

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Town of Epsom

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275-E:2 I (a), illegal retaliation for protected reporting
RSA 275-E:9, illegal retaliation for protected reporting for a public
employee

Employer: Town of Epsom, PO Box 10, Epsom NH 03234

Date of Hearing: September 10, 2018

Case No.: 57076

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant alleges that the employer illegally retaliated against him by suspending him without pay for one week and requiring him to attend a class on RSA 91-A, because he reported an attorney, ("TS" for the purposes of this Decision) to the Judicial Conduct Committee (JCC). He asserts this reporting is protected under RSA 275-E:2 I (a) and 275-E:9.

He requests, as relief in this action, a declaratory ruling in his favor, back wages, removal of disciplinary action in his file and attorneys' fees.

The employer argues they did not discipline the claimant for his reporting of TS to the JCC. They argue that he was disciplined for the mishandling of the information that he provided to them and provided information in violation of RSA 91-A. Further, the information was provided to the JCC in error as that body hears cases only for judges, as it should have been filed with the Attorney Discipline Office of the Professional Conduct Committee (PCC) which handles complaints against attorneys.

Further, the claimant did not report any alleged violations perpetrated by the employer, and therefore no protected reporting could occur.

FINDINGS OF FACT

The claimant has worked for the Town of Epsom Police Department in various roles since 1997. He has been the Chief of Police since 2004 and he continues in this role today.

The claimant argues the employer illegally retaliated against him by issuing a one week unpaid suspension for reporting TS to the JCC.

On October 16, 2017, an issue arose between TS and Officer Michaels, an officer for the Town of Epsom, in open court, though not during a trial. The claimant felt that TS was posing a safety issue to his officers because of this issue and his previous contact with the police department. The claimant decided to report TS to the proper authorities. The claimant then collected all the data on TS in the Police Department's database. He did a computer search for TS which included all reports in which he or his family was listed, regardless of whether they were victims, witnesses, or an accused.

On October 20, 2017 the claimant and Officer Michaels prepared a letter of complaint and attached the supporting documentation from the Police Department records, which was intended for the Attorney Discipline office (PCC), however was instead sent to the JCC. A copy was also sent to TS.

TS emailed the employer on October 24, 2017, to make a complaint regarding the claimant's actions. His complaint concerned town resources, misuse of information and the data which was released about himself and his family. He states he will bring action against the Town for these issues which he believes are criminal. He specifically noted in this email he had no problem with a complaint being made about him and people speaking their minds.

The JCC returned the claimant's complaint regarding TS to the employer on October 24, 2017, stating they were not the correct entity with which to file a complaint regarding an attorney.

The employer's Selectboard immediately notified the claimant he was not to refile the complaint with the PCC, and that they would look into his complaint.

The employer immediately contacted Municipal Resources Inc (MRI) to investigate the conduct of the claimant to see if any actions taken were indeed criminal.

November 22, 2017, Alan Gould, President of MRI, issued a report regarding the claimant's actions and determined that some actions were improper and may be violations of certain statutes (documentation of full report in Claimant's Exhibit #3).

On January 3, 2018, the employer disciplined the claimant for his actions on or about October 16 through 20, 2017, which involved his gathering documents "without any thought or concern about [TS] and his children's privacy rights" which are a violation of RSA 91-A:5 IV and exposing the Town to potential civil liability, by suspending him for one week without pay and requiring him to attend training on RSA 91-A. The claimant appealed this Decision on January 10, 2018, which the employer denied on February 2, 2018. The claimant offered a settlement to the employer on February 7, 2018, which they denied on March 9, 2018.

On March 6, 2018, the employer's legal counsel referred this matter of the claimant's actions to the Attorney General's office for review of potential misuse of an official position. This is currently being handled by Sullivan County as there was a potential conflict with Merrimack County, who would have had jurisdiction.

The claimant had his annual performance review on July 16, 2018. The employer noted the issues found in the MRI report and that the claimant had met some

areas that had needed improvement, but that there were still areas in which he needed to comply.

