

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



V

**Cracker Barrel Old Country Store Inc**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275-E:1 I (a) illegal termination for protected reporting

**Employer:** Cracker Barrel Old Country Store Inc, PO Box 787, Lebanon TN 37088  
Cracker Barrel Old Country Store Inc, 16 Nashua Rd, Londonderry NH  
03053

**Date of Hearing:** August 22, 2017

**Case No.:** 55262

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant alleges that he was illegally terminated May 11, 2017, because he verbally reported to his manager that the use of Quimico, a degreaser, around the food/steam table was illegal. He requests, as relief in this action, compassion.

The employer argues they were not aware of any reports of illegal use of a degreaser around the food/steam table. Further, the claimant was terminated after an investigation into his inappropriate and harassing conduct with a female employee and discriminatory comments regarding the age of other employees, in contravention of their zero tolerance harassment and discrimination policies. The claimant also did not follow the grievance procedure or arbitration policy if he had disagreed with his termination.

**FINDINGS OF FACT**

The claimant worked as a cook for the employer from December 8, 2012 through his termination on May 11, 2017.

The claimant alleges he reported the illegal use of a degreaser around a food/steam table verbally to his managers Jeffrey Wall and Louise Korzeb. He thinks he saw "John" a cook, spraying the degreaser on the food/steam table once "sometime last year" in 2016. It may have happened on other occasions. He does not remember any dates or times of year, as he did not know he would be required to write it down. Mr. Wall responded "ok" but the claimant does not know if it was investigated or not.

He further claims to have seen a new employee spraying the degreaser around the food/steam table. He instructed the employee not to do that, but did not report the activity to anyone.

He agreed he had participated in an investigation in April 2017 regarding alleged comments he made to another employee. He denied the harassing comments with the female employee, but offered he did tell a dishwasher they were too old. He agrees that at no time during the investigation into his activity did he mention to any representative of the employer or any coworker he had made a report of the illegal use of degreaser around the food/steam table.

Jeffrey Wall left the claimant's location in April 2017. Mr. Laporte took over at that time. The claimant agrees he did not notify Mr. Laporte of any illegal degreaser use. The only reference the claimant made was "I know things you don't know" but did not elaborate at any time on this cryptic statement.

The claimant was also attempting a transfer to a South Carolina location in April 2017. The District Manager had told him she would "make it happen." He did not follow up with her or the South Carolina location after his termination.

He credibly testified is aware of the open door policy of the employer and the poster in the breakroom with the 800 number to call. He chose not to do so.

The employer investigated the claimant after a report by a female employee, RG, that the claimant made inappropriate and harassing comments about her appearance and that women should not be working. During the investigation with the claimant and other witnesses, the employer discovered the claimant made additional statements such as "women don't belong in the workplace" and that he "had never worked with so many women and old people" which he told the employer was bad for them. The claimant denied the statements regarding RG, but agreed with the other statements.

The employer terminated the claimant after their investigation due their zero tolerance policy regarding harassment and discrimination.

### **DISCUSSION AND CONCLUSIONS**

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "pretext" analysis because of the circumstantial evidence of retaliation presented. 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. he engaged in an act or acts protected by the statute;
2. he suffered an action proscribed by the statute (termination); and
3. there was a causal connection between the protected acts he engaged in (his report of the use of degreaser near a food/steam table) and the action he suffered as a result of that/those protected act/s (termination).

In Collazo v. Bristol-Myers Squibb Manuf., Inc. 617 F.3d 39, 49-50 (1<sup>st</sup> Cir. 2008), the court opined that "[O]ur law is that temporal proximity alone can suffice to meet the relatively light burden of establishing a *prima facie* case of retaliation."

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 his 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 termination. He alleges he made a verbal report to the regarding the illegal use of a degreaser, but cannot provide a date or even year in which it occurred. He testified it was in 2016 and reported 2017 on this Whistleblowers Complaint form. He also agreed he did not tell any of the employer representatives involved in the investigation or his subsequent termination of his alleged earlier report.

Even if the claimant had established a *prima facie* case, he would have failed in his claim as the employer presented credible testimony and evidence that the claimant was terminated for his harassing and discriminatory comments and conduct regarding women and age, not for any alleged reporting of illegal use of degreaser.

Further, the claimant failed to establish that the use of degreaser around a food/steam table is an illegal activity in contravention of any rule or law.

The Hearing Officer finds that the claimant failed to show that the proffered legitimate, non-retaliatory reason for his termination was not the true reason for his termination, and that his assertion was the true reason for the unlawful conduct/retaliation.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he suffered any retaliation in response to a protected reporting.

### **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 he was terminated in retaliation for his protected reporting, it is hereby ruled that the Whistleblower's Claim is invalid.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: September 15, 2017

Original: Claimant  
cc: Employer  
MJD/nm