In the Matter of MASSACHUSETTS PORT AUTHORITY

and

JANICE STEVENSON

Case No. UP-06-2686

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| ***63.*** | ***Discrimination*** |
| ***65.2*** | ***concerted activities*** |
| ***65.6*** | ***employer speech*** |
| ***91.1*** | ***dismissal*** |
| ***91.31*** | ***standing to file charge*** |

*June 18, 2008*
*Michael A. Byrnes, Chairman*
*Paul T. O'Neill, Board Member*

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| *William V. Hoch, Esq.* | *Representing Massachusetts* |
| *Patricia A. Day, Esq.* | *Port Authority* |
| *Janice Stevenson* | *pro se* |

**ORDER OF DISMISSAL**

The Commonwealth Employment Relations Board (Board) has decided to dismiss the above-referenced matter. On March 8, 2006, Janice Stevenson (Stevenson) filed a charge with the former Labor Relations Commission (Commission), alleging that the Massachusetts Port Authority (Employer or Massport) had violated her rights to engage in lawful, concerted activities for the purpose of her mutual aid or protection in violation of Sections 3, 4(1), and 4(3) of M.G.L. c. 150A (the Law).[1] On July 10, 2006, Stevenson filed a motion to amend her charge to include a count alleging that the Employer had violated Section 4(4) of the Law when it terminated her on May 22, 2006. The Employer filed a timely opposition to that motion. Stevenson withdrew the motion on August 1, 2006.

The parties' written submissions show that, from November 14, 2005 until May 22, 2006, Stevenson was employed as the Employer's Diversity Director, a non-union position. Stevenson worked a 7.5-hour workday, from 8:45 a.m. to 5:00 p.m., Monday through Friday. Stevenson reported to Deputy Director of Diversity Christian Thirkell (Thirkell) and to Director of Diversity Dr. Sandra Casey Buford (Dr. Buford).

On or about March 27, 2006, Thirkell asked Stevenson to prioritize certain projects. Stevenson decided to work late on March 28, 29, 30 and 31, 2006 to complete those projects. At the end of the week, Stevenson recorded eight hours of overtime on her weekly timesheet. When Operations Manager Tiffany Brown-Grier (Brown-Grier) received Stevenson's timesheet, she changed the number of hours that Stevenson had entered on each of those days to 7.5. Brown-Grier then forwarded the timesheet to Buford with a note indicating that, although Stevenson had worked late on those days, she had done so without Buford's prior approval.

On April 7, 2006, Stevenson wrote a memo asking Buford to approve her overtime. Stevenson claimed in the memo that Thirkell had approved the overtime. She further claimed: "Since I have presented my overtime hours for payment, I am suffering negative consequences." She wrote a second e-mail to Buford on April 9 stating essentially the same thing.

Buford and Stevenson had a meeting to discuss this issue on April 10, 2006. Before the meeting, Buford e-mailed Stevenson asking her to document her overtime hours for the previous week. During the meeting, Buford asked Stevenson to sign a handwritten piece of paper on which Stevenson had listed some of the tasks she had performed during the week of March 27. Stevenson refused to sign the paper at this meeting. In her written submission, Stevenson claims that she refused to do so, because she did not think the list was complete, and because she was concerned that, if she signed it, she would be giving the impression that she had falsified her timesheet.[2] Buford wrote Stevenson an e-mail after the meeting, emphasizing that overtime must be approved in advance under Department policy. Buford also asked Stevenson to maintain a daily log of her activities.

On April 9, 2006, Stevenson wrote a long memo on the Employer's letterhead with the subject line "The Diversity Department of Massport Policy and Practice of Deleting Overtime Hours from Timesheets Violates 29 C.F.R. Part 541 and State Labor Law."[3] On April 11 and 12, Stevenson and Thirkell again exchanged memos regarding the overtime dispute. Thirkell's memo ordered Stevenson to leave work promptly at 5:00 p.m. each day and indicated that she would not be paid any overtime without prior written approval.

On April 11, 2006, Stevenson filed a wage and hour complaint seeking seven hours of overtime pay with the Attorney General's Office. She also contacted the Employer's Human Resources Department about this issue. At some point between April 11 and May 2, 2006, the Department paid Stevenson the overtime she had been seeking.

On May 2, 2006, Buford wrote Stevenson the following memo titled "April 28, 2006 Incident:"

> Janice, on Friday, April 28th, I asked you to assist me with packing my office. You responded in a very disrespectful, rude uncooperative manner. This was the second time that you have behaved this way when I requested you to do something. The first time I asked you to initial a hand-written paper composed by you that listed work that you said you had performed. You replied "no." When I asked

1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission."

