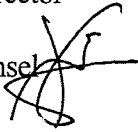


Memo

Date: May 3, 2010

To: Patricia E. Ryan, Executive Director

From: John Gause, Commission Counsel 

Re: E09-0467, 0467-A,

and

This memo addresses Respondents' request for administrative dismissal of the above-referenced complaint.

Complainant alleges that Respondents violated the Maine Human Rights Act by terminating her employment because of her activity protected by the Whistleblowers' Protection Act. At the time of Complainant's termination, Complainant's employer, Respondent, (" ") was under a court-ordered receivership pursuant to 22 M.R.S. Chapter 1666-A. The second Respondent, (" "), was the receiver. At the time of Complainant's termination, pursuant to the order appointing receiver, had the sole authority to discharge Complainant's employment. made the termination decision.

Both respondents have asked for administrative dismissal because (1) did not make the termination decision, did not have the authority to do so, and is not liable for the decision made by ; (2) is not liable because it was not Complainant's "employer"; (3) is immune from suit for damages; and (4) Complainant has not received court approval prior to filing suit against , as required by the receivership statute. For the following reasons, the complaint should not be administratively dismissed.

With respect to , while it is true that it is not vicariously liable for the employment decisions made by , *see, e.g., Canney v. City of Chelsea*, 925 F.Supp. 58, 66 (D.Mass. 1996); 65 Am. Jur. 2d Receivers § 285, Complainant argues that is independently liable for "aiding, abetting, inciting, compelling, or coercing another to do any such types of unlawful discrimination." 5 M.R.S.A. § 4553(10)(D). To the extent that Complainant can establish an independent basis (such as the aiding and abetting provision) to hold liable, the investigation against should proceed. The fact that was in receivership does not preclude this investigation against *See, e.g., 65 Am. Jur. 2d Receivers § 366* ("Where the appointment of a receiver for a corporation does not have the effect of terminating the legal existence of the corporation, the appointment does not preclude the commencement or prosecution to judgment of actions against the corporation, where the purpose and effect thereof is not to acquire a lien upon the property of the corporation or to interfere with the receiver's possession of the property. . . .").

With respect to [redacted] it appears to have been Complainant's "employer" under the Act at the time of the termination decision. "Employer" is defined, in part, as "any person in this State employing any number of employees, whatever the place of employment of the employees." 5 M.R.S.A. § 4553(4). The Act specifically defines the term "person" to include receivers. 5 M.R.S.A. § 4553(7). Although [redacted] had been Complainant's employer until it went into receivership, EMHS appears to have supplanted [redacted] in that role when it was appointed emergency receiver. The appointment order states, in part, that [redacted] shall "have all of the powers enumerated in 22 M.R.S.A. § 7934." July 1, 2009 Order at page 1. Section 7934 divested [redacted] of possession and control of the hospital. 22 M.R.S.A. § 7934. The order states that [redacted] "is authorized to hire, direct, manage and discharge any professional, administrative and/or management staff of [redacted]." Order at page 2, ¶ 2. It also divested the [redacted] Board of Directors "of governance responsibility and/or management authority over the affairs of [redacted] and such authority shall instead be exercised by [redacted] or its designee." Order at page 2, ¶ 4. Given the fact that [redacted] had exclusive control over Complainant's employment (and, indeed, exercised that control by terminating her employment), [redacted] appears to have been Complainant's "employer" for purposes of the Act. *Cf. Legassie v. Bangor Publ. Co.*, 1999 ME 180, ¶ 6, 741 A.2d 442 (power to control is the most important factor in determining the existence of an employer-employee relationship for purposes of establishing vicarious liability in tort).

Moreover, even if [redacted] (and not [redacted] were the one that employed Complainant, would still be covered by the Act's definition of "employer," which includes a "person acting in the interest of any employer, directly or indirectly." 5 M.R.S.A. § 4553(4). Pursuant to the receivership statute, EMHS had the duty "to preserve the assets and property of the residents or clients, the owner and the licensee." 22 M.R.S.A. § 7934(1) (emphasis added). Accordingly, its actions were "directly or indirectly" in the interest of [redacted] which was presumably the owner or licensee. EMHS also appears to be acting "indirectly" in [redacted] s interests by addressing the issues that led to the receivership. Finally, even if a court were to determine that [redacted] were not an "employer," it, too, could be liable under the provision in the Act (not limited to employers) that defines "unlawful discrimination" to include "[a]jiding, abetting, inciting, compelling or coercing another to do any of such types of unlawful discrimination." 5 M.R.S.A. § 4553(10)(D).

With respect to immunity, to the extent that [redacted] asserts immunity based on its actions in its official capacity, Complainant may still proceed with an action seeking prospective injunctive relief. *See, e.g. Pulliam v. Allen*, 104 S.Ct. 1970, 1981 (1984). As for personal immunity, the statute contemplates an exception to that immunity when a receiver engages in intentional wrongdoing, which is what is alleged here (termination because of protected whistleblower activity). *See* 22 M.R.S.A. 7936 ("Except in cases of gross negligence or intentional wrongdoing, the receiver is liable in his official capacity only and any judgment rendered shall be satisfied out of receivership assets.") (emphasis added). Immunity is thus not a valid basis to dismiss the complaint.

Finally, with respect to whether court permission is required, the statute provides that "[n]o person may bring suit against a receiver appointed under section 7933 without first securing leave of the court." 22 M.R.S.A. § 7936 (emphasis added). Permission is thus required prior to filing "suit," but this is an administrative investigation. Although "suit" is undefined in the statute, its common legal meaning is "[a]ny proceeding by a party or parties against another in a court of law." *Black's Law Dictionary*, Eighth Edition (2004). The Commission's administrative investigation is not a

proceeding in a court of law. Moreover, unlike a suit, the Commission's investigations do not adjudicate parties' rights, and the Commission does not have the authority to award damages. *Cf. Tomer v. Maine Human Rights Com'n*, 2008 ME 190, ¶ 14, 962 A.2d 335, 340 (finding an administrative dismissal did not affect the legal rights, duties, or privileges of a party to a Commission action). The statutory requirement of receiving court permission prior to filing suit is thus inapplicable here. There also does not appear to be a policy reason for requiring prior court approval. *See Anes v. Crown Partnership, Inc.*, 932 P.2d 1067, 1070 (Nev. 1997) ("The purpose of the rule is to accommodate all claims possible in the receivership action under the supervision of the appointing court, and to render the receiver answerable solely to that court."); 75 C.J.S. Receivers § 416 ("Ordinarily, the rule [requiring court permission prior to filing suit] does not apply where the action does not affect the custody and control of receivership property. . . .").

In sum, the complaint should not be dismissed. Rather, as a result of the issues raised here, the investigation with respect to _____ should focus on the extent to which it violated the provision prohibiting "aiding, abetting, inciting, compelling, or coercing another to do any such types of unlawful discrimination." 5 M.R.S.A. § 4553(10)(D). With respect to _____, the investigation should include a determination of whether it was acting as Complainant's "employer." If not, the focus would be on whether it, too, violated the aiding and abetting clause.

Cc: Patricia E. Ryan, Executive Director