Maine Human Rights Commission

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INVESTIGATOR'S REPORT
E17-0476
August 22, 2018

Sharron Denbow (Bangor)

v.

Shade Doctor of Maine, LLC (Brewer)

Summary of Case:

Complainant, who worked as a crew member for Respondent, a seller of window shades, alleged that she was subjected to unlawful discrimination in employment when she was sexually harassed, ultimately leading to her constructive discharge. Respondent denied discrimination and stated that Complainant voluntarily resigned. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Complainant was discriminated against in employment on the basis of sex.

Jurisdictional Data:

1) Dates of alleged discrimination: 10/3/2017.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 10/23/2017.

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, and state and federal employment regulations.

4) Complainant is represented by Arthur J. Greif, Esq. Respondent is not represented by counsel.

IV. Development of Facts:

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

> Respondent's co-owner[1] ("Owner") sexually harassed Complainant by making sexual comments, touching her, and exposing himself to her while working in his home office. Complainant tried to stop Owner's touching by telling him she was not "touchy-feely" and that she did not like to be touched. She also complained about Owner's behavior to the Operations Manager ("Manager"), who told her she would have to put up with it. The month prior to resigning, Owner called her to his office twice. Both

[1] The company is co-owned by "Owner" and his wife ("Wife').

times, he was naked from the waist down. On Complainant's last day of work, Owner cornered her and placed his hands on her back. She told him she had had enough and quit.

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

Complainant and Husband were long-time friends of Owner and Wife, so knew that Owner and Wife tended to be undressed while in the residence part of the home where Owner worked. Owner wore long garments and did not expose his genitals to Complainant. She once entered his office, without notice or knocking, while he was undressed at the computer, but all she saw was the back of his chair. When Complainant and Husband fought at work, Owner asked her to get back to work. Complainant replied that she had had enough, and quit, saying that she would destroy Husband and his job.

3) The Investigator made the following findings of fact:

a) Complainant and Husband were social friends with Owner and Wife prior to becoming employees of the business. Husband was Respondent's full-time Service Manager, while Complainant was hired for a part-time position.

b) Respondent's company is operated in a separate portion of Owner and Wife's residence. Owner's office is located in the residence portion of the building ("Residence"). Employees were sometimes in the Residence to discuss business. Even during business hours, Owner spent much of the time naked or in various stages of undress. Owner warned employees to knock before entering the Residence. Owner also went to the business portion of the building in a long bathrobe, with at most a thigh-length nightshirt underneath. Owner claimed that it was necessary for him to dress in this manner because a back brace prevented him from wearing pants.

c) In or about April 2017, Owner, while dressed in a bathrobe, asked Complainant if she would massage his lower back. She refused, and said she was not a "touchy-feely" person.

d) In or about June 2017, Complainant entered the Residence. She alleged that prior to entering, she paged Owner to let him know that she would be coming over. Respondent disputed any prior notice and claimed that Complainant entered without knocking. It is undisputed that when Complainant entered Owner's office in the Residence, Owner was sitting undressed at his computer.

e) Complainant wore high heels at work. She alleged that Owner asked her whether she wore them to bed; Owner denied this particular comment, and provided that he asked Complainant if the shoes were left over from when she was a stripper. Complainant also alleged that while she was pulling cords for shades, Owner stated, "I could pull those for you but then I wouldn't be able to look at you." Complainant further alleged that Owner told her that he liked big-breasted women. Owner disputed that he made this comment, adding that this is not his preference; he claimed Complainant wore low-cut tops and he had to tell her to stop leaning over in front of him.

f) In or about September 2017, Complainant and Owner were at a club with their spouses. At some point, Owner approached Complainant from behind and placed both his hands on her waist.

g) In or about September 2017, Complainant alleged that on two occasions she was paged to come to Owner's office in the Residence, and that both times she found Owner naked from the waist down. Owner denied that he interacted with any employees while naked. Respondent provided a written statement from Husband stating that while he was not present during any of the alleged inappropriate

behavior, Complainant told him that she had entered the Residence and found Owner completely naked. Husband also confirmed that Complainant told him that during one meeting with Owner he was wearing only a t-shirt and she could clearly see his genitals. Husband further wrote that, after he mentioned these complaints to Owner, Owner apologized to Husband and stated he was unaware he had exposed himself.

h) On at least one occasion, Complainant told Manager that she was uncomfortable with Owner's attire. Manager's written statement indicates that she told Complainant she should discuss this with Owner, as this was "not business related." Complainant indicated in her sworn Commission complaint that Manager was of no assistance and that she told Complainant that she "had to put up with it."

i) Complainant also claimed that Owner made it a point to touch her shoulders and back anytime he moved to get by her. She claimed that she told Owner several times that she did not like to be touched.

j) On or about 10/3/2017, Owner went to Complainant's work area to discuss a performance issue. Owner claimed that he confronted Complainant because she and Husband were having an ongoing argument in the workplace about personal issues, and that he told Complainant to leave those issues at home and get back to work. Complainant claimed that she quit after Owner again touched her during their conversation. Husband and Manager's written statements indicate that, after Complainant said she quit and was leaving work, she referred to filing a sexual harassment complaint against Owner.

