Maine Human Rights Commission

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INVESTIGATOR'S REPORT
MHRC Case No. E16-0449
October 11, 2018

Lynn Keeran (Eddington)

v.

Discovery House[1] (Bangor)

Summary of Case:

Complainant, who worked as an administrative assistant for Respondent, a drug treatment facility, alleged that she was subjected to unlawful discrimination in employment because of her sex, and retaliated against for reporting the discrimination she experienced. Respondent denied discrimination or retaliation and stated that Complainant was discharged for slandering Respondent's management. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and holding a Fact Finding Conference ("FFC"). Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Complainant was discriminated against on the basis of sex and retaliated against for engaging in protected activity.

Jurisdictional Data:

1) Dates of alleged discrimination: 12/16/2015.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 10/20/2016.

3) Respondent employs a number of individuals in excess of the jurisdictional requirements of state and federal law, and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964, as amended, the Maine Whistleblowers' Protection Act, and state and federal employment regulations.

4) Complainant is not represented by counsel. Respondent is represented by Brittany Stancombe Hopper, Esq.

IV. Development of Facts:

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

Complainant worked as an administrative assistant to Respondent's Program Manager ("Manager") and

[1] Complainant named "Discovery House" as the Respondent in her complaint; Respondent provided that its legal name is "Discovery House – BR, Inc." Because Complainant did not amend her complaint, the name she used has been retained.

Program Director ("Director"). Director repeatedly made sexual remarks to Complainant, hugged her from behind, and leered at her while licking his lips. Director did this to other female employees as well. Complainant and others repeatedly complained to Manager about Director's behavior, but he only told them to "just hang in there" until he took over as Director. Complainant and two other female coworkers ("Coworker 1" and "Coworker 2") complained to another supervisor, and then to a patient advocate ("Advocate") who directed them to corporate human resources ("HR"). Ultimately, Coworker 1 and Coworker 2 contacted HR; Complainant spoke with HR later, and reported some, but not necessarily all, of harassment she experienced. [2] She also reported that Director had left her a note asking whether she was the one who contacted Advocate. While Complainant was on medical leave, Coworker 1 told her that Director and Manager were trying to get her to say that everything reported to HR was untrue; Complainant responded by sharing some negative information she had heard about management and the company. Coworker 1 shared Complainant's text messages with management, and as a result, Complainant was discharged for disparaging the company.

2) Respondent provided the following in support of its position:

Complainant never made any complaints about sexual harassment; she expressed frustration with Manager's lack of leadership. HR was already scheduled to be at the facility the day after Complainant's call, and she spoke to the staff about Manager's leadership abilities. HR did not tell either Director or Manager about her prior conversation with Complainant. About two weeks later, Coworker 1 reported to Manager that Complainant had sent her messages that Director and Manager were "both being investigated for a lot of things," and that nurses had told Complainant that their licenses were "on the line" and that they needed to get out of there. Complainant also wrote that, because of the things Director and Manager were involved in, the company may just close that location and start from scratch with new staff. Manager showed the texts to Director, who decided to discharge Complainant for violating a company policy prohibiting spreading information that could be detrimental to the organization.

3) The Investigator made the following findings of fact:

a) In November 2014, Complainant was hired to work three days per week as an administrative assistant to Manager (her direct supervisor) and Director. There were about 12 employees in the workplace, and about half of them were female.

b) About two months after she was hired, Director allegedly began giving her gift cards. Director also allegedly offered Manager's position to Complainant on multiple occasions, but she refused.

c) Complainant alleged that Director told her that he preferred her not to wear cardigan sweaters, so he could see more of her body. Director also allegedly told Complainant that he had had a dream about her wearing red, and that he wanted her to wear red to work. Complainant claimed Director would also stare at her and other female employees, looking them up and down, licking his lips, and making noises. She further claimed that he would press up against her to talk to her, and that she would keep backing up until there was nowhere left to go. Complainant claimed that females in the office had a pact that no one would go in to Director's office alone.