2. Stevenson did not provide a copy of the note, but she did provide a comprehensive memo dated April 1, 2006 that lists her assignments for the week in question. It is not clear if Stevenson prepared this before or after her meeting with Buford.

3. The parties' written submissions do not indicate whether Stevenson ever distributed this memo.

> you again, you repeated "no" and would not cooperate with my request.
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> Also on two occasions, once on April 28th and the week prior I heard you making the statement "It's not in my job description." Please understand that you, as well as all employees, may be asked to perform other duties as assigned at any time. When asked to assist me to pack boxes, you never indicated that you had a physical restriction that would prohibit you.
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> On Thursday, April 27th in a staff meeting, in the presence of other staff members, your conduct was very unprofessional. You laid your head and forearms on the conference table, held your notebook up to your face while others were talking, and behaved in a very uncooperative manner when you were asked to comment on your work.
>
> I am requesting that you correct this behavior immediately. Insubordination will not be tolerated. You must behave respectfully and make a meaningful contribution in staff meetings as a part of the team at all times.

Stevenson replied to the memo on May 2, sending a copy to Buford and to the Human Resources Department. In that memo, Stevenson denied that she had engaged in insubordination, claiming that "[i]nsubordination is an overused and misused word." Stevenson further claimed that she had injured herself while packing boxes.[4] She did not deny that she had laid her head and forearms on the table during a staff meeting. She did, however, assert that her behavior did not meet the standard definition of insubordination. Stevenson's memo also stated: "It is a well-established rule in Diversity, 'Do Not take Any Problem Outside of Diversity.'" The memo finally stated that Buford wrote the May 2 memo in retaliation for her filing an overtime claim and for violating Diversity's "confidentiality and secrecy policy."[5] In her written submission, Stevenson also alleges that Buford told her on May 2, 2006 that she was not a union employee.

On May 3, 2006, the Employer placed Stevenson on a three-month probation for: "Refusal to perform work requested by Director of Diversity, rude and disrespectful behavior towards supervisors, unprofessional conduct during staff meetings, inappropriately aggressive comments and gestures towards supervisors, poor teamwork and general lack of cooperation." The Employer provided Stevenson with a corrective action form, which indicated that she could be subject to termination after the first four weeks of the probationary period.

On May 9, 2006, Thirkell sent Stevenson a memo communicating additional areas of her performance and behavioral issues that needed improvement, including adhering to her scheduled hours and maintaining professional and respectful behavior. Stevenson wrote back to Thirkell the same day, complaining that the Employer had deviated from its personnel procedures by giving her a corrective action plan without first giving her a performance evaluation. Stevenson states: "When a supervisor takes it upon herself to deviate from the normal form of evaluation, such deviation supports a claim of discrimination."

Stevenson alleges in her written submission that, in a meeting with Buford and Thirkell on May 9, 2006, Thirkell told her not to: write correspondence regarding conditions of employment; respond to correspondence regarding conditions of employment; or talk to other employees regarding conditions of employment. In its response to Stevenson's written submission, the Employer denies making those statements but admits asking Stevenson not to complain loudly about her supervisors on her telephone in the Diversity lobby when clients were in the area. The Employer also acknowledges that Buford encouraged employees to bring work concerns to her attention so problems could be resolved in-house, but the Employer stresses that this practice does not equate to an all-out prohibition on raising concerns with people outside the Diversity Department.[6] In her reply, Stevenson concedes that the Employer told her that she was told not to complain loudly in the Diversity lobby.

On May 18, 2006, Stevenson wrote to the Office of the Attorney General, claiming that she was being retaliated against for filing a complaint with that office. On May 19, 2006, Stevenson wrote a letter to a co-worker, using both of their private e-mail addresses. The second paragraph of this e-mail states:

> "I truly believe Diversity's animosity is because of my discussion with you and Janice Bollman regarding employment of conditions for certain persons, especially older females at Massport.
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> . . .
>
> I want to work for Massport. I am not angry at anyone. I just wish office workers had the rights of union employees. What happened to me would not have gotten to this point, if I was a union employee.

Stevenson provides no further details regarding what discussions, if any, she had about working conditions for older, female employees.

The Employer terminated Stevenson on May 22, 2006 for insubordination and inappropriate conduct. Her termination letter indicates that the date of the last incident that caused the discharge was May 17, 2006, but neither party provided any details of this incident other than to state that it involved a verbal confrontation between Stevenson and Buford.

