Maine Human Rights Commission

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INVESTIGATOR'S REPORT
E15-0135
February 22, 2017

Kayla Butcher (Turner)

v.

K & R Autosales, Inc. (Auburn)

Summary of Case:

Complainant, who worked for Respondent as an office assistant, alleges that after her relationship with a supervisor for Respondent ended, she was subjected to a hostile work environment and less favorable terms and conditions of employment because of her sex. She also alleges that she was subjected to retaliation (hours and pay cut, termination of her employment) after reporting ongoing sex discrimination to the company's owner. Respondent, an auto seller, denied discrimination or retaliation and claims that Complainant's position was eliminated for financial reasons. The Investigator conducted a preliminary investigation, which included reviewing all the documents submitted by the parties and holding a Fact Finding Conference ("FFC"). Based on all of this information, the Investigator recommends that the Commission find reasonable grounds to believe that Respondent unlawfully retaliated against Complainant for reporting unlawful activity in the workplace and that the Commission find no reasonable grounds to believe unlawful discrimination occurred on the grounds of sex in Complainant's terms and conditions of employment. based on sex.

Jurisdictional Data:

1) Dates of alleged discrimination: 6/9/2014.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 3/19/2015.

3) Respondent employs a number of individuals[1] in excess of the jurisdictional requirements of state and federal law and is subject to the s required to abide by the non-discrimination provisions of the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964, as amended, the Maine Whistleblowers' Protection Act ("WPA") and state and federal employment regulations.

4) Complainant is represented by Sally Morris, Esq. Respondent is represented by Rebecca Webber, Esq.

[1] Complainant asserted that Respondent has between 15-20 employees. Respondent claims that it employs less than 15 employees. Since resolution of this issue is not relevant to other issues in the case, no finding is made regarding the number of employees.

IV. Development of Facts:

1) Complainant provided the following in support of her claims:

She worked as an office assistant for Respondent for almost a year, working 25 hours per week; she took on additional work taking pictures of cars and cleaning the office. After she and the General Manager ("GM") got involved romantically, Respondent's owner ("Owner") told them to break it off to avoid drama in the workplace, threatening Complainant that she would be fired if anything else happened but not similarly threatening GM. GM and Complainant did end their relationship, but GM continued to pursue, intimidate and harass Complainant to resume the relationship. When Complainant refused, Owner - who was very close friends with GM – took away Complainant's cleaning pay but told her she would still have to clean for less money than before. After GM threatened Complainant over the company's intercom system, he told her to take a few days off. Complainant texted Owner to report continuing sexual harassment and ask if she still had a job; Owner didn't respond. When Complainant texted Owner again the next day, Owner texted back that Respondent no longer needed her services.

2) Respondent provided the following:

While Complainant and GM were involved in a consensual romantic relationship, that had nothing to do with decisions Respondent made about her employment. Complainant was not a great employee for a number of reasons, including the fact that Respondent had to warn her about using her cell phone and wearing inappropriate clothing at work. Also, the cleaning work she was doing was supposed to be separate from her office assistant work but Owner found out that she was doing the work while on the clock in her office assistant role. Respondent's termination of Complainant's employment was that the company's sales slowed down Complainant wasn't replaced; the company hired a billing clerk and not an office assistant.

3) The Investigator made the following findings of fact:

a) Complainant began working as an office assistant in August 2013. Later that year or in early 2014, she received a raise and took on the additional duty of taking pictures of cars for sale. She also acquired the job of cleaning the office for $75 per week.

b) Complainant was the only woman working for Respondent.

c) Respondent had no formal training about sexual harassment or retaliation.

d) In early 2014, GM and Complainant entered into a romantic relationship; GM was in a supervisory position. The relationship lasted until the middle of May 2014, when the GM disclosed the relationship to Owner.

e) When Owner learned of the relationship between Complainant and GM, Owner warned both to end the relationship and that termination of employment would result for any further "drama."

f) Complainant did end the relationship with GM when Owner told her she could lose her job. Over the next few weeks, GM continued to try and pursue a relationship with Complainant and made sexually inappropriate comments and gestures in the workplace to her. Complainant was intimidated by GM, and one Friday in May GM held Complainant up against a wall at work.

g) Over Memorial Day weekend 2014, GM got married.

h) The following Tuesday, Owner discontinued the $75 additional pay Complainant received for cleaning the office.