The claimant acknowledged that he would not have handed out the information he provided to the JCC to other members of the public.

The claimant is still under investigation by Sullivan County as of the date of this hearing.

DISCUSSION AND CONCLUSIONS

As an initial matter, the employer argues that the claimant did not report any alleged violation performed by the employer. The claimant made a report of his own accord and not with the affirmation of the employer to a third party, which they argue is not covered by the statutes.

RSA 275-E:2 Protection of Employees Reporting Violations. –

I. 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; or

(b) The employee objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law; or

(c) The employee, in good faith, participates, verbally or in writing, in an investigation, hearing, or inquiry conducted by any governmental entity, including a court action, which concerns allegations that the employer has violated any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States.

RSA 275-E:9 Protection of Public Employees. – No governmental entity shall threaten, discipline, demote, fire, transfer, reassign, or discriminate against a public employee who files a complaint with the department of labor under RSA 275-E:8 or otherwise discloses or threatens to disclose activities or information that the employee reasonably believes violates RSA 275-E:2, represents a gross mismanagement or waste of public funds, property, or manpower, or evidences an abuse of authority or a danger to the public health and safety. Notwithstanding this provision of law, public employers may discipline, demote, fire, transfer, or reassign an employee so long as the action is not arbitrary or capricious and is not in retaliation for the filing of a complaint under this chapter. Any public employee who files such a complaint or makes such a disclosure shall be entitled to all rights and remedies provided by this chapter.

Though these statutes falls under the Whistleblower's Protection Act, there are no statutes that define a whistleblower or define whose action the employee can report. As the statutes are silent, and though it is contra intuitive of the term "whistleblower", this complaint meets the criteria set forth in RSA 275-E:2 I (a) and 275-E:9 for a protected reporting.

Although there is evidence of the steps taken by the employer in this matter, as the New Hampshire Supreme Court opined in Appeal of Mary Ellen Montplaisir 147 N.H.

297 (2001), evidence is only considered to be direct if “it consists of statements by a decision maker that directly reflect the alleged animus and bear squarely on the contested employment decision.” Nothing in the evidence presented suggests animus on the part of the employer or retaliation based on the claimant’s protected reporting. Therefore, the evidence presented is considered circumstantial.

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 (retaliation); and
3. there was a causal connection between the protected acts he engaged in (reporting TS to the JCC) and the action he suffered as a result of that/those protected act/s (suspension).

In Collazo v. Bristol-Myers Squibb Manuf., Inc. 617 F.3d 39, 49-50 (1st 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 establishes a *prima facie* case of illegal retaliation. He filed a report with the JCC regarding TS. The claimant was given a one week unpaid suspension by the employer. There is a causal connection, between his protected reporting, to the unpaid suspension/retaliation.

The employer effectively rebutted the claimant’s assertion. The employer, from the very beginning of this issue, focused on the potential impropriety and/or criminality of the claimant’s actions. They made no reprimand or discipline simply because the claimant reported TS to the JCC, or for his error in sending it to the JCC rather than the PCC. They hired a third party to investigate the claimant’s actions. As a result of the report issued by MRI for improper actions and potential criminal conduct on the part of the claimant, the employer disciplined the claimant. The claimant is still under investigation as of the date of the hearing.

Though the act of reporting an alleged violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States is protected under the statutes, it does not mean that every aspect of making that report is protected,

including the employer's reasonable belief that there had been potential impropriety and/or criminality of the claimant's actions, including an unauthorized dissemination of protected information from within the employer's records. Actions taken by an employee in the commission of making any report, or causing a report to be made, of any violation must be lawful and proper to maintain a protected status.

The claimant failed to show any persuasive evidence or testimony that the employer's motivation for his suspension was for his protected reporting of TS, rather than their proffered legitimate, non-retaliatory reason for his suspension.

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

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 suffered retaliation for his protected reporting, it is hereby ruled that these Whistleblower's Claims are invalid.


Hearing Officer

Date of Decision: October 2, 2018

Original: Claimant
cc: Claimant's Attorney
Employer
Employer's Attorney
Employer's Attorney