V. Analysis:

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.

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).

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 (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.

6) 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).

7) The fact that the conduct complained of is unwelcome must be communicated directly or indirectly to the perpetrator of the conduct. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988). In some instances, Complainant may have the responsibility for telling the alleged harasser directly that their comments or conduct is unwelcome. In other instances, however, Complainant's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the conduct is unwelcome. *Id.* Where Complainant never verbally rejects a supervisor's sexual advances, yet there is no contention or evidence that she ever invited them, evidence that she consistently demonstrated unalterable resistance to all sexual advances is enough to establish their unwelcomeness. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1990). Complainant may also be relieved of the responsibility for directly communicating unwelcomeness when she reasonably perceives that doing so may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the business. *Id.*

8) An employee "may use the doctrine of constructive discharge to satisfy the elements of 'discharge' or 'adverse employment action' in an otherwise actionable claim" under the MHRA. *Levesque v. Androscoggin County,* 2012 ME 114, ¶ 8.[2] 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.*

9) Here, Complainant established a hostile work environment claim, with reasoning as follows:

   a) Respondent's position appears to be that because Complainant and Husband were social friends outside

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[2] Constructive discharge is not a stand-alone claim; it "must necessarily stand or fall with some form of unlawful discrimination". *Sullivan v. St. Joseph's Rehab. and Residence,* 2016 ME 107, ¶19. Rather, 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. *Id.* at ¶18; *Levesque,* 2012 ME 114 at ¶8.

of work, there was nothing wrong with Owner conducting business in the Residence wearing little or no clothes. Owner also contended that there was nothing wrong with him sitting naked at the computer during business hours, since his back was to the door and Complainant allegedly failed to knock. This argument is not persuasive. No employee should ever run the risk of seeing anyone, especially an owner, naked or near-naked, in order to perform one's assigned job duties.

b) Further, despite Owner's denial that he ever interacted with employees while naked, his own witness, Husband, provided a written statement that Complainant told him that Owner had exposed his genitals to her on at least one occasion, and that Owner apologized for this. Whether inadvertent or not, this would clearly be subjectively and objectively offensive conduct, even if it occurred on just one occasion. There are also other factors that call into question whether Owner's exposure was unintentional.[3]

c) Putting aside the allegations of exposure, Owner admitted to working while undressed and placing the burden on employees to warn him when they were approaching, as well as making a number of other sexual comments, such as asking Complainant to massage his back, and asking her whether her high heels were from her days as stripper.[2] In sum, even assuming that no indecent exposure had occurred, these admitted facts alone would arguably establish a hostile work environment based on sex.

d) It is also found that Complainant did complain to Manager about Owner. Manager's reason for not investigating this - allegedly because she believed Owner's lack of attire was "not business related" – was inexplicable, since it is undisputed that Complainant was performing her assigned job duties at the time that the alleged exposure occurred. The fact that Complainant and Husband were social friends with Owner in no way changed Manager's responsibility to investigate a complaint of sexual harassment. It is also not reasonable to insist that Complainant discuss this directly with Owner, especially since he was her harasser, and he had ignored her multiple prior requests not to touch her.

e) In this case, the affirmative defense described above is not available because the alleged harasser was also a co-owner of the company, and his unlawful actions are imputed automatically to the employer since owners are considered to be the "alter ego" or "proxy" of the company. In any event, Complainant established a tangible employment action by showing that she was constructively discharged. She was sexually harassed (including through physical contact), Owner ignored her objections, and Manager refused to take action. A reasonable person in this situation would feel they had no choice but to resign.

VI. Recommendation:

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

There are **Reasonable Grounds** to believe Shade Doctor of Maine discriminated against Sharron Denbow on the basis of sex (hostile work environment), and conciliation should be attempted in keeping with 5 M.R.S. § 4612(3).

Amy M. Sneirson, Executive Director

Robert D. Beauchesne, Investigator

[3] Complainant is also a lifetime registrant on the Maine sex offender registry.

[2] Complainant claims that Owner actually asked her whether she also wore the high heels in bed. Regardless, both comments are objectively and subjective offensive.