



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT

**E18-0331**

October 7, 2019

**Kimberly S. Hunter (Lewiston)**

v.

**St. Mary's Hospital<sup>1</sup> (Lewiston)**

### Summary of Case:

Complainant, who was a housekeeper for Respondent, a hospital, alleged that she was subjected to unlawful discrimination in employment because of her sex and that she was subjected to retaliation for reporting sexual harassment. Respondent denied discrimination or retaliation and stated that Complainant's concerns were investigated and appropriately addressed. 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 that she was subjected to retaliation for engaging in protected activity.

### Jurisdictional Data:

- 1) Dates of alleged discrimination: Ongoing.<sup>2</sup>
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 9/6/2018.
- 3) Respondent 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 ("WPA"), and state and federal employment regulations.
- 4) Complainant is represented by Arthur J. Greif, Esq. Respondent is represented by David Strock, Esq.

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<sup>1</sup> Complainant named "St. Mary's Hospital" as the Respondent in her complaint. Respondent provided that its legal name is "St. Mary's Health System." Because Complainant did not amend her complaint, the name used in her complaint has been retained.

<sup>2</sup> Complainant was still an employee of the hospital when she filed her original Commission complaint. On 4/5/2019, Complainant filed an amended complaint alleging that she was notified on 3/22/2019 that she would not be allowed to work until further notice, although she technically has not been discharged.

#### **IV. Development of Facts:**

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

Complainant worked in the hospital's housekeeping department. A male co-worker ("Co-worker") began touching her arm when speaking to her. She tried to avoid him, but he frequently cornered her. Co-worker made comments that made Complainant uncomfortable. Co-worker would follow her around, threatening to spank her. He harassed her almost every shift. She had to swat his hand away when he attempted to grab her crotch. Complainant hesitated filing a complaint against Co-worker too because she had recently complained about another male co-worker. She finally decided to do so after Co-worker told another male employee about what he had been saying to Complainant. After her report, the sexual harassment stopped, but she still had to work with Co-worker, who would stare her down. A supervisor ("Supervisor") told Complainant that other female employees had complained about harassment by Co-worker. Human Resources ("HR") closed Complainant's complaint without ever speaking to her. The Director of Facilities ("Director") confronted Complainant in his office and told her to drop the matter. She felt uncomfortable and left his office. Director followed her out, yelling at her that she needed to return to his office. Complainant reported this hostile behavior to HR, who claimed Complainant must have misinterpreted Director's actions. Co-worker was finally transferred to another department. He was eventually discharged. Complainant was subjected to ongoing retaliation by management. She asked for a reduced schedule to attend training, which Director agreed to do. Complainant's new supervisor later told her that Director wanted to get rid of her, and was eliminating her position for budgetary reasons, even though a new housekeeper had recently been hired.

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

Complainant's complaints were investigated. They did not rise to the level of unlawful sexual harassment. Prompt and effective action ensured the conduct ended. Complainant later reported to Supervisor that Co-worker had made inappropriate comments to her and tried to touch her. Co-worker denied the allegations. He still received a verbal warning about the conduct. Complainant confirmed that inappropriate behavior had stopped. She later reported to Supervisor that Co-worker was staring at her at work. Director attempted to speak with Complainant about this issue, but she left his office and refused to discuss it. Complainant complained to HR that the hospital had not responded appropriately to her prior complaints. HR made sure Complainant and Co-worker would no longer work together. HR interviewed Co-worker, who denied all allegations aside from part of one comment. Based upon that investigation, and newly discovered details about prior complaints made against Co-worker, he was discharged. No retaliation against Complainant occurred. Her hours were later reduced after she requested an on-call position. She was offered additional hours, but she declined, saying she needed more time for school.