   i. Complainant contends that this was retaliation for reporting GM's sexual harassment.
   ii. According to Respondent, Complainant was supposed to be doing the cleaning work on Sundays, but Owner learned that instead Complainant had been doing the cleaning task during her regular work hours, while also being paid an hourly wage for her office assistant position. Complainant was offered additional hours in her office assistant position to make up the hours that she lost cleaning.
   iii. At the FFC, Owner stated that Complainant had told him that she did not realize she had been doing anything wrong by doing the cleaning during the week.

i) Complainant felt as though only she had been disciplined and that she had been treated less favorably because the GM had been a long-term employee with the company and was a close personal friend of Owner's. According to Respondent, Owner subsequently added additional tasks to GM's duties to make sure that he understood the severity of the situation.

j) Complainant felt that the only complaints about her clothing were from GM, since Respondent had no dress code.

k) For the two weeks after Owner discontinued the cleaning pay, Complainant avoided GM.

l) On June 9, 2014, GM made inappropriate comments about Complainant's shirt all day, asked Complainant to bend over so he could look down her shirt and pretended to put water in her shirt. At the end of the workday, GM made a gesture simulating oral sex and Complainant clocked out and began to leave; as she was leaving, GM announced over the company-wide intercom that "jealousy will kill you." Complainant felt that GM was talking to and threatening her.

m) After Complainant left work, she called GM and asked why he was giving her a hard time. GM told her that he'd warned her about wearing inappropriate clothing at work; GM told Complainant that she could call Owner about this, but that she was "not going to like how this ends." GM called Complainant back later and told her to take the next few days off.

n) Complainant then texted Owner to inquire if she still had a job, and to report that the GM was sexually harassing her and making inappropriate comments. Owner did not respond. After Complainant sent a follow-up text the following day, Owner notified her by text that her "services are no longer needed."

o) Complainant's part-time office assistant position was eliminated in June 2014.

p) Complainant's duties were assumed by other employees until a billing clerk was hired over 10 months later. The billing clerk focuses on billing, answers phones, works on internet and website development, checks titles, manages inventory, and assists the bookkeeper, among other things.

q) In its initial response to Complainant's charge of discrimination, Respondent included the following (among other) information:

i. Complainant was warned numerous times about use of her cell phone at work but the warnings were verbal and not written. She was warned also about wearing short skirts and tight shirts and also about some clothing that was not in good shape. [Owner] gave her money to buy some appropriate clothing....
ii. Her hours weren't cut but there wasn't as much work to do.... She was hired to work 25-30 hours per week and her hours had gone up in April 2014 because K&R bought a lot more cars.
iii. Complainant was not let go because of a violation of policy. She was a part-time person who was needed when it was really busy but not when business dropped off last spring. The company hired no one for nearly a year and then hired someone who also did billing and a number of other tasks that Complainant did not. Complainant's position as it existed has not been filled.

r) At the FFC, Respondent was asked to indicate all factors that went into the decision to end Complainant's employment.

i. GM indicated that the decision was based upon Complainant's inappropriate attire on her final day at work, and her defensive attitude when he confronted her about this. GM also stated that he also spoke to Owner that day about an ongoing issue with Complainant being under the influence of marijuana at work, which the GM felt also negatively affected her job performance.
ii. Owner (who was sequestered during the FFC) was also later asked what factors were involved in his decision to end Complainant's employment. He cited: 1) lack of work; 2) texting; 3) neglecting her duties in the office; and, "stealing" (by getting paid for cleaning while on the clock. He was asked again if there were any other factors. He said there were none. A question was then asked whether use of marijuana was a factor. Owner then replied, that he did recall that being discussed as well with the GM prior to the discharge decision.

s) Owner was also asked at the FFC whether he was aware of Complainant's report that GM was still sexually harassing her prior to GM's making the termination decision. Owner stated he was not. Owner was shown an exhibit submitted by Complainant which displays screen shots of text messages indicating that her report of alleged ongoing harassment and inappropriate conduct by GM occurred on June 9th and 10th while his text to her regarding no longer needing her services did not occur until June 11th. Owner stated that he had never read Complainant's preceding texts prior to informing her she was discharged.

V. Analysis:

1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 Maine Revised Statutes ("M.R.S.") § 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.

Sex Discrimination – Terms and Conditions of Employment

1) The MHRA provides, in part, as follows: "It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification . . . for any employer to . . . because of . . . sex...to discharge an employee or discriminate with respect to . . . hire, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment . . . ." 5 M.R.S. § 4572(1)(A).

