

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



V

**University of New Hampshire Durham Campus**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275-E:2 I (a), Illegal Termination for Protected Reporting  
RSA 275-E:2 I(c), Participation in Investigation, Hearing, Inquiry,  
Court Action.

**Employer:** University of New Hampshire Durham Campus, 5 Chenell Drive,  
Concord, NH, 03301.

**Date of Hearing:** January 11, 2016

**Case No.:** 51320

**BACKGROUND AND STATEMENT OF THE ISSUES**


The claimant alleges that the employer retaliated against her and illegally terminated her employment for complaints and grievances she made about her supervisor Michael Saputo harassing her and creating a hostile work environment.

The claimant filed a Whistleblower Complaint with this Department on August 1, 2015. She requests as relief for this action compensation for lost wages and her job back or, if that is unavailable, the ability to seek other employment with the University.

The employer denied they participated in any retaliatory action against the claimant. The employer argued the written warnings and subsequent termination of the claimant's employment on April 8, 2015 were due to ongoing timeliness and other performance problems with the claimant's work, and not for retaliatory reasons.

**FINDINGS OF FACT**

The claimant began employment with the employer in 1986. She began in in Dining Support Services and then moved to Catering and Conferences. In 2010, the claimant moved to the Housing Department as an Administrative Assistant III, where she was supervised by Michael Saputo.

The Housing Department lost several employees in the year 2012. As a result, responsibilities within the department shifted and Mr. Saputo and  job duties increased.

In her 2012 performance review, Mr. Saputo found the claimant needed improvement in managing deadlines. The claimant did not agree with the outcome of this evaluation.

The claimant believed that Mr. Saputo became critical of her work, inquired excessively about her projects and deadlines, created unnecessary work for her to complete, and purposefully clapped his hands behind her back to startle her. The claimant felt stress from her interactions with Mr. Saputo, and believed that he created a hostile work environment. The claimant also had medical and personal relationship issues, unrelated to work, that caused her stress.

On March 5, 2013 Mr. Saputo issued the claimant a written Final Warning regarding a violation of the employers acceptable use policy for her inappropriate use of the employers technological resources because she had sent 598 personal e-mails from her work account between September 25, 2012 and February 15, 2013 that could not be attributed to her break time. This action was a result of an independent investigation that was not conducted by Mr. Saputo.

Mr. Saputo issued the claimant a written warning on August 13, 2013 for inefficient and ineffective use of time, not responding to student/tenant e-mails and voicemails in a timely manner, and failure to be in the housing office during regular work hours. The claimant was given a performance plan and asked to make changes in her work performance over the next 30 days.

On September 5, 2013, the claimant received a written warning for attendance problems, problems following guidelines regarding tenant agreements, and problems with timeliness and accuracy with her work. The claimant was directed to follow outlined performance expectations in accordance with a performance plan, and that if those expectations could not be met, that further disciplinary action, including termination could occur.

In April 2014, the claimant spoke to Ms. Patty Rooney in Human Resources about Mr. Saputo's hostile behavior. The claimant expressed frustration with the situation, but did not indicate to Ms. Rooney that she believed Mr. Saputo's behavior was because she was a member of a protected class.

The employer issued a Final Warning to the claimant on December 8, 2014 for deficits in her work performance, including attendance, compliance, and timeliness of work and with deadlines. She was placed on a 90 day performance improvement plan to assist her in meeting the work expectations as outlined by the employer.

The claimant e-mailed Ms. Rooney on December 19, 2014 to file a grievance about Mr. Saputo's behavior. She completed and signed a F.A.I.R Notice Form/Complaint and Grievance Process that alleged harassment by Mr. Saputo that included intimidation by copying e-mail communication to additional parties, excessive inquiry about her work, purposefully looking for errors, and adding duties to make her job cumbersome.

On April 1, 2015, Donna Marie Sorrentino, Title IX Coordinator, found the claimant's grievance to be unfounded. The claimant believed the outcome of the grievance was unfair because none of her witnesses were spoken to.

The employer terminated the claimant's employment via letter dated April 8, 2015 for failure to meet expectations with meeting deadlines, efficiency, and prioritizing projects as detailed in the performance improvement plan. Ms. Rooney and Ms. Irla-Chesney were involved in the decision to terminate the claimant's employment.

On April 16, 2015, the claimant filed a grievance with the employer reiterating her prior complaints against Mr. Saputo and alleging her termination was in retaliation for her January 5, 2015 grievance.

On April 23, 2015, Ms. Sorrentino found the claimant's complaints about Mr. Saputo had already been substantially reviewed through the January 5, 2015 grievance, and that her termination was a result of her inability to meet performance expectations, and not because of retaliation.

### **DISCUSSION AND CONCLUSIONS**

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 (termination); and
3. there was a causal connection between the protected acts she engaged in and the action she 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 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/s.

The claimant described a difficult and challenging work environment in which the employer intentionally acted in a manner that caused her distress. However, the claimant has not established that she was engaged in acts protected by the statute. Regardless of how distasteful the claimant's work environment was, it does not violate any law or rule as required by RSA 275-E. The claimant never articulated that she was a member of a protected class being subject to discrimination or harassment. The claimant did file a grievance with the employer alleging the conduct she complained of violated the employers' policies, but this does not fall under the protections afforded by the statute. Therefore, the claimant has failed to establish a *prima facie* case of retaliation/termination.

However, even if the claimant had established a prima facie case of retaliation or termination, the employer proved their actions were motivated by legitimate, non-retaliatory reasons, and not because of the claimant's grievance or reports.

The employer provided credible testimony and evidence to show that the claimant's termination was based on poor work performance and failure to meet expectations as outlined in the performance improvement plans. The Hearing Officer finds that the claimant's termination from employment on April 8, 2015 were motivated by legitimate, non-retaliatory reasons, and not for the grievance filed by the claimant.

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that the employer's proffered legitimate non-retaliatory reason for the claimant's termination were not the true reasons for this action.

### **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 she suffered retaliation for her engagement in protected acts, it is hereby ruled that the Whistleblower's Claim is invalid.

---

Danielle N. Albert  
Hearing Officer

Date of Decision: January 25, 2016

Original: Claimant  
cc: Employer