- 3) The Investigator made the following findings of fact:

- a) Complainant was hired by Respondent as a housekeeper in April 2017. Co-worker, who worked in Utilities, worked a later shift. Their shifts overlapped for one hour. Complainant stated that Co-worker acted appropriately until they began working the same shift, on or about December 2017/January 2018.
- b) Complainant claimed that Co-worker then began touching her arm when he was speaking to her, and repeatedly cornered her when she was in cleaning rooms. She did not say anything to Co-worker at that time because she did not want to seem rude or hurt his feelings. Complainant further alleged that Co-worker began making comments that made her feel uncomfortable. These included allegedly telling

Complainant to "watch out for creeps" on her way home. After Complainant responded that she would not be a robbery target, because her housekeeping uniform would reflect that she had no money, Co-worker allegedly responded, "Trust me, they wouldn't be after you for money. They'd be after you for something else and so would I."<sup>3</sup>

- c) On or about 1/27/18, Complainant alleged that Co-worker unexpectedly attempted to grab her crotch with his hand. She further alleged that his hand came within a few inches of that area before she pushed his hand away. Co-worker allegedly then laughed and walked away.
- d) Complainant further alleged that Co-worker would follow her on almost every shift and say he was going to, "spank [her] butt." He allegedly only made these comments when no one else was around.
- e) In mid-January 2018, another male co-worker, on his last day of work, allegedly cornered Complainant in a bathroom she was cleaning. She believed he was seeking a hug from her. Complainant later reported this incident to Supervisor, who did not investigate because the employee no longer worked there.
- f) In February 2018, a third male employee, allegedly told Complainant that he had told another female employee that she was not too old for him to take her over his lap and give her a spanking. Complainant stated that the similarity of that comment to the ones made by Co-worker led her to believe that Co-worker had spoken to the male employee, in an effort to have him convey to Complainant that making such comments was not a big deal. Complainant stated that it was this decision to involve another employee in their situation that led her to finally report Co-worker's prior conduct and comments.
- g) On or about 2/12/18, Complainant told Supervisor that Co-worker had made inappropriate comments and had tried to touch her. Supervisor told Complainant that he would investigate and address the situation.<sup>4</sup> Supervisor spoke with Co-worker, who denied the alleged misconduct. Supervisor gave Co-worker a verbal warning. Supervisor stated at the FFC that at the time the warning was issued, he was aware of one or two prior complaints from female employees regarding alleged inappropriate touching or comments by Co-worker. The following week, Supervisor asked Complainant whether Co-worker had engaged in any further inappropriate conduct. Complainant told Supervisor that he had not, but that she did not feel comfortable working around Co-worker.
- h) In early April 2018, Complainant became upset at work after Co-worker allegedly stared at her with a "smug" look on his face. Upon seeing that Complainant was upset, a nurse contacted Supervisor, who transferred Co-worker to another area for the next few hours. Complainant met with Supervisor about the incident the following week. Complainant alleged that Supervisor told her during that meeting that other female employees had made prior similar complaints of harassment by Co-worker.
- i) On or about 4/23/18, Complainant spoke to a manager in another department about her perception that nothing had been done in response to her prior complaint against Co-worker. The manager reported Complainant's concerns to HR, who subsequently contacted Supervisor and Director. Later that day, Director asked Complainant to meet with him in his office regarding her concerns. Complainant alleged that Director told her that she should be satisfied that her complaint was registered, and that he wanted her to drop the matter. Director denied saying this. Complainant further alleged that when she became

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<sup>3</sup> Co-worker admitted to HR that he made the comment about would-be robbers not only being interested in money, but he denied saying something similar to, "and so would I."

<sup>4</sup> Complainant alleged that Supervisor also told her he would report the incident to Director.

upset and left Director's office, he followed her, yelling her name repeatedly, then held the elevator door open with his foot in an effort to make her return to the office. Director did admit to following Complainant out of his office to the elevator, allegedly because he was concerned that she was so upset, but denied the remaining allegations.