2) The phrase "terms, conditions or privileges of employment" is broad and not limited to discrimination that has an economic or tangible impact. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (interpreting Title VII of the Civil Rights Act of 1964); *King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "An employee has suffered an adverse employment action when the employee has been deprived either of 'something of consequence' as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld 'an accouterment of the employment relationship, say, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.'" *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20 (citations omitted).

3) Because here there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).

4) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that she (1) was a member of a protected class, (2) was qualified for the position he held, (3) suffered an adverse employment action, (4) in circumstances giving rise to an inference of discrimination. *See Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). *Cf. Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1st Cir. 2002).

5) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Dept. of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. *See id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet her overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16. In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.

6) In this case, Complainant established a prima-facie case by showing that she was in a protected class (female), and was qualified for her position, but failed to establish that the alleged less favorable terms and condition were the result of her sex, with reasoning as follows:

   a) Respondent stated that both Complainant and GM were similarly threatened with termination if their relationships continued. Neither received any type of formal or informal discipline as a result of that warning, even if Complainant believed the warning to be directed primarily or solely at her. Respondent contended that Owner gave additional duties to GM as a consequence, a contention which Complainant could not dispute..

   b) Although Complainant's cleaning duties were taken away soon after Owner was made aware of GM's relationship with her, Owner credibly provided that this decision was made because Owner was looking more closely at the daily affairs of his business after the disclosure. In doing so, Owner found that Complainant was on the clock as an office assistant while doing cleaning work for which she was paid

additionally. Even if Complainant simply misunderstood when she was supposed to do this work, one would assume that any business owner would have reversed this practice as soon as they became aware of it, regardless of the sex of the employee.

c) There is also little support for Complainant's claim that her hours were decreased (but not the male GM's) after the relationship was disclosed. A review of pay records reflects that her hours ranged from high teens to low 30s without any noticeable pattern aside from the hours Complainant had available to work that week. Respondent also offered her office hours to make up for the lost cleaning hours.

7) Unlawful discrimination on the basis of sex/gender in terms and conditions of employment is not found.

Sexual Harassment

8) The Commission's Employment Regulations provide, in part, that: "[h]arassment on the basis of protected class is a violation of Section 4572 of the Act. Unwelcome advances because of protected class (e.g., sexual advances or requests for sexual favors), comments, jokes, acts and other verbal or physical conduct related to protected class (e.g., of a sexual, racial, or religious nature) or directed toward a person because of protected class constitute unlawful harassment when . . . [s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working or union environment." Me. Hum. Rights Comm'n Reg. Ch. 3, §10(1)(C) (Sept. 24, 2014).

9) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile work environment claim exists, it is necessary to view "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the workplace to become hostile or abusive. *Id*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996). "The standard requires an objectively hostile or abusive environment--one that a reasonable person would find hostile or abusive--as well as the victim's subjective perception that the environment is abusive." *Nadeau*, 675 A.2d at 976.

10) Accordingly, to succeed on such a claim, Complainant must demonstrate the following:

> (1) that she (or he) is a member of a protected class; (2) that she was subject to unwelcome [**insert protected class**] harassment; (3) that the harassment was based upon[**insert protected class**]; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that [the] objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

Watt v. UniFirst Corp., 2009 ME 47, ¶ 22, 969 A.2d 897, 902-903.

11) The Commission's Employment Regulations provide that an employer "is responsible for its acts and those of its agents and supervisory employees with respect to unlawful harassment." When the supervisor's harassment results in a tangible adverse employment action, "liability attaches to the employer regardless of whether the employer knew or should have known of the harassment,

and regardless of whether the specific acts complained of were authorized or even forbidden by the employer." When no tangible adverse employment action results, the employer may raise an affirmative defense by proving by a preponderance of the evidence both that it "exercised reasonable care to prevent and correct promptly any harassing behavior"; and that the Complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Me. Hum. Rights Comm'n Reg. Ch. 3, §10(2) (Sept. 24, 2014).

