



Maine Human Rights Commission

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Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT

MHRC Case No. E17-0162

July 30, 2018

Amanda Dube (Hallowell)

v.

Red's Pizza and Grill¹ (Gardiner)

I. Summary of Case:

Complainant, who worked for Respondent as a line cook, alleged that Respondent discriminated against her based on her sex when it subjected her to a hostile work environment, resulting in her constructive discharge. Respondent, a restaurant, denied discrimination and asserted that Complainant quit before it was able to act on her complaints. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, requesting additional information, and holding an Issues and Resolution Conference ("IRC").² Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that Respondent unlawfully discriminated against Complainant based on sex.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: June 2016 to January 22, 2017.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): April 3, 2017.
- 3) Respondent is an employer that is subject to the Maine Human Rights Act ("MHRA") and state employment regulations.
- 4) Neither party is represented by counsel.

III. Development of Facts:

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

¹ Complainant named Respondent as Red's Pizza and Grill. Respondent provided that its legal name is Red's Pizza & Grill, Inc. As Complainant did not amend her complaint, the name she used has been retained.

² Respondent did not appear for the IRC.

Complainant worked for Respondent as a line cook. Another line cook (“Coworker”) made sexual comments around and to Complainant. Complainant informed Respondent about the comments, but the issue was not taken care of. One night, Complainant was left to close the restaurant alone with Coworker, and Coworker made several sexual comments that made Complainant extremely uncomfortable. Complainant informed Respondent. A few days later, Complainant quit because she did not believe Respondent would take action to stop the issue. Complainant believes Respondent subjected her to sexual harassment and constructively discharged her.

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

Complainant only made Respondent aware of two occasions when Coworker made sexual comments. The two occasions were separated by several months. When Complainant informed Respondent of the second occasion, Respondent gave Coworker a written warning. Had Respondent gotten the impression that Complainant was made uncomfortable by the situation, Respondent would have discharged Coworker. Respondent is not liable because it took appropriate corrective action.³ Respondent believes Complainant quit because she was not given a night off that she requested.

3) The Investigator made the following findings of fact:

- a) Complainant worked as a line cook at Respondent’s restaurant from May 12, 2016 until January 22, 2017.
- b) In the Summer of 2016, Coworker began making comments about other employees’ body parts in a sexual manner. The comments made Complainant uncomfortable.
- c) On June 27, 2016, Coworker made comments to Complainant and two other female employees about pulling their hair and impregnating them. They told one of Respondent’s two owners (“Owner”) about the comments. Owner told Coworker that the comments were not allowed.
- d) In the Summer of 2016, after an employee told a regular customer what Coworker had been saying to female employees, the customer came inside the restaurant and yelled at Coworker to stop making the female employees feel uncomfortable.
- e) In the Fall of 2016, Coworker began to make comments to Complainant such as telling her she looked like a hot lesbian if she wore a ball cap or telling her to stop looking so hot if she came to work wearing make-up. Complainant believes Owner heard some of these comments because Owner would also have been working at the time they were made.
- f) Coworker also told Complainant she should break up with her boyfriend and that it was ok to cheat on her boyfriend. Coworker told Complainant she had the nicest ass at Red’s.
- g) Complainant told Owner about these comments on multiple occasions. Complainant believes Owner did not take her complaints seriously.
- h) On January 19, 2017, Complainant and Coworker were left alone to close the restaurant. Coworker made sexual comments to Complainant about her pants (saying he could see her pussy), asked her if she wanted to make out, said that she should go out and fuck as many people as she can, spoke about his

³ Respondent also seems to assert that it is not liable because it has since closed. This does not prevent it from being held liable for discrimination that occurred while Complainant was employed there.

purported past sexual encounters, and asked Complainant how many people she has had sex with. Before making these comments, Coworker alluded to the doors being locked. These comments made Complainant highly uncomfortable.

- i) On January 20, 2017, Complainant informed Owner of the events of the previous night. Complainant got the impression that Owner did not grasp the gravity of the situation. Respondent recalls that Complainant did not seem upset during the conversation, though Respondent's notes do show that Complainant told Owner that the events made her uncomfortable. Respondent provided a witness statement (Exhibit C) from another coworker ("Employee 1") that states that Complainant had a smile on her face when talking to Owner about the issue.⁴
- j) On January 22, 2017, after deliberating with her mother, Complainant told Owner that she would no longer be working for Respondent.
- k) On January 22, 2017, Respondent gave Coworker a written warning that *further* sexual harassment *may* lead to discharge.⁵ It is unclear whether this warning was produced before or after Complainant informed Respondent that she was leaving her job.
- l) Complainant provided contemporaneous text messages with Employee 1 (Exhibit A) and between her and another coworker ("Employee 2") (Exhibit B). Employee 2 stated to Complainant that Coworker should have been fired, that "they should have just got rid of him a long time ago," and that "every single person down there has had a problem with him."⁶

IV. 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.
- 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).
- 3) 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).