- j) Later that day, Complainant spoke with HR about the incident with Director, and she reported some of the prior complaints she had made regarding Co-worker. HR contacted Supervisor and Director to ensure that Complainant and Co-worker did not work together in the future.
- k) On or about 4/30/18, HR interviewed Complainant, a female co-worker in whom Complainant had confided,<sup>5</sup> and Co-worker, who denied the majority of the allegations.
- l) On or about 5/8/18, Respondent made the decision to discharge Co-worker. Respondent asserted at the FFC that it was in the course of that new investigation that they learned that Co-worker had prior complaints involving similar misconduct. Following the FFC, Respondent provided notes written by Supervisor regarding Co-worker's work history. That information reflected that female employees had complained about inappropriate behavior by Co-worker in 2008 (touching and putting his arms around her), June 2013 (touching her shoulders and making inappropriate comments), and February 2018 (making lewd comments and "being touchy feely").<sup>6</sup>
- m) On 5/9/18, Complainant had a meeting with HR, Supervisor, and Director. She was informed that Co-worker was no longer an employee. Complainant allegedly asked about other complaints made against Co-worker. HR allegedly denied that there were any other complaints in Co-worker's file. Supervisor allegedly denied previously telling her that Co-worker had prior complaints.<sup>7</sup> Complainant alleged that she felt HR was pressuring her to close her complaint. Respondent claimed that HR was just inquiring whether Complainant was satisfied with the results of the investigation. She indicated she was not.
- n) On 5/10/18, Complainant sent an email to Risk Management regarding her dissatisfaction with the prior day's meeting. On 5/24/18, Complainant met with a Risk Management Supervisor to discuss her complaints involving Co-worker, Director, and HR. Complainant alleged that it became clear to her at that meeting that Risk Management only appeared to be concerned about protecting its managers and HR staff from blame, rather than her. Respondent claimed that the Risk Management Supervisor only assured Complainant that her complaints had been taken seriously and appropriately addressed.
- o) On 1/21/19, Complainant gave written notice to her new supervisor that she would only be available to work on Wednesdays and the weekend due to training for medical coding. The new supervisor discussed this with Director, and they agreed to Complainant's request to assume an on-call, part-time position as of 2/2/19. Complainant alleged that on or about 3/20/19, her new supervisor informed her that Director had abruptly ended all on-call positions, allegedly due to budgetary reasons, even though a new

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<sup>5</sup> The female co-worker allegedly informed HR that she believed Co-worker had previously been accused of inappropriate misconduct by other female employees, and that she believed Co-worker did not understand "personal boundaries."

<sup>6</sup> Co-worker's written discharge form refers to four women (including Complainant) who had expressed being made to feel uncomfortable by either his comments, unwanted touching, or invasion of personal space.

<sup>7</sup> At the FFC, Supervisor stated that he did not recall denying telling Complainant Co-worker had prior complaints at that meeting.

housekeeper had recently been hired. Complainant further alleged that her new supervisor told her in person that Director was trying to get rid of her due to her prior sexual harassment complaint.

## 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.

### *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) 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). “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.

- 6) Here, Complainant established her hostile work environment claim, with reasoning as follows:
- a) Complainant has established that she was subjected to severe and pervasive sexual harassment by Co-worker. Severity is clearly established by Co-worker's alleged attempt to touch Complainant's genital area. Although it is unknown whether Co-worker actually intended to touch Complainant, or whether it was done in jest, there is no reason to believe that he would not have carried out the act had Complainant not reacted by pushing his hand away from that area. Pervasiveness is also established given Complainant's credible claim that Co-worker harassed her on almost every shift she worked with him. This harassment allegedly included unwanted touching of her arm, cornering her in rooms, following her, and multiple alleged comments about spanking her. Further, the alleged comment about robbers wanting something from Complainant other than money, is also clearly inappropriate, even if Co-worker denied adding, "and so would I." If he did make that comment, which is found to be likely, given Complainant's credibility and Co-worker's history of making similarly inappropriate comments, then the comment could clearly be considered as "severe" as well.
  - b) While Respondent contended that it took prompt, appropriate, and corrective action when it issued Co-worker a verbal warning in response to Complainant's report of inappropriate conduct, it is undisputed that the individual who issued the warning, Supervisor, was aware of at least one or two documented prior complaints of similar alleged misconduct (inappropriate comments, unwanted touching) at the time the warning was given. In fact, Supervisor's own records reflect that there were in fact *three* prior similar complaints made by female employees. Despite Co-worker's denial of any misconduct in Complainant's case, and in two of the three prior complaints, the fact that the same type of misconduct had been reported by multiple sources should have added additional validity to Complainant's allegations, especially since she was apparently unaware of any prior complaints when she reported Co-worker. The fact that Supervisor checked in with Complainant only once, just a week after the incident, to see whether Co-worker had engaged in any further harassment provides support for a finding that Respondent did not take sufficient steps, in light of Co-worker's history, to ensure that the harassment did not happen again.
  - c) Respondent also claimed that it took prompt, appropriate, and corrective action by eventually discharging Co-worker, after it discovered that he had a history of prior complaints, during a later investigation into Complainant's allegation that Co-worker had been staring at her. However, this simply reinforces Complainant's claim that her initial report was improperly investigated. Whether this occurred because Supervisor was intentionally trying to protect Co-worker's job by failing to pass on Complainant's report to upper management (or HR), or whether he has not been sufficiently trained to recognize that this needed to be done, in either case Respondent is responsible for its failure to adequately investigate and respond to Complainant's initial complaint. Further, it was not until Complainant later reported alleged intimidation by Co-worker that Respondent even took the minimal step of ensuring that they would no longer work together.<sup>8</sup>