12) In the present case, Complainant did establish that she was subjected to unlawful sexual harassment, with reasoning as follows:

a) Complainant is a member of a protected class based on her sex.

b) After Complainant and GM ended their relationship, Complainant was subject to unwelcome sexual harassment by GM. The harassment was based on sex. Complainant credibly provided details indicating that GM was attempting to resume their relationship and harassing her while at work. GM's flat denials were not persuasive.

c) The harassment was sufficiently severe or pervasive to alter the conditions of Complainant's job and create an abusive work environment. Even if GM's repeated attempts to resume a relationship with Complainant and comments about Complainant's appearance were not enough on their own to be considered severe or pervasive, when that conduct is combined with Complainant's credible contention that GM pinned her up against a wall at work, the record supports a finding that the harassment was sufficiently severe or pervasive to create an abusive work environment here.

a. GM's sex-based conduct was objectively and subjectively offensive.

b. There is a basis to find employer liability here. Complainant was subjected to a tangible employment action, in that GM harassed Complainant and told her not to come back to work for a few days. When Complainant complained about this, and about GM's sexual harassment to Owner, Owner terminated her employment. Liability attaches to Respondent regardless of whether Owner knew or should have known of the harassment.[2]

d) Unlawful discrimination on the basis of sex (sexual harassment) is found.

Whistleblower/MHRA Retaliation

16) The WPA provides, in relevant part, that it is unlawful, based on protected activity, to "discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment." 26 M.R.S. § 833(1). Protected activity includes an employee, acting in good faith, reporting to the employer or a public body what the employee has reasonable cause to believe is a violation of a law or rule. 26 M.R.S. § 833(1)(A).

[2] Given the screen shots of Complainant's text messages specifically referencing GM's ongoing harassment, which appear directly above Owner's text message discharging Complainant, it seems plain that Owner knew or should have known of the harassment and, rather than addressing it, chose to terminate Complainant's employment.

17) The MHRA also makes it unlawful for "an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of [the Act] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S. § 4572(1)(E).

18) 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. The prima-facie case for an MHRA claim is similar, except that the adverse action must be "material". The term "materially adverse action" covers only those employer actions "that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 126 S. Ct. 2405.

19) Complainant has established her prima-facie case by establishing that she engaged in conduct protected under the MHRA/WPA by reporting what she believed to be unlawful conduct (ongoing harassment by GM), that she was subjected to an adverse employment action (her position was eliminated), and that there was a causal connection between the two events, with reasoning as follows:

a) Respondent's credibility on the reason for Complainant's end of employment has been inconsistent. In its written reply to Complainant's MHRC complaint, the sole explanation provided as a reason for this action was financial. Even after Complainant's rebuttal challenged Respondent's assertion that business was slow at the time of the job elimination, Respondent did not offer any other additional previously undisclosed factors that may have influenced the decision. At the FFC, GM stated a number of additional factors (inappropriate attire, bad attitude, marijuana use at work) that were also discussed with Owner prior to the separation decision. When Owner was asked the same question, he cited neglecting office duties, texting, "stealing" by double-dipping by cleaning, and lack of business at the dealership. When pressed again about any other factors, he denied any until being asked specifically about the marijuana use, which he then added as a factor as well.

b) Respondent's sole explanation for why none of the myriad additional reasons for Complainant's separation were provided prior to the FFC was that it did not want to damage Complainant's future employment prospects by providing the actual reasons to the MHRC, or to the Maine Department of Labor's Unemployment Commission during her application for benefits. This explanation is found to be unpersuasive given Respondent's willingness to share this information at the FFC, where presumably it would share the same risk of public disclosure to future employers as would have disclosing these reasons in its initial answer to the MHRC charge.

c) Respondent's credibility is even further undermined by Owner's claim that he never saw Complainant's reports about GM continuing to harass her prior to informing her that her services were no longer need. Both texts refer specifically to GM's harassment and Complainant's fear of losing her job. The fact that Owner's text regarding no longer needing Complainant's services was sent only a day or two after she reported harassment is strong evidence that the incidents were related, especially given the shifting explanation for the reasons for Complainant's separation.

20) Discrimination based upon WPA and/or MHRA retaliation is found in this case.

VI. Recommendations

Based upon the information contained herein, the following recommendations are made to the Commission:

1) There are **NO REASONABLE GROUNDS** to believe that Complainant Kayla Butcher was subjected to unlawful discriminated on the basis of sex (terms and condition of employment) by Respondent K & R Autosales, Inc. and this claim should be dismissed in keeping with 5 M.R.S. § 4612;

2) There are **REASONABLE GROUNDS** to believe that Complainant was subjected to unlawful discrimination on the basis of sex (hostile work environment) by Respondent K & R Autosales, Inc.;

3) There are **REASONABLE GROUNDS** to believe that Complainant was subjected to unlawful WPA or MHRA retaliation by Respondent; and

4) That conciliation on these claims should be attempted in keeping with 5 M.R.S. § 4612(2).

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