⁴ This statement, which was written after Respondent learned of this Complaint, also used phrases such as "hostile work environment[sic]" and "immediate[sic] action", which raise doubt that Employee 1 wrote this statement without guidance.

⁵ Complainant believes that Coworker has since been discharged for similar behavior.

⁶ Complainant also was asked to provide any text messages or emails between her and Coworker and any text messages between her and Owner around the time she quit. None was provided.

- 4) “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.
- 5) Accordingly, to succeed on such a claim, Complainant must demonstrate the following: (1) that she 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.
- 6) When unlawful harassment is committed by a coworker (not a supervisor), “an employer is responsible for acts of unlawful harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct unless it can show that it took immediate and appropriate corrective action.” Me. Hum. Rights Comm’n Reg. Chapter 3, §10(3) (Sept. 24, 2014). “The immediate and appropriate corrective action standard does not lend itself to any fixed requirements regarding the quantity or quality of the corrective responses required of an employer in any given case. Accordingly, the rule of reason must prevail and an employer’s responses should be evaluated as a whole, from a macro perspective.” *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 28, 969 A.2d 897, 905.
- 7) Here, Complainant has shown that she was subjected to a hostile work environment based on her sex, with reasoning as follows:
 - a. In total, the comments made by Coworker to Complainant appear to be severe and/or pervasive. Coworker made frequent sexual comments about Complainant’s appearance and propositioned her. Respondent does not seem to dispute that Coworker’s behavior amounts to sexual harassment,⁷ but claims that it is not liable because it did not know about most of the alleged harassment, and it took prompt and appropriate action when it learned of Coworker’s behavior.
 - b. Complainant credibly provided that a number of sexual statements were made in front of Owner, such as Coworker calling her a “hot lesbian” and commenting on her appearance. The text messages Complainant provided also tend to support her position that Respondent knew or should have known of Coworker’s harassing behavior, since they show that other employees had problems with his conduct and believed he should have been discharged long ago. Respondent was certainly aware that Coworker’s behavior had at one point risen to the level of having a *customer* attempt to correct it. Any action taken prior to January 19 was ineffective.

⁷ Respondent provided a copy of the written warning it gave Coworker on January 22, 2017, which specifically states that his comments are “considered sexual harassment”.

- c. Respondent contends that Complainant was not upset by the remarks, so its decision to give Coworker a warning was sufficient. This argument is unavailing. First, Coworker had been warned about sexually-charged comments to Complainant in the past, but continued to make them with impunity. Complainant provided that she was offended and uncomfortable, and the comments are objectively offensive as well. Complainant was not obligated to appear distraught in order to have her complaints taken seriously.

8) Discrimination on the basis of sex (hostile work environment) is found.⁸

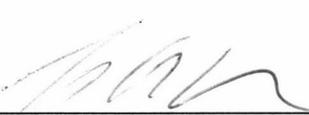
V. Recommendation:

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

There are **Reasonable Grounds** to believe that Red's Pizza and Grill discriminated against Amanda Dube based on her sex and the claim should be conciliated in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneider, Executive Director



Joseph H. Hensley, Investigator

⁸ Complainant also alleged that she was constructively discharged. An employee is constructively discharged when they have no reasonable alternative to resignation because of intolerable working conditions caused by unlawful discrimination. *See Sullivan v. St. Joseph's Rehab. and Residence*, 2016 ME 107; *King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "The test is whether a reasonable person facing such unpleasant conditions would feel compelled to resign." *Id.* If the employee proves they were constructively discharged because of intolerable working conditions caused by unlawful discrimination, they may be entitled to damages flowing from the loss of their job. *Sullivan*, 2016 ME 107, ¶19. at ¶18; *Levesque*, 2012 ME 114 at ¶8. Here, it is unnecessary for the Commission to resolve this claim, since it relates only to the damages to which Complainant may be entitled.

Saving screenshot...