### Standing

The Employer contends that, as a matter of law, Stevenson cannot bring a cause of action under Sections 3, 4(1) and 4(3) of the Law for two reasons: 1) Stevenson does not meet the definition of an employee under the Law, because she is not represented by any of Massport's nine bargaining units; and 2) Chapter 760 of the Acts of 1962 does not include Section 3 among the provisions of the Law that apply to Massport. We disagree that Stevenson is precluded from bringing the instant cause of action.

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4. Stevenson asserts that she filed an injury report on April 28, 2006.

5. Stevenson provides no copy of this policy in either her memo or written submission.

6. The Employer provided no affidavits with its submission. Stevenson provided an unsigned affidavit.

As to the Employer's first argument, Section 2 of the Law broadly defines the term "employee" as "any employee . . . not limited to the employees of a particular employer." It makes no exceptions for unrepresented employees. Therefore, Massport's argument that Stevenson is not an employee within the meaning of the Law lacks merit.

Regarding the second argument, Section 3 of the Law grants to employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." Chapter 760 of the Acts of 1962 describes the applicability of the Law to various authorities, including Massport.[7] Massport correctly notes that Section 3 is not included in the second paragraph of Chapter 760, which states:

> Notwithstanding any provision of law to the contrary, the provisions of section four, four A, four B, five, six, six A, six B, six C, seven and eight of Chapter 150a of the General laws, so far as apt, shall apply to [the Employer] and [its] employees.

However, Chapter 760 does make Section 4 of the Law applicable to Massport. Section 4 of the Law sets forth employer prohibited practices. In particular, Section 4(1) of the Law makes it a prohibited practice for an employer "to interfere with, restrain or coerce employees in the exercise of the *rights guaranteed in section three*." (Emphasis added). Based on this reference to Section 3, we construe the language in Chapter 760 making Section 4 of the Law applicable to Massport and other authorities as permitting employees of these entities to bring prohibited practice charges alleging violations of their rights under Section 3 of the Law, as Stevenson did here. Accordingly, Massport's argument that Stevenson had no standing to bring this charge under Chapter 760 of the Acts of 1962 lacks merit.

We do note, however, that Section 3 of the Law is not an independent prohibited practice. Claims alleging that an employer has violated an employee's rights under that section must be brought under Section 4 of the Law. Consequently, we examine Stevenson's allegations under Sections 4(1) and 4(3) of the Law only.[8]

### Section 4(3) Allegation

To establish a violation of Section 4(3) of the Law in cases where there is no direct evidence of anti-union animus, a charging party must first establish a *prima facie* case of unlawful discrimination by producing evidence that: 1) the employee was engaged in protected activity; 2) the employer knew of the activity; 3) the employer took adverse action against the employee; and 4) the adverse action was motivated by the employer's desire to penalize or discourage the protected activity. *Adrian Advertising*, 13 MLC 1233 (1986), *aff'd sub nom.*, *Despres* v. *Labor Relations Commission*, 25 Mass. App. Ct. 430 (1988), *citing*, *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559 (1981). With respect to the motivational element, the charging party must demonstrate in its *prima facie* case that protected activity played some role in causing the adverse action. *Boston City Hospital*, 11 MLC 1065, 1071 (1984).

Here, Stevenson alleges that she was disciplined, required to write a daily task report, and ultimately terminated because she engaged in protected, concerted activity. Specifically, Stevenson claims that the Employer retaliated against her because she complained about the removal of her overtime, filed a wage and hour complaint and an injured-on-duty report, and refused to perform hazardous work, namely packing boxes. In response, the Employer contends that it disciplined and terminated Stevenson based upon her performance and behavior.

