

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place, Room 503
Boston, Massachusetts 02108
(617) 727-2293

JOHN J. CAPORELLI, JR.,
Appellant,

v.

D-07-322

CITY OF WORCESTER,
Respondent.

Appellant's Attorney:

Gary H. Goldberg, Esq.
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120 Main Street
Worcester, MA 01608

Respondent's Attorney:

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Commissioner:

Christopher Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural and Factual Background

Pursuant to G.L. c. 31, § 2 (b), the Appellant, John Caporelli, Jr. (hereafter "Appellant"), filed this appeal on September 6, 2007, with the Civil Service Commission (hereafter "CSC") claiming that he had been disciplined by the Respondent, the City of Worcester (hereafter "City" or "Appointing Authority), as Appointing Authority, by way of a five-day suspension, which he received on August 29, 2007. The appeal was timely filed.

The Appellant is employed by the City of Worcester as a building custodian/fireman and has held that position since January 6, 2003. *Joint Pre-Hearing Memorandum* at 2 (hereafter “Memorandum”). Until March 2006, the Appellant worked from 7:30 a.m. to 3:30 p.m., Monday through Friday. *Id.* In March 2006, the Appellant applied for and received Workers’ Compensation benefits. *Id.* When the Appellant returned from his Workers’ Compensation leave of absence on October 16, 2006, his hours were changed to 10:00 a.m. to 6:00 p.m. *Id.* The Appellant has filed a union grievance on this matter which is currently pending arbitration.

On March 14, 2007, the Appellant was issued a written reprimand. On March 19, 2007, the Appellant received another reprimand in a correspondence from Principal Bowolick of the school for which the Appellant worked. On March 20, 2007, the Appellant was issued yet another written reprimand by Principal Bowolick.

On April 2, 2007, the Appellant received notice of a hearing to consider his termination. A hearing was held on May 2, 2007 and June 26, 2007. On August 6, 2007, the Appellant was suspended for five days and was ordered to attend and complete anger management training before returning to work, which the Appellant completed successfully.

The Appellant also has filed a law suit against the Respondent in the Superior Court, seeking legal and equitable remedies arising from the reprimands and his five-day suspension.

Appointing Authority’s Grounds for Dismissal of the Appeal

In support of its *Motion to Dismiss*, the City asserts that the Appellant has waived his right to a hearing at the Civil Service Commission because the Appellant has filed an action under G.L. c. 149, § 185(d). *Motion to Dismiss* at 2. According to G.L. c. 149, § 185(f):

Nothing in this section shall be deemed to diminish the rights, privileges or remedies of any employee under any other federal or state law or regulation, or under any collective bargaining agreement or employment contract; except that the institution of a private action

in accordance with subsection (d) shall be deemed a waiver by the plaintiff of the rights and remedies available to him, for actions of the employer, under any contract, collective bargaining agreement, statute, law, rule or regulation, or under the common law.

Under subsection (d), an aggrieved employee can file an action in the Superior Court. C. 149, § 185(f) states that if an aggrieved employee files an action in the Superior Court, the employee waives other rights and remedies available to him. Accordingly, the City argues that the Appellant has waived his rights under subsection (f).

The City argues that although the Appellant has compartmentalized his various reprimands “into separate counts, alleging retaliation for different reasons,” the Court will most likely address the five-day suspension along with the other reprimands, thus the Appellant’s compartmentalized pleading “is defeated by the generalized prayer for relief which seeks any possible type of equitable or legal relief under the Whistleblower count, which could include overturning the suspension and/or reimbursement for the lost wages attendant to the suspension.” *Motion to Dismiss* at 2-3.

Appellant’s Arguments in Opposition to the Motion to Dismiss

The Appellant asserts that the filing of his suit in Superior Court does not constitute a waiver of his right to a hearing at the Commission. In his Superior Court Complaint, the Appellant alleges two counts: Count One under G.L. c. 152, § 75B(2); and Count Two, under G.L. c. 149, § 185. Under Count One, the Appellant alleges, *inter alia*, that his five-day suspension was a result of retaliation for filing a Workers’ Compensation claim. Under Count Two, the Appellant alleges that two reprimands, not including the five-day suspension, were retaliation for reporting violations of law constituting risks to public health, safety, and/or environment. *Appellant’s Opposition to Appointing Authority’s Motion to Dismiss* at 2 (hereafter “Opposition”).

