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INVESTIGATOR'S REPORT
MHRC Case No. E18-0132-A & B
October 10, 2019

Jana Markwart-Sapienza (Rockport)

v.

The Drouthy Bear (Camden) and Andrew Stewart (Camden)

I. Summary of Case:

Complainant Jana Markwart-Sapienza worked as a line cook for Respondent The Drouthy Bear and alleged that Respondents retaliated against her for reporting overtime wage discrepancies and discriminated against her based on her national origin by permitting and/or creating a hostile work environment.[1] Respondents Drouthy Bear ("Restaurant") and Andrew Stewart ("Owner"), a restaurant and its owner respectively, denied retaliating or discriminating against Complainant and stated that the reason behind Complainant's discharge was due to her failure to get along with other workers, her general poor attitude, and an instance where she physically moved another employee. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, holding an Issues & Resolution Conference ("IRC"), and requesting additional information. Based upon this information, the Investigator recommends that the Commission find that there are reasonable grounds to believe that Respondents retaliated against Complainant, but that there are no reasonable grounds to believe that Respondents subjected Complainant to an unlawful hostile environment.

II. Jurisdictional Data:

1) Dates of alleged discrimination: Fall 2017 through January 5, 2018.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): April 2, 2018. Complainant amended her complaint to add her hostile work environment claim on May 2, 2019.

3) Respondents has 19 employees and is subject to the Maine Human Rights Act ("MHRA"), the Maine Whistleblowers' Protection Act ("WPA"), as well as state and federal employment regulations.

[1] Complainant additionally claimed that her discharge was based on her national origin. This claim is unsubstantiated by the evidence. The time elapsed between her reports of national origin discrimination and her discharge breaks the chain of causation. As such, Complainant failed to establish this claim and the hostile work environment and WPA claims will be the only claims analyzed in this report.

4) Complainant is represented by Attorney Lisa J. Butler, Esq. Respondent is represented by Patrick J. Mellor, Esq.

III. Development of Facts:

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

Complainant is a German national, English is her second language, and she speaks with an accent. Complainant was a line cook at Restaurant from October 26, 2015 until her discharge on January 5, 2018. Early in 2016, Complainant's supervisor ("Supervisor") and Restaurant employees made jokes relating to Complainant's national origin. For example, they called her "Obergruppenführer", which means senior group leader of the Third Reich. During the months of May, July, October, and December 2017, Complainant noticed a miscalculation in her overtime pay. Complainant reported these instances to Owner, but Owner did not look into the pay discrepancies until Complainant filed a complaint with the state agency overseeing wage and hour issues ("Agency") after she was terminated from employment. On January 5, 2018, Owner called Complainant and terminated her employment. Owner stated that Complainant was not being fired because of the quality of her work, but because other employees had allegedly complained about Complainant. However, Complainant was never counseled or disciplined for her alleged poor attitude. After she was discharged, Complainant filed a report with Agency. Agency audited Restaurant and found that Restaurant miscalculated overtime pay.

2) Respondents provided the following in support of their position:

Respondents knew of Complainant's national origin when they hired her. Respondents admit that jokes were made at Complainant's expense, but they were reciprocated. When Complainant got offended by a specific joke made by Supervisor, she confronted him and he stopped the conduct immediately. In August 2017, Owner and Supervisor contemplated discharging Complainant due to complaints about her, but decided against it due to insufficient staffing and seasonal needs. Respondents acknowledge that there were oversights regarding overtime pay but provided that they did not discharge Complainant because of her reports, but rather because was rude, aggressive, negative, and inappropriate with the employees. Furthermore, in December 2017, Complainant "physically moved" another employee in the kitchen. This led Owner to make the decision to terminate her employment on January 5, 2018, after the holiday season was over.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties and the information gathered at the IRC:

   a) In early 2016, Supervisor and coworkers made jokes based on Complainant's national origin. Supervisor's comments, in particular, were frequent and severe. Once Complainant confronted him about the comments, however, he stopped immediately. Complainant did not report the jokes made by other coworkers.

   b) Complainant made good faith reports to Owner regarding overtime discrepancies on or around the following dates: May 2017; July 2017; October 2017; and December 2017.

   c) While Owner paid Complainant the overtime she reported was missing, the record reflects that he was upset by her reports. During the IRC, Owner admitted to becoming upset and angry when Complainant reported the overtime pay discrepancies.

d) Respondents believed Complainant was negative, and that she complained too much. In describing the reason for her discharge, Respondents focused on her negativity and her frequent complaints. As one example, Complainant alleged that in mid-December, after she had made several reports about not being paid for her overtime hours, she borrowed a Restaurant sweatshirt because it was cold both outside and in the kitchen. According to Complainant, Owner berated her in front of her coworkers, stating that she was "the only one who is so negative and complains a lot."

e) Owner and Supervisor decided not to fire Complainant in December due to the holiday season.

f) Respondents alleged that, in December 2017, Complainant "physically moved" a coworker. Complainant denies physically moving a coworker, instead stating that she accidentally bumped into the coworker while holding a hot pan.

g) On or around January 5, 2018, Complainant was discharged.

h) After her discharge, Complainant received her final paycheck, which once again did not include her overtime pay. Complainant filed a complaint with Agency, which conducted an audit that resulted in Restaurant having to pay Complainant and other employees past-due overtime totaling $149.06.

