Maine Human Rights Commission
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INVESTIGATOR'S REPORT
E14-0661
April 27, 2016

Shasta Roy (Richmond)

v.

Theodore's Seamless Gutters (Augusta)

I. Complainant's Complaint:

Complainant Shasta Roy alleged that Respondent Theodore's Seamless Gutters ("Theodore's"), and specifically its owner ("Owner"), subjected her to a sexually hostile work environment, discharged her due to her sex, and retaliated against her for reporting and opposing the sexual harassment she was experiencing.

II. Respondent's Answer:

Theodore's received notice of the complaint, but did not provide any information during this investigation.

III. Jurisdictional Data:

1) Dates of alleged discrimination: mid-2013 through June 20, 2014.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): November 19, 2014.

3) Complainant provided that Respondent has fewer than 15 employees. Respondent is subject to the Maine Human Rights Act, ("MHRA") and the Maine Whistleblowers' Protection Act ("WPA"), as well as state employment regulations.

4) Neither Complainant nor Respondent is represented by counsel.

5) Investigative methods used: A thorough review of the written materials provided by Complainant. Respondent did not respond to the Commission's efforts to reach it, and did not provide any information. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds."

IV. Development of Facts:

1) The parties in this case are as follows:

a) Ms. Roy worked as a foreman for Theodore's from May 2013 until she was discharged on June 20, 2014. Ms. Roy had previously worked for Theodore's for approximately two years beginning in 2010.

b) Theodore's is a gutter contractor.

2) Complainant provided the following in support of her position:

a) During her employment with Theodore's, Ms. Roy performed her job satisfactorily.

b) In mid-2013, Owner began to send text messages ("text") to Ms. Roy. Initially the texts complimented her work. Over time, Owner began to send inappropriate texts including, "[r]emind me to hug you the next time I see you," "I just need to cum, you want to listen, lol," and "[w]ill you talk to me as I cum."

c) In January 2014, Owner continued to text Ms. Roy. One of the texts stated, "Don't just walk in, watching porn, lol," and "[f]uck cum is good."

d) In March 2014, Ms. Roy walked into Owner's office, which was also his apartment, and saw him naked watching pornography. Owner knew that Ms. Roy was coming by the office to pick up work orders for the day. This happened again two or three other times during Ms. Roy's employment.

e) On at least two occasions, Ms. Roy told Owner that his behavior was objectionable and offended her. Ms. Roy also told Owner that he should only text her if it was work related. Despite Ms. Roy's objections, Owner continued to text her.

f) Ms. Roy was very uncomfortable with what was happening, but needed her job to support her family.

g) As a result of Owner's behavior, Ms. Roy had to seek counseling and was prescribed medication.

h) On June 14, 2014, Owner discharged Ms. Roy. She was told that there was only half a day's worth of work at the shop, and Owner could not afford to have her work unless he "was to get a check and to go on unemployment."

i) Two days later, Owner hired two men to replace Ms. Roy.

3) Respondent did not provide any information during the investigation.

a) The Commission sent Respondent notice of the complaint and a Commission Request for Information and Documents on February 13, 2015, via U.S. Mail. It was not returned to the Commission and is deemed received.

b) On March 27, 2015 and May 12, 2015, the Commission sent Respondent certified letters with additional copies of the complaint and request for information and documents, each time requesting a response. Each mailing was returned marked "unclaimed". On June 1, 2015, the Commission sent Respondent (at Owner's address) via certified mail yet another copy of the complaint and information requests, and urged a response. That mailing also was returned marked "unclaimed".

c) On August 25, 2015, the Commission sent Complainant and Respondent a notice by U.S. Mail that the record in this case would be closed to new evidence on September 8, 2015. The Commission sent one copy of Respondent's notice to its business address; that mailing was returned to the Commission

marked "box closed, unable to forward". The Commission sent another copy of Respondent's notice to Owner's address; that mailing was returned to the Commission marked "not deliverable as addressed, unable to forward".

d) On November 25, 2015, the Commission sent Respondent a copy of new information Complainant had submitted. The mailing was sent to Owner's address, and was not returned to the Commission. Another copy of the mailing went to Respondent's address and was returned to the Commission as "box closed, unable to forward".

e) The Commission's Chief Investigator attempted to reach Respondent and Owner by telephone at least five times without success.

V. <u>Analysis:</u>

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.

<u>Sex Discrimination: Termination</u>

2) The MHRA provides that it is unlawful to discharge an employee because of his or her sex. 5 M.R.S. § 4572(1)(A).

3) Because here there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).

4) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (a) she belonged to a protected class; (b) she performed her job satisfactorily; (c) her employer took an adverse employment decision against her; and (d) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261.

5) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. *See id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet her overall burden at this stage by showing that (a) the circumstances underlying the employer's articulated reason are untrue, or (b) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.

6) In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.

7) Complainant has established her prima-facie case. She is female, she performed her job satisfactorily, Respondent terminated her employment, and Respondent continued to have a need for her work to be performed. Complainant was immediately replaced by two new male employees.