[2] At the FFC, Complainant stated that she could not recall all of the topics she discussed with HR, but she was certain that comments about her clothing were part of that conversation.

d) Complainant (and other female coworkers) tried to complain about Director's behavior to Manager, who allegedly told her to just "hang in there," because he would soon take over Director's position.

e) In 2015, Respondent was acquired by a large health care provider ("Corporate"). Corporate HR claimed that all employees would have been informed of its harassment complaint process as part of the acquisition. Complainant claimed that none of the required labor posters were put up until the day before Director and Manager knew that HR was coming to visit the facility.

f) In late 2015, Complainant and another female employee spoke to a supervisor about Director's alleged sexual harassment. The supervisor allegedly declined to get involved because he was retiring soon, and advised them to contact Advocate. Another employee contacted Advocate, who provided a telephone number to contact Corporate HR.

g) Coworker 1 contacted HR, and allegedly reported that Director had slapped her butt.[3] HR disputed that Coworker 1 reported any concerns aside from a recent disciplinary action she had received.

h) On 12/2/2105, Director left a note on Complainant's desk, asking "Did you call [Advocate]?" Complainant believed that Advocate had informed Director of the female employees' complaints of sexual harassment because Advocate and Director were very good friends.

i) The next day, Complainant had a long telephone call with an HR representative who was driving to Maine to visit the facility the next day. HR claimed that Complainant never discussed sexual harassment during their conversation, and that her main complaint was that she doing much of Manager's work. This is disputed by Complainant, who claimed that she reported Director's sexual harassment and the note he left asking if she had contacted Advocate.

j) On 12/14/2015, Complainant had a text exchange with another coworker ("Nurse"). Complainant wrote, "I just got off the phone with someone from the home office and they were appalled. She wants me to gather info and get back to her." She further wrote, "[Coworker 1] told them that [Coworker 2] and I had made sexual harassment reports but forgot to tell them that she did too so I'm sure they wanted us out ASAP." Complainant also wrote that "[Director] had really gotten out of hand and was asking me to wear certain colored clothing and what types so he could see if I looked as good as he imagined…he is a sick man." Nurse replied, "OMG. Yes he is. He is constantly staring at breast (*sic*)." Complainant replied, "Yes!! And he was not even trying to hide it anymore, he was looking me up and down and licking his lips and he would groan…" Nurse texted in response, "I hope you told the home office this stuff." Complainant replied, "Yes I did, and that it is so unprofessional there."

k) On 12/16/15, Coworker 1 told Manager that Complainant had sent her text messages disparaging the company. Complainant texted that she believed Manager and Director were "both being investigated for a lot of things" and that nurses had told her they were concerned about their licenses because "there is something going on". She also speculated that Corporate might just close the facility, noting her belief that this was a common thing for large companies to do after an acquisition. Manager shared the text messages with Director, and they concluded that the messages were unprofessional and untrue, and intended to harm Respondent. As a result, they discharged Complainant the following day.

V. Analysis:

[3] Complainant believed this report was made because Coworker 1 texted asking her if she recalled the date of the alleged butt slap; Complainant did not remember the date of the incident.

1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary 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 the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

Sex Discrimination - Hostile Work Environment

2) The MHRA provides that it is unlawful to discriminate on the basis of sex with respect to the terms, conditions, or privileges of employment. 5 M.R.S. § 4572(1)(A). 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).

3) "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.

4) 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 sexual harassment; (3) that the harassment was based upon sex; (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.

5) 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 employee 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).

6) Here, Complainant established her hostile work environment claim, with reasoning as follows:

   a) Complainant has established that she was subjected to pervasive sexual harassment by Director. She credibly explained that on almost every workday she had some interaction with Director in which he was inappropriate. He ogled her while licking his lips and making noises, hugged her from behind, commented on her body, and told her to wear certain types and colors of clothing. Director's conduct was subjectively and objectively offensive and was sufficient to create an abusive working environment.

   b) While Respondent disputed that Complainant reported any sexual harassment, the record supports that she did at least attempt to report it. She and others reached out to Manager and to another supervisor, but neither of them would take any action. When she and others contacted Advocate, Director found out and left a note asking if she was the one who made the contact. Complainant and others also reached out to HR. Complainant's claim that she spoke to HR about sexual harassment is buttressed by her email to Nurse describing her report. In addition, Coworker 2 provided that she had reported sexual conduct by Director to HR as well, which tends to support Complainant's position.

