

## *Appeal of Preve: Employer Success at Supreme Court Due to Effective Investigation and Targeted Discipline*

By Anna B. Cole

Always perform an effective investigation and impose only reasonable, supportable discipline – these are oft-repeated maxims of HR professionals and employment attorneys alike. While investigations and targeted discipline take time (and often cost money), they are essential if an employee challenges an employer decision. We often find examples in case law of the negative consequences that can result when employers fail to live up to these HR principles. However, the New Hampshire Supreme Court’s recent decision in *Appeal of Preve* effectively demonstrates the defensive value of spending time and money early in a disciplinary process.

In *Preve*, the employer’s effective investigation and appropriately focused discipline was used to undermine the disgruntled employee’s assertion that the employer’s actions were the result of unlawful retaliatory animus. In October 2017, after an incident at the Circuit Court in Concord, the Epsom Police Chief believed that a particular attorney posed a risk to his officers and determined that a complaint should be filed against the attorney. The Court found that the Chief searched the police department’s database for any reports that referenced the attorney or his family, regardless of whether the attorney or his family members were included in the report as a witness, victim, or accused. The Court further found that the Chief prepared a letter of complaint and attached all of the information from the database search without redacting sensitive information, such as social security numbers, addresses, or dates of birth, and filed it with the Judicial Conduct Committee. (*Note: The complaint should have been filed with the Professional Conduct Committee, which oversees attorneys, not the Judicial Conduct Committee, which oversees judges*).

On October 24, 2017, after learning of the complaint, the involved attorney threatened to sue the Town alleging that the Chief’s conduct, including his disclosure of the attorney’s and his family’s sensitive information, was criminal. The Town

immediately hired Municipal Resources Inc (MRI) to investigate whether the Chief’s conduct violated any criminal statutes and instructed him not to refile the complaint with the Professional Conduct Committee. In its investigation report, MRI concluded that some of the Chief’s actions were improper and may have violated certain statutes. Based on MRI’s findings, the Town disciplined the Chief and directed him to attend training. In its disciplinary letter, the Town focused on the Chief’s decision to use the police department’s database to gather the information and his failure to redact the information before including it in his complaint. The Town further stated that the Chief’s conduct potentially violated certain criminal statutes, as well as the Town’s Code of Ethics, and potentially exposed the Town to civil liability.

After exhausting his appeal rights before the Town, the Chief filed a complaint with the New Hampshire Department of Labor (DOL) asserting that the Town disciplinary action violated the New Hampshire Whistleblowers Protection Act (Act). After a hearing, the DOL determined that, although the Chief’s report constituted protected activity under the Act, the Chief failed to present evidence that “suggests animus on the part of the [Town] or retaliation based on the [Chief’s] protected reporting.” Instead, the DOL noted that,

The [Town], from the very beginning of this issue, focused on the potential impropriety and/or criminality of the [Chief’s] actions. [The Town] made no reprimand or discipline simply because the [Chief] reported [the attorney] to the JCC . . . [The Town] hired a third party to investigate the [Chief’s] actions. As a result of the report issued by MRI for improper actions and potential criminal conduct on the part of the [Chief], the [Town] disciplined the [Chief].

On appeal, the New Hampshire Supreme Court upheld the DOL’s decision and found that it was supported by sufficient evidence to conclude that the “Town’s concerns regard-

ing the potential impropriety of the [Chief's] inclusion of private information obtained from the Town's confidential database with the complaint were the primary motivation for the discipline," not retaliation for engaging in protected activity under the Act.

As the decision makes clear, the Town's careful and thoughtful handling of the incident ultimately paid off. The Town was patient and measured in responding to the attorney's complaint and expended resources to obtain an independent investigation. This leads us to the final HR maxim – Never be in a hurry to discipline. Take the time necessary to get the right investigator involved, allow the investigator the time required to timely and effectively complete the investigation, make your disciplinary determination base on the investigator's findings, and then be clear in your communication with employees about what conduct is re-

sulting in discipline. As in the *Preve* case, regardless of the motives that a disgruntled employee may attribute to the employer, these steps will help the employer ensure that, if called upon, they can demonstrate the discipline has a legitimate basis.

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20 year loan	<b>2.60%</b>
25 year loan	<b>2.70%</b>

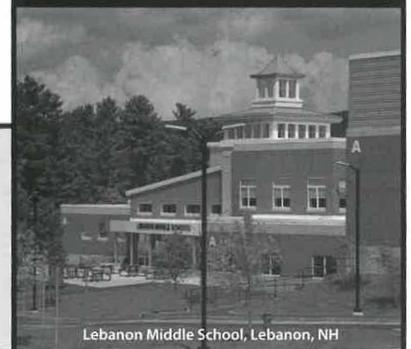
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- Completed application approved by Bond Bank Board
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