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<sup>8</sup> It is also arguable that Respondent and/or Supervisor failed to properly investigate Complainant's claim involving the male co-worker who allegedly tried to give her an unwanted hug on his last day of employment. Although Supervisor claimed that no action was necessary because the accused was no longer an employee, further investigation may have revealed that that employee may also have had prior, similar incidents of misconduct, or that additional training needed to

- 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 (1<sup>st</sup> 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 that she was effectively discharged when Respondent eliminated her position and/or gave her no hours on the schedule.<sup>9</sup> Respondent, in turn, provided a nondiscriminatory reason for its action: all on-call positions were eliminated for budgetary reasons.

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be provided to employees regarding respecting personal space. The fact that Respondent later considered rehiring that employee, suggests that a least a minimal investigation into his alleged actions would have been appropriate.

<sup>9</sup> Complainant also asserted that other actions taken by Respondent, through Director, HR, and Risk Management, constituted retaliation. However, none of the alleged retaliation appeared to involve any adverse employment action. While, as noted above, it is clear that Respondent failed to conduct a proper and thorough investigation into Co-worker's employment history prior to determining that sexual harassment had occurred, there is little evidence to suggest that

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

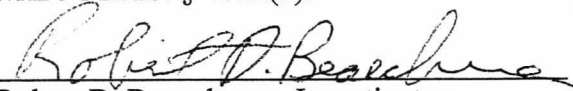
- a) Respondent has offered no objective evidence to support its claim that Complainant's position (and other on-call positions) were eliminated due to budgetary concerns. Although it is undisputed that Complainant voluntarily requested a reduction in work hours to undergo training, that arrangement appeared to be mutually agreeable for at least approximately six weeks before all on-call positions were allegedly summarily eliminated. Complainant also claimed, and Respondent has not disputed, that a new housekeeper had been hired shortly before the elimination of Complainant's housekeeping position.
- b) Complainant also credibly stated at the FFC that her new supervisor expressly told her that Director wanted to get rid of her because she filed her earlier sexual harassment complaint. Director would also likely have been motivated because even aside from that complaint, she had repeatedly complained about Director's own actions throughout the investigation into her complaints against Co-worker.
- c) In sum, even if budgetary reasons may have been a factor in the elimination of Complainant's position, given Director's likely motivation to retaliate against Complainant for her prior complaints about him, and her new supervisor's purported declaration that Director wanted to get rid of her because of prior sexual harassment complaint, it is found that there is sufficient evidence to believe that her prior reports were more likely than not to have been an at least a factor in the elimination of her position.

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 St. Mary's Hospital discriminated against Kimberly S. Hunter on the basis of sex (hostile work environment);
- 2) There are **Reasonable Grounds** to believe that St. Mary's hospital retaliated against Kimberly S. Hunter for engaging in WPA- and/or MHRA-protected conduct; and
- 3) Conciliation should be attempted in keeping with 5 M.R.S. § 4612(3).

  
Robert D. Beauchesne, Investigator

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Respondent came to this conclusion in order to retaliate against Complainant for making her initial report. The same is true with respect to the alleged retaliation by Director, following Complainant to the elevator after she abruptly left his office. No adverse employment action resulted, and it appears that Director's pursuit was not the result of her filing her complaint of harassment, but rather because she arguably engaged in insubordination by refusing to have a discussion with a supervisor about a recent issue at work. Although Complainant also alleged retaliation by her work being overly scrutinized and/or by co-workers adding to her workload, she had offered little proof, aside from her own opinion, that these alleged acts of retaliation were causally connect to her reports of harassment. For these reasons, the retaliation analysis will be confined to her removal from the schedule.