In *Town of Southborough*, 21 MLC 1242 (1994), the former Commission adopted the NLRB's standard in *Meyers Industries (I)*, 268 NLRB 493, 115 LRRM 1025 (1984), *remanded sub nom*., *Prill* v. *NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948, 971 (1985), requiring an employee to establish that he or she was either engaged in activities with other employees or acting on their authority to satisfy the first element of a *prima facie* case. Here, there is no evidence that Stevenson was acting in concert with any other employee when she protested the removal of her overtime hours, filed wage and hour and injured-on-duty claims, or refused to pack boxes. Although she provided an e-mail in which she claimed that Massport had retaliated against her for seeking to assert rights for older, female employees, Stevenson provided no details about these purported efforts, despite filing two lengthy written submissions. Moreover, the e-mails that Stevenson provided between herself and another employee do not demonstrate that Stevenson was acting on behalf of other employees. Even though Stevenson states in one of her e-mails that she would like to join a union, because Stevenson did not use the Employer's e-mail system to send this e-mail, there is no evidence, and Stevenson does not claim, that the Employer had any knowledge of it. Furthermore, although Stevenson alleges that, on May 2, 2006, the Employer told her that she was not in a union, this accurate statement, standing alone, does not establish any anti-union animus on the Employer's part. Based on these facts, Stevenson has failed to establish the first, second, and fourth elements of her *prima facie* case of unlawful discrimination. Thus, there is not probable cause to believe that the Employer disciplined or terminated Stevenson because she had engaged in protected, concerted activity within the meaning of Section 4(3) of the Law. Accordingly, that portion of Stevenson's charge alleging a violation of Section 4(3) of the Law is dismissed.

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7. The other authorities are the Massachusetts Turnpike Authority, the Massachusetts Parking Authority and the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority.

8. Stevenson's written submission sets forth two counts. The first is titled "Section 3 Violation" and the second, "Section 4(1) and 4(3) violations." Both counts contain essentially two allegations: 1) the Employer disciplined, changed her terms and conditions of employment and ultimately terminated Stevenson because she had complained about overtime, filed wage and hour and injured-on-duty claims, and refused to engage in "hazardous work;" and 2) the Deputy Director of Diversity instructed Stevenson not to communicate with other employees regarding terms and conditions of employment. For the sake of clarity, the Board has decided to analyze these allegations under Section 4(3) and Section 4(1), respectively.

Section 4(1) Allegation

Section 4(1) of the Law makes it a prohibited practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 3 of the Law. *Plainridge Race Course, Inc.*, 28 MLC 185, 186 (2001); *Community Child Care of Malden, Inc.*, 4 MLC 1863, 1866 (1978). A finding of illegal motivation is generally not required. *Commonwealth of Massachusetts*, 26 MLC 218, 219 (2000). Rather, the focus of the Board's inquiry is the effect of the employer's conduct on a reasonable employee. *City of Boston*, 26 MLC 80, 83 (2000).

Here, Stevenson alleges that the Employer's "overbroad confidentiality and secrecy policies" violate Sections 3 and 4(1). However, Stevenson provides no details of these policies other than to state that the management of the Diversity Department required complaints to be taken first to the Diversity Director. Stevenson argues that this requirement restricted employees' rights to go to other departments for assistance in resolving workplace problems. As Massport notes, however, Stevenson admits that she went to the employer's Human Resources Department and to the Workers' Compensation Department to discuss her concerns. Moreover, it is not unusual for an employer's internal complaint policy to have multiple steps requiring employees to try to resolve their dispute within their department as the first step. In light of the fact that Stevenson did go to other departments regarding her overtime complaint, and in the absence of additional details about the employer's purported confidentiality and secrecy policies, there is not probable cause to believe that the employer violated the Law in the manner alleged, and this aspect of Stevenson's charge is dismissed.

Stevenson also alleges that, on March 9, 2006, Thirkell warned her not to communicate orally or in writing with other employees about terms and conditions of employment. Massport denies that it has a policy that prohibits employees from speaking about their terms and conditions of employment but admits that, at some point, it did tell Stevenson not to complain loudly about her supervisors on the telephone in the Diversity lobby when clients were in the area. Stevenson fails to rebut this assertion in her reply to the employer's written submission.

If an employer's rule conflicts with an employee's right to engage in concerted, protected activity, the employer must prove that it had a legitimate and substantial business justification for both making the rule and applying it in a particular situation. If the employer meets that burden, diminution of the employees' right to engage in the protected activity must be balanced against the employer's interest in the rule. *City of Haverhill*, 8 MLC 1690, 1695 (1981), *citing*, *Jeanette Corp.* v. *NLRB*, 532 F.2d 916 (3rd Cir. 1996). Here, even assuming without deciding that Stevenson's complaints constituted protected, concerted activity within the meaning of Section 3 of the Law, it was reasonable, as a matter of maintaining proper business decorum and professionalism, for the employer to ask Stevenson not to complain loudly about supervisors in front of clients. Moreover, in the absence of persuasive evidence that the employer otherwise prohibited Stevenson from complaining to other employees about her job, there is not probable cause to believe that this limited directive restrained, interfered with, or coerced employees in the exercise of rights guaranteed under Section 3 of the Law. Accordingly, this portion of Stevenson's charge is dismissed.

SO ORDERED.

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