< Courtnee Reds

2074584007



Sat, 01/28/2017



So I just heard what happened to you! I'm sorry! He's freaking nuts and shouldn't work there

1:29 PM

I know. He's crazy. I was so done with him

1:32 PM



And reds

1:32 PM

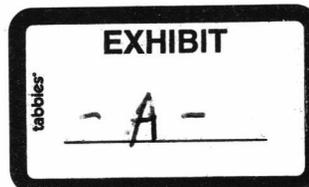


That's what I heard which you should still have your job and he should have got fired that kid if stuff in a work place is illegal

1:33 PM



Enter message



①

< Courtnee Reds

2074584007



You can get them in so much trouble which is the sad let they should have just got rid of him a long time ago

1:37 PM

Oh I know. Everyone complained about him which makes it worse!!!

1:38 PM



Yes every single person down there has had a problem with him! That doesn't say enough there to get rid of him???

1:38 PM

I know. And he's still working there after I



Enter message



2

Saving screenshot...

< Courtnee Reds

2074584007



the sad let they should
have just got rid of him
a long time ago

1:37 PM

Oh I know. Everyone
complained about him
which makes it worse!!!

1:38 PM

Yes every single person
down there has had a
problem with him! That
doesn't say enough
there to get rid of him???

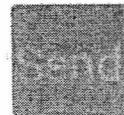
1:38 PM

I know. And he's still
working there after I
quit. Stupid.

1:43 PM



Enter message



3

Prez Reds
2074468345

Sun, 01/22/2017

...
7:16 PM

What
7:16 PM

So I don't mean to pry
and if you don't wanna
tell me I totally
understand but uh what
happened with Josh
your parents came in
earlier and were quite
pissed off
7:16 PM

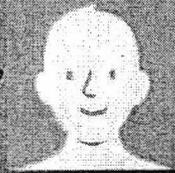
With all the comments
thursday. They werent
putting up with it.
Like i said it'd sexual

①

< Prez Reds
2074468345



With all the comments
thursday. They werent
putting up with it.
Like.jen said, it'd sexual
harassment.

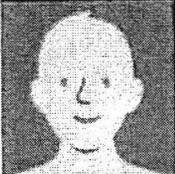


7:17 PM

It's been bothering me
for a while.



7:17 PM



Oooh yeah that's shit he
said was fucked up!
That's what I thought
but I didn't know if
maybe he said more

7:18 PM

What did josh say after
my parents left? What



2



Enter message



< Prez Reds

2074468345



but I didn't know if
maybe he said more
7:18 PM

What did josh say after
my parents left? What
did everyone say?

7:18 PM



that any would want to
say anything to
7:28 PM



Nothing... It was eerily
quiet... Your mom told
him he's lucky he wasn't
talking to your guys
lawyer Your stepdad
was pissed... It wasn't
really anything

7:28 PM

3



Enter message





Jen blanche <jennblanche@gmail.com>

hello Prez

Prezleigh Fortin <prezleighfortin@gmail.com>
To: Jen blanche <jennblanche@gmail.com>

Wed, May 31, 2017 at 2:53 PM

I started working at reds early summer of 2016. For me it was an easy envirement to work in, low stress and the crew worked very well together. Josh and Amanda started the same time about about a month after me. One night Amanda, Courtney and I were working with Josh and he had said some off the cuff things which made us girl uncomfortable. We saw a regular customer of ours while Courtney and I were out on our smoke and had told him what Josh had said to us. The regular went inside after we told him and proceeded to yell at Josh. We saw Jen that night and told her what had happened. She took Josh outside and spoke to him privately. After that incident I never had another problem with Josh saying off the cuff things to me. The crew seemed to work pretty good together and i never felt at all like I was in a hostile work envirement. Infact i really like working for Mike and Jen. They were always great bosses. They were understanding and always went out their way to help me if things were going right in my life and they knew I needed help. So much so that I chose to stay on even after picking up another job. Even after months of working both jobs i chose to go back to working at Reds fulltime because I missed the work envirement and working for Mike and Jen. Towards the end of Amanda working there I guess she and Josh were not getting along. I didnt really notice it. I remember her telling Jen about the incident in question happening and Amanda had kinda off played it off like no big deal, she even told Jen with a smile on her face so I know I didnt take any incling from it that Amanda had been personally affected by it. I remember Jen telling Amanda that she would personally talk to Josh. Next thing I knew Amanda had quit about this issue. Again I didnt think this had personally affected Amanda because of the way she had played it off. Mike and Jen are wonderful bosses and I know of Amanda had told Mike and Jen about how much this had bothered her they would of taken imidiatae action.

Signed Prezleigh Fortin

On May 25, 2017 3:23 PM, "Prezleigh Fortin" <prezleighfortin@gmail.com> wrote:
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