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March 16, 2011

Rodney Witham (Oakland)

v.

Parker K. Bailey & Sons, Inc. (Waterville)

### **I. COMPLAINANT'S CHARGE:**

Complainant, Rodney Witham, alleged that Respondent, Parker K. Bailey & Sons, (hereinafter, Bailey), terminated his employment in retaliation for his vocal whistleblowing when he contacted the Department of Labor to complain about illegal deductions from his paycheck.

### **II. RESPONDENT'S ANSWER:**

Respondent denied that Complainant was discriminated against, and asserted that other employees' positions were eliminated as well because of the slumping economy.

### **III. JURISDICTIONAL DATA:**

- 1) Date of alleged discrimination: April 9, 2009.
- 2) Date complaint filed with the Maine Human Rights Commission: May 28, 2009.
- 3) Respondent employs 30-35 employees and is subject to the Maine Human Rights Act as well as state and federal employment regulations.
- 4) Respondent is represented by Brett Baber, Esq. Complainant is represented by Chad Hansen, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution conference. Based on this review, this complaint has been identified for a brief Investigator's Report, which summarizes the allegations and denials in relationship to the applicable law but does not fully explore the factual issues presented. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of reasonable grounds or no reasonable grounds in this case.

### **IV. DEVELOPMENT OF FACTS:**

- 1) The parties and issues in this case are as follows:

- a) The Complainant, Rodney Witham worked for Bailey as a Class A driver and a mover from March 2007 until his termination on April 9, 2009.
  - b) Bailey operates a moving and storage company.
  - c) President, CB; Owner's Son, RB; General Manager, KF; Secretary, MM; Former Truck Driver 1, GP; Former Truck Driver 2, EQ; Former Truck Driver 3, TP; Former co-worker, ER.
  - d) Complainant, Rodney Witham, alleged that Bailey terminated his employment in retaliation for his vocal whistleblowing when he contacted the MDOL to complain about illegal deductions from his paycheck. Bailey denied that Mr. Witham was discriminated against, and asserted that other employees' positions were eliminated as well because of the slumping economy.
- 2) Mr. Witham provided the following concerning his employment with Bailey:
- a) I worked for Bailey as a Class A driver and mover from March 2007 until it terminated my employment on April 9, 2009. During the course of my employment, I complained to management numerous times about illegal deductions from my paycheck. Bailey was charging drivers ATM fees and late log fines from the corporate office. I attempted to resolve this issue with the company, but I was unsuccessful. Therefore, I contacted ( MDOL ).
  - b) After I contacted MDOL in January of 2009, they conducted an investigation on February 5, 2009, and instructed Bailey to pay me and other employees money which it had illegally deducted from our paychecks. General Manager terminated my employment on April 9, 2009. The reason given for my termination was that the company was experiencing a re-organization and that my position was no longer supported in the company's plans. I believe that this reason is not true. I believe that I was terminated for complaining about the illegal deductions from my paycheck.
- 3) Bailey provides the following regarding Mr. Witham's allegation of whistleblower retaliation:
- a) Neither President nor General Manager knew who had contacted the Maine Department of Labor ( MDOL ). They did not know that Mr. Witham was involved. The company had to downsize its Waterville location in the spring of 2009. The Brunswick Naval Air Station had closed, resulting in a substantial loss of volume in Waterville. Nationwide, home sales were declining, eroding revenue for moving companies, including Bailey.
  - b) Due to the number of customer claims and complaints involving Mr. Witham, he was selected for termination.
  - c) Mr. Witham contends that there is evidence that Bailey's position is pretext based on its advertising for a new driver shortly after his termination. Mr. Witham held a Class A license. On or about April 18, 2009, another driver, Former Truck Driver 3 in Waterville, quit. He also held a Class A license. Bailey's overall goal as a company from April 2009, moving

forward was to have one full-time Class A driver and one full-time Class B driver willing to run over the road on a consistent basis. Neither Former Truck Driver 3 nor Mr. Witham was willing or capable of fulfilling the company's needs in this manner. There were other drivers utilized after Mr. Witham and Former Truck Driver 3 left the company. There is other objective evidence of downsizing. Since the spring of 2009, two other drivers' positions have been eliminated and one of the drivers has been driving the Class B truck over the road. There has been one new hire, effective September 2009, a Class A driver who is committed to driving over the road.

- 4) Former Truck Driver 3 responds in the following manner:
  - a) I worked for Bailey during the same period of time as Mr. Witham. He started there before me, so he had greater seniority than I did. I and many other employees were upset that the company was taking money out of our paychecks. I and many other employees knew that Mr. Witham complained to MDOL about the company unlawfully taking money out of our paychecks.
  - b) It was common knowledge that Mr. Witham complained to MDOL and I know that management knew that he went to MDOL because, after he complained, the relationship between management and the drivers became very tense.
  - c) I thought that Mr. Witham was a good worker and he did not deserve to be laid off or terminated.
  