IV. Analysis:

1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even change of Complainant prevailing in a civil action.

National Origin Discrimination – Hostile Work Environment

2) The MHRA provides that it is unlawful to discriminate on the basis of national origin 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, comments, jokes, acts and other verbal or physical related to protected class 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 [national origin] harassment; (3) that the harassment was based upon [national origin]; (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 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 his or her 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 Complainant ever invited them, evidence that Complainant 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.*

7) An employer "is responsible for its acts and those of its agents and supervisory employees with respect to unlawful harassment." Me. Hum. Rights Comm'n Reg. Ch. 3, § 10(2). 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." *Id.* 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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

8) 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. *Id.* "The immediate and appropriate corrective action standard does not lend itself to any fixed requirements regarding the quantity or qualify 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.

9) Complainant has not established that she was subjected to a hostile work environment on the basis of national origin. Reasoning is as follows:

   a. With regard to harassment by a supervisor, Complainant established that Supervisor made jokes about her German national origin that were directed at Complainant. These jokes occurred for weeks and were severe in nature because the jokes included repeated references to Complainant as an "Obergruppenführer", which is a Nazi leader. Complainant was subjectively offended by the conduct, which was also objectively offensive. Nonetheless, while Supervisor's conduct likely constituted harassment, there is no basis for holding Respondents liable for the conduct. Respondents did not take a tangible employment action against Complainant based on the harassment, and Respondents established their affirmative defense. Once Complainant communicated unwelcomeness to Supervisor, Supervisor stopped the offensive jokes immediately. Complainant did not raise the issue of national origin discrimination again, demonstrating that her complaint was effective and prevented further harassment.

   b. With regard to harassment by her coworkers, Complainant also failed to establish grounds for employer liability. Complainant unreasonably failed to take advantage preventative or corrective opportunities provided by the employer or to avoid harm otherwise because she never communicated unwelcomeness or reported these jokes to Supervisor or Owner. Owner was of the opinion that these jokes were lighthearted and reciprocated by Complainant. Moreover, Supervisor's immediate correction of his own behavior suggests that had Complainant reported the alleged harassment was unwelcome, Supervisor would have been able to take corrective action. Complainant's failure to communicate unwelcomeness relieves the employer of liability here.

10) It is found that Complainant has not established her hostile work environment claim against Respondents.

WPA Retaliation

11) 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. See 5 M.R.S. § 4572(1)(A); 26 M.R.S. § 833(1)(A).

12) 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 action which may be proven by a "close proximity" between them. *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). The prima-facie case creates a rebuttable presumption that Respondents retaliated against Complainant for engaging in protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondents 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. If Respondents make that showing, then 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.* To prevail, 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 Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).

13) Complainant has established a prima-facie case by reporting that employees were denied breaks and overtime pay. These reports were made shortly before her discharge; the proximity of the timing is a strong indicium of a causal connection. Respondents provided legitimate, nondiscriminatory reasons for Complainant's discharge by claiming Complainant's attitude towards her coworkers was inappropriate and that she physically moved another employee.

14) In the final analysis, Complainant has met her burden of showing that the real reason for her discharge was her alleged protected activity, with reasoning as follows:

a. Complainant performed her job satisfactorily and Respondent has not produced evidence it had concerns about her work performance. Respondents did not keep personnel records; therefore, there is no record of performance evaluations or coworkers' complaints.[2]

b. There is substantial corroborating evidence that Complainant engaged in protected activity, verbally and in writing. Complainant reported pay discrepancies multiple times: May 2017; July 2017; October 2017; and December 2017. While Owner claimed he did not know that his pay practices were illegal until mid-December 2017, this statement lacks credibility given that Owner appears to have been an experienced business person, Complainant raised the issue multiple times over a period of six months, and Respondents had posted an Agency poster about overtime pay in Restaurant.

c. Respondents alleged that, in December 2017, Complainant "physically moved" another employee. Complainant denied this encounter and further posited that she was likely holding a hot dish and accidentally bumped into the coworker. Furthermore, Respondents never addressed this potential issue with Complainant, making it unlikely that this was the reason for her discharge.

d. During the IRC, Owner admitted to becoming upset and angry when Complainant reported the overtime pay discrepancies. Respondents viewed Complainant as negative and as someone who complained constantly; the only complaints Respondents specifically mentioned, however, were her complaints that she was not being paid properly. Given Respondents' admitted anger over these reports, it is more likely than not that Complainant would not have been discharged but for her protected activity.

15) Retaliation in violation of the WPA is found.

V. Recommendation:

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

1) There are **No Reasonable Grounds** to believe that The Drouthy Bear and Andrew Steward discriminated against Jana Markwart-Sapienza on the basis of national origin (hostile work environment, discharge), and those claims should be dismissed in accordance with 5 M.R.S. § 4612(2).

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[2] The affidavits from the employees posit that Complainant was overbearing and difficult to work with. That may be so, but it does not break the causal connection between Complainant's reports and her ultimate discharge.

2) There are **Reasonable Grounds** to believe that The Drouthy Bear and Andrew Stewart retaliated against Jana Markwart-Sapienza for engaging in WPA-protected activity; and conciliation of that claim should be attempted in accordance with 5 M.R.S. § 4612(3).

Alexandra R. Brindley, Investigator