did report to Maplewood for the new school year in September 2014.

She did not lose any pay or benefits in the transfer.

The claimant did not file a grievance regarding the transfer to Maplewood.

She now states the transfer to Maplewood occurred as a result of her prior grievances. The regulations allow for employees to be transferred if it is in the best interest of the school district. She feels the transfer was not in the best interest of the school district, therefore it could only be in retaliation for her grievances.

The claimant filed a Whistleblowers’ Complaint with this Department on October 10, 2014, as her attorney told her “they were trying to get rid of her.” She decided to fight because she “might lose her job anyway.”

She requests, as relief in this action, to be reinstated to her former position, her sick bank restored, her legal bills paid, reimbursement for medical co-payments, and to have the false allegations removed from her file.

The employer argues the claimant did not suffer any retaliatory actions for her grievances.

On August 30, 2012, the claimant participated in a meeting regarding a particular student. The meeting reviewed the child’s particular education needs as he transitioned into the school. The meeting resulted in clear directives regarding his educational plan.

The claimant did file a grievance on September 2, 2012, regarding the August 30, 2012, meeting directives, but she withdrew the claim on September 12, 2012, the same day the grievance had been denied by the employer.

The claimant failed to follow the directives from the August 30, 2012, meeting, as she did not have the student participate in a test which is required of all students, unless an exemption exists, which this student did not have at the time.

On March 22, 2013, the claimant received a letter of counsel because she failed to follow directives from the employer following a December 2012, meeting regarding a student's educational plan. This did not relate to her grievance from September 2, 2012, but from her failure to follow directives.

On April 1, 2013, the claimant filed a second grievance with the employer, alleging the employer put false allegations and inaccurate statements in her personnel file on March 22, 2013, because she had filed the grievance in 2012.

The claimant again withdrew this grievance from the employer on April 17, 2013.

In January 2014, the claimant approached the employer regarding an issue with her school identification badge. She stated that the badge appeared to have human teeth marks and residue. She asked the employer to pay for DNA testing on the badge and the coffee cup, which belonged to the claimant, but had been used by the person, her subordinate, whom she had suspected of having bitten her school identification badge. The employer refused and the claimant paid for the testing herself. The results of the test are not relevant to this matter.

After this incident, much commotion and disruption occurred within the school with both faculty and students. The employer determined the best course of action included removing both the claimant and her subordinate.

Pursuant to Collective Bargaining Agreement between Somersworth Association of Educators and the Somersworth School Board, effective July 1, 2012 through June 30, 2014, article 10 Assignment and Transfer, A. The teaching staff shall be assigned to particular school buildings by the Superintendent within the limits of contractual agreement. Reassignment may be made when, in the judgment of the Superintendent, such reassignment or transfer is good for the school system.

They argue the transfer of both individuals was for the good of the school system as the disruption caused a poor environment for the faculty and students alike.

The employer further claims the transfer to Maplewood was not in retaliation for any grievances filed, but because the situation caused concerns and removing the participants appeared to be the best solution for the school system.

The hearing was continued to February 11, 2015.

FINDINGS OF FACT

The claimant worked as a special education teacher for the employer.

The claimant issued a grievance to the employer on September 2, 2012, after an August 30, 2012, meeting regarding a particular student's transition to their school. The claimant issued the grievance because she felt the student's educational needs and requirements were not be properly addressed and handled by the employer.

The claimant withdrew the grievance on September 12, 2012, the same day the grievance had been denied by the employer.

The claimant failed to follow the directives from the August 30, 2012, meeting, as she did not have the student participate in a test which is required of all students, unless an exemption exists, which this student did not have at the time.

On March 22, 2013, the claimant received a letter of counsel because she failed to follow directives from the employer following a December 2012, meeting regarding a student's educational plan.

On April 1, 2013, the claimant filed a second grievance with the employer, alleging the employer put false allegations and inaccurate statements in her personnel file on March 22, 2013, because she had filed the grievance in 2012.

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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. she engaged in an act or acts protected by the statute;

2. she suffered an action proscribed by the statute (retaliation); and
3. there was a causal connection between the protected acts she engaged in (her reporting inappropriate actions regarding her student and her allegation that false accusations and inaccurate statements were intentionally placed in her personnel file) and the action she suffered as a result of that/those protected act/s (false accusations and inaccurate statements were intentionally placed in her personnel file and a transfer to a new job at Maplewood).

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 his protected act/s.

The claimant fails to establish a *prima facie* case of illegal retaliation. She reported to the employer, in the form of a grievance, that she believed her student's education had not been handled appropriately by the school. The employer did insert a letter of counsel in the claimant's file. The claimant then filed a second report, also in the form of a grievance, alleging the letter of counsel of March 22, 2013, contained false accusations and inaccurate statements that were intentionally placed in her personnel file to discredit her. The employer then transferred the claimant to a new job at Maplewood.

The claimant, however, fails to establish a causal connection between her protected reportings, and both the insertion of letter of counsel in her personnel file and her transfer to the new job at Maplewood.

Even if the claimant had established a *prima facie* case of illegal retaliation, the employer proved their actions were motivated by legitimate, non-retaliatory reasons, and not because the claimant filed two grievances.

The employer provided credible testimony and evidence that the letter of counsel provided to the claimant on March 22, 2013, was not motivated by her grievance on September 2, 2012, but by her failure to follow the directives provided by the employer during a December 2012 meeting.

The employer also provided credible testimony and evidence to show that the claimant's transfer to Maplewood on March 17, 2014, was motivated by a situation with a subordinate which resulted in a disturbance and disruption within the school, to both faculty and students, not by the either of the claimant's two previous grievances, filed September 2, 2012 and April 1, 2013, both of which were withdrawn by the claimant.

Pursuant to 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.

The claimant notified the employer of her concerns via the grievance process. She withdrew those grievances. She is not eligible to refile those grievances with the employer as the time limitation imposed by the Collective Bargaining Agreement has passed. While she made a good faith effort to file the grievances, she effectively rescinded the notice to the employer regarding her issues.

Practically, though the grievances were withdrawn, the employer had been notified of the claimant's concerns and, in theory, they could become cause for retaliation as one cannot "un-ring the bell".

However, the Hearing Officer finds the employer showed the reasons for the written letter of counsel on March 22, 2013, and her transfer to Maplewood were motivated by legitimate, non-retaliatory reasons, and not because the claimant filed two grievances.

The Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence that the employer's proffered legitimate, non-retaliatory reasons for the claimant's written letter of counsel of on March 22, 2013, and her transfer to Maplewood, were not the true reasons for these actions.

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 suffered retaliation for her protected reporting, it is hereby ruled that the Whistleblower's Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 3, 2015

MJD/kdc