- 5) Former Truck Driver 1 made the following statements concerning his employ with Bailey:
  - a) General Manager told me, shortly after Bailey terminated Mr. Witham, that he was looking to hire a driver to replace Mr. Witham. Owner's Son told me that Mr. Witham was laid off because he was too slow of a worker. Mr. Witham was nowhere as slow as another driver, ER. Based on my experience working with both these men, ER is much slower at loading furniture. In addition, ER has a history of getting trucks stuck. Mr. Witham did not have a problem with getting trucks stuck.
  - b) I, and many other employees, knew that Mr. Witham complained to the MDOL about the company unlawfully taking money out of our paychecks. I had discussed the problem with Mr. Witham and he complained to the MDOL on behalf of me and others who felt that the company was taking money unlawfully. I spoke with many employees about Mr. Witham's complaint to the MDOL.
  - c) I also witnessed Mr. Witham speak to Owner about these unlawful deductions from our paychecks. Mr. Witham was speaking with President on the phone at the time. I was with Mr. Witham during this phone conversation so I only heard his side of the conversation.
  - d) After Mr. Witham contacted the MDOL, Secretary warned me that "Mr. Witham should watch himself because he's being watched by the Baileys" and that they were looking for a reason to fire him."
  
- 6) Additional investigation reveals:

- a) Bailey's final submission to the Commission indicates, for the first time, that "due to the number of customer claims and complaints involving Mr. Witham, he was selected for termination."

## V. ANALYSIS:

- 1) The Maine Human Rights Act requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The Whistleblowers' Protection Act provides, in part, that it is unlawful employment discrimination to discharge an employee because the employee, acting in good faith, reports orally or in writing to the employer what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States. 26 M.R.S.A. § 833(1)(A).
- 3) Complainant, Rodney Witham, alleged that Respondent, Bailey, terminated his employment in retaliation for his vocal whistleblowing when he contacted MDOL to complain about illegal deductions from his paycheck. Bailey denied that Mr. Witham was discriminated against, and asserted that other employees' positions were eliminated as well because of the slumping economy.
- 4) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that he engaged in activity protected by the WPA, he was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *See DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.
- 5) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA protected activity. *See Wytrowski v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry his overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*
- 6) Here, Mr. Witham's has alleged that he reported to his employer first and then, to MDOL in January of 2009, a violation of Maine law. Mr. Witham had complained about Bailey's policy of charging ATM fees and late log fines. He learned that this was not legal, and when an investigation was conducted by MDOL, Bailey was told by MDOL to return the money. Co-workers provided affidavits which supported Mr. Witham's assertion that the company knew who had contacted MDOL, even though the company stated that they had no idea who had contacted MDOL. MDOL conducted its investigation on February 5, 2009 and

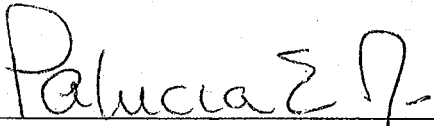
instructed Bailey to pay him and other employees money which it had illegally deducted from their paychecks. General Manager terminated Mr. Witham's employment on April 9, 2009. The reason given for his termination was that the company was experiencing a re-organization and that his position was no longer supported in the company's plans.

- 7) Secretary told Former Truck Driver 1 that Mr. Witham should watch himself because he was being closely watched by the Baileys and that they were looking for a reason to fire him.
- 8) Bailey has asserted that neither President nor General Manager knew who had contacted MDOL. They stated that they did not know that Mr. Witham was involved. They asserted that the company had to downsize its Waterville location in the spring of 2009. The Brunswick Naval Air Station had closed, resulting in a substantial loss of volume in Waterville. They explained that, nationwide, home sales were declining, eroding revenue for moving companies, including Bailey.
- 9) Interestingly, for the first time, in their final submission to the Commission, they stated that, due to the number of customer claims and complaints involving Mr. Witham, he was selected for termination. This was the first mention of these issues.
- 10) Mr. Witham contends that there is evidence that Bailey's position is pretext based on its advertising for a new driver shortly after his termination. Mr. Witham held a Class A license. On or about April 18, 2009, another driver, Former Truck Driver 3 in Waterville, quit. He also held a Class A license. Bailey stated that its overall goal as a company from April 2009, moving forward was to have one full-time Class A driver and one full-time Class B driver willing to run over the road on a consistent basis.
- 11) There were other drivers utilized after Mr. Witham and Former Truck Driver 3 left the company. There is other objective evidence of downsizing. Since the spring of 2009, two other drivers' positions have been eliminated and one of the drivers has been driving the Class B truck over the road. There has been one new hire, effective September 2009, a Class A driver who is committed to driving over the road.
- 12) At the final stage of the analysis, the company's claim of financial hardship is contradicted by its own act in advertising the need for four more employees less than one month after discharging Mr. Witham. Additionally, shortly after Mr. Witham's termination, Former Truck Driver 1 was told by General Manager that Bailey was looking for a driver to replace Mr. Witham. Additionally, one must not overlook the timing of Mr. Witham's termination, which occurred soon after his complaint to MDOL about Bailey's unlawful payroll deductions.
- 13) Mr. Witham is found to have been retaliated against for whistleblower activity.

## VI. RECOMMENDATION:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that Mr. Rodney Witham was unlawfully retaliated against in employment ( termination) on the basis of whistleblower activity by officials of Bailey; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Patricia E. Ryan, Executive Director



Michèle Dion, Investigator