   c) Because the harassment did not result in a tangible employment action, Respondent could have avoided liability by establishing that it exercised reasonable care to prevent and correct harassment and that Complainant unreasonably failed to take advantage of available corrective and/or preventive opportunities. Respondent failed to prove either. As noted above, Complainant's initial reports were brushed off, most notably by Manager, who told her to "hang in there" until he was promoted. When she finally was able to communicate some of what she was experiencing, HR did nothing to stop the harassment, despite having received reports from at least two female employees. Respondent's inaction when given the chance to prevent further harassment means that it is liable for the harassment.

7) It is found that Respondent is liable for subjecting Complainant to a hostile work environment on the basis of sex.

Retaliation – MHRA/WPA

8) The MHRA prohibits retaliation against employees who, pursuant to the WPA, make good faith reports of what they reasonably believe to be a violation of law or a condition jeopardizing the health and safety of the employee or others in the workplace. *See* 5 M.R.S. § 4572(1)(A)&(B); 26 M.R.S. § 833(1)(A)&(B). 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).

9) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she 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.

10) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action." *DiCentes,* 1998 ME 227, ¶ 16, 719 A.2d at 515. *See also Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse action." *Id.* Complainant must show that she would not have suffered the adverse action but for her protected activity, although the protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).

11) Here, Complainant established a prima-facie case by showing that she reported sexual harassment and was discharged soon thereafter. Respondent, in turn, provided a nondiscriminatory reason for its action: it discharged Complainant for making disparaging comments about the company in violation of company policy.

12) In the final analysis, Complainant has established that Respondent's reason was pretextual and that the real reason for her discharge was her protected activity, with reasoning as follows:

a) Complainant and several female coworkers made several attempts to report Director's harassment, but it was only when a coworker spoke with Advocate that someone expressed interest in hearing what was happening. Although Advocate did provide information about contacting HR, he also apparently alerted Director about the sexual harassment allegations. Director then left Complainant – and apparently only Complainant – a note asking if she had been the one to contact Advocate. This suggests that he was aware of his prior inappropriate sexual behavior towards her, and that he viewed her as a threat to his continued employment. This is also evidenced by the fact that Director and Manager allegedly tried to coerce Coworker 1 into stating that everything the female employees reported to Corporate was untrue.

b) Although Respondent contended that it was Complainant's allegedly "untrue and scandalous" text messages to Coworker 1 that compelled her discharge, the messages were largely innocuous and expressed Complainant's personal beliefs about the ongoing situation at the facility. Specifically, she wrote that Director and Manager were about to be investigated, that Corporate might conceivably shut down the facility and start over with new staff if the problems were severe, and that nurses had recently come to Complainant with concerns about their licenses being in jeopardy due to improprieties at the facility. Complainant did not spread these thoughts to other employees, but rather was talking to someone she trusted, who had also reported harassment, and who claimed that she was at the time under pressure to disavow her reports. Under the circumstances, this sort of private speculation between two employees who believed HR was investigating their reports of sexual harassment does not appear to amount to "[s]preading information that could be detrimental to the organization." This is especially so where Respondent opted to bypass its progressive discipline steps.

c) Given the note Director left for Complainant which strongly suggested he believed she reported his behavior, the temporal proximity between the reporting and her discharge, and Director's role as the

decision-maker who bypassed progressive discipline and discharged Complainant, it appears more likely that not that Complainant's discharge was the result of her protected activity.

13) Retaliation in violation of the WPA and MHRA is found.

VI. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following findings:

1) There are **Reasonable Grounds** to believe that Discovery House discriminated against Lynn Keeran on the basis of sex (hostile work environment);

2) There are **Reasonable Grounds** to believe that Discovery House retaliated against Lynn Keeran for engaging in WPA- and/or MHRA-protected conduct; and

3) Conciliation should be attempted in keeping with 5 M.R.S. § 4612(3).

Amy M. Sneirson, Executive Director

Robert D. Beauchesne, Investigator