Under G.L. c. 152, § 75B(2), the Workers’ Compensation statute, according to the Appellant, challenging his five-day suspension in Superior Court and the Commission is

permissible, since there is no waiver provision in c. 152, § 75B(2). Since he is alleging the five-day suspension was a result of his Workers' Compensation claim, and not the other reprimands he received for reporting safety issues which fall under G.L. c. 149, § 185, which does include a waiver provision, the Appellant asserts that he has a viable claim in both the Superior Court and the Commission regarding the five-day suspension.

Additionally, the Appellant states that the rights and remedies he could receive at the Superior Court and the Commission are different, so he is not seeking duplicate or cumulative awards.

Conclusion

Since the Appellant filed the review of his five-day suspension under G.L. c. 152, § 75(B), and not under G.L. c. 149, § 185, the City's Motion to Dismiss must be denied.

According to G.L. c. 152, § 75B(2):

No employer or duly authorized agent of an employer shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by this chapter. . . Any person claiming to be aggrieved by a violation of this section may initiate proceedings in the superior court . . . An employer found to have violated this paragraph shall be exclusively liable to pay to the employee lost wages, shall grant the employee suitable employment, and shall reimburse such reasonable attorney fees incurred in the protection of rights granted as shall be determined by the court. The court may grant whatever equitable relief it deems necessary to protect rights granted by this section.

Unlike G.L. c. 149, § 185, G.L. c. 152, § 75B(2) does not contain a waiver provision of the Appellant's rights. The Superior Court will consider the Appellant's five-day suspension in light of c. 152, § 75B(2) regarding retaliation for the Appellant filing a Workers' Compensation claim. The Superior Court will not review the five-day suspension as retaliation for the Appellant reporting safety hazards at the school where he is employed.

The purpose of the waiver provision in c. 149, § 185 is to prevent “an employee’s duplicative or cumulative recovery based on the retaliatory action.” *Haddad v. Scanlon*, 10 Mass. Super. LEXIS 272, *9 (1999). The Appellant has the right to pursue his claims in the Superior Court if the claims are “substantially separate from and independent of the cause of action to recovery for the retaliatory action.” *Id.* at *10. The Appellant has the burden of showing “not only that distinct actions [form the basis of the Appellant’s rights]. . . but also to show distinct damages.” *Id.* at *12. Since the Appellant has alleged conduct and facts relating to the Workers’ Compensation claim that are independent from his Whistleblower claim, namely that he was reprimanded, not suspended, based on his filing of a Workers’ Compensation claim, wholly separate from the Whistleblower claim, the Appellant’s burden is satisfied.

The City states in its Motion to Dismiss that the Appellant’s pleading “is defeated by the generalized prayer for relief which seeks any possible type of equitable or legal relief under the Whistleblower statute, which could include overturning the suspension and/or reimbursement for the lost wages attendant to the suspension.” *Motion to Dismiss* at 2. However, the generalized prayer for relief under the Whistleblower statute will only be granted, if the Appellant succeeds, relating to the two reprimands, and not to the five-day suspension.

Ultimately, the Whistleblower statute “was obviously designed to broaden protection to vulnerable workers.” *Bennett v. Holyoke*, 230 F.Supp.2d 207, 220-221 (2002).

The Appellant here is seeking two different claims, arising under independent statutes, sets of facts, and desire outcomes. He is not seeking duplicative or cumulative relief, as was the purpose for having the waiver provision in c. 149, § 185.

For the above reasons, the Respondent's *Motion to Dismiss* filed under Docket No. D-07-322 is *denied* and a full hearing will be scheduled to determine if the City had just cause for issuing the five-day suspension.

Civil Service Commission

Christopher Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on February 21, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Gary H. Goldberg, Esq. (for Appellant)
Sean P. Sweeney, Esq. (for Appointing Authority)