8) Complainant provided that Respondent told her that it did not have enough work to keep her employed.

9) At the final stage of analysis, Complainant has shown that Respondent's stated reason for her discharge was false and that she has at least an even chance of success in a lawsuit, with reasoning as follows:

   a) There is nothing in the record to show that Respondent had a reduced workload which warranted Complainant's termination. To the contrary, within two days of discharging Complainant, Respondent hired not just one, but two new employees. Both of these employees were male, which suggests that Complainant's sex or gender was a factor in her discharge. The new hires also show that Respondent's stated reason – a lack of work – was likely untrue.

   b) Additionally, Complainant had repeatedly rebuffed Owner's sexual advances, then was discharged and replaced with male employees. This also supports Complainant's position that she was fired because of her sex or gender.

10) Discrimination based on sex is found.

<u>*Termination: Sexual Harassment*</u>

11) The Commission's Employment Regulations provide, in part, as follows:

> Harassment 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:
>
> C. Such 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.

Maine Human Rights Commission Regulation, Chapter 3, § 3.10(I)(C) (September 24, 2014).

12) "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.

13) 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 sexually 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.

14) 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). 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.*

15) The Commission's Regulations provide the following standard for determining employer liability for sexual harassment committed by a supervisor:

> An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to physical or mental disability harassment. When the supervisor's harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, 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 the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:
>
> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
>
> (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Chapter 3, § 3.10(2) (September 24, 2014).

16) In this case, Complainant has established that she was subjected to a sexually hostile work environment. Reasoning is as follows:

a) Owner sent Complainant sexual text messages over the course of her employment. The comments were based on sex, and included numerous propositions for sexual activities.

b) Complainant has shown that the harassment was unwelcome. Complainant told Owner on more than one occasion that his behavior was inappropriate. Additionally, she told him to only text her for work-related reasons.

c) Given the number and frequency of the sex-based comments made by Owner, Complainant had shown that the comments were pervasive. Complainant has shown that her work environment was abusive: she had to seek counseling, and ultimately she was discharged. Owner's conduct is both objectively and subjectively offensive such that a reasonable person would find it hostile or abusive, and Complainant found his conduct to be hostile and abusive.

d) The final part of this analysis includes whether or not there is a basis for employer liability. Neither Owner nor any other member of Respondent's company took any action to remedy Complainant's complaints. The record supports a finding that Respondent is liable for Owner's conduct here.

17) Hostile work environment sexual harassment is found.

MHRA and WPA Retaliation Claims

22) Complainant also alleged that she was discharged in retaliation for complaining about Owner's sexually offensive behavior.

23) With respect to Complainant's WPA claim, the MHRA prohibits termination because of previous actions that are protected under the WPA. *See* 5 M.R.S. § 4572(1)(A). The WPA protects an employee who "acting in good faith . . . reports orally or in writing to the employer . . . what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States." 26 M.R.S. § 833(1)(A).

24) With respect to the MHRA retaliation claim, the MHRA 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).

25) 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).

26) In order to establish a prima-facie case of MHRA retaliation, Complainant must show that she engaged in statutorily protected activity, she was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56; *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).

27) 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.

28) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA- or MHRA-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).

29) Complainant has met her prima-facie case because she complained about sexual harassment that was ongoing by Owner, and soon thereafter was discharged.

30) As noted above, Complainant provided that Respondent told her she was being discharged because it did not have any work for her.

31) Complainant has carried her overall burden in her retaliation claim because she has shown that there was a causal connection between the protected activity and her discharge with reasoning as follows:

   a) As stated above, Complainant rebuffed Owner's sexual advances over a period of time and was ultimately discharged from her job. Two days later, Respondent hired two male employees. This tends to show that Respondent's claim that it had no work for Complainant was false, and that her discharge was due to her refusal to comply with Owner's sexual demands and her repeated complaints about the abusive treatment she was experiencing.

   b) Based on these facts, the record shows that Complainant has at least an even chance of success in a lawsuit where Complainant's employment was terminated after she complained about ongoing offensive sexual behavior by the Owner, and Owner hired two male employees immediately after telling Complainant that he was terminating her employment due to a lack of work.

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

VI. <u>Recommendation:</u>

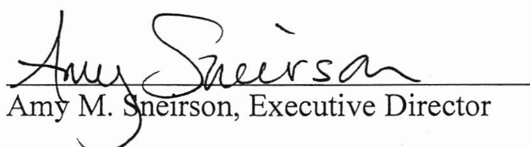
For the reasons stated above, it is recommended that the Commission issue the following finding:

1. There are **Reasonable Grounds** to believe that Respondent Theodore's Seamless Gutters discharged Complainant Shasta Roy because of her sex in violation of the MHRA;

2. There are **Reasonable Grounds** to believe that Respondent Theodore's Seamless Gutters subjected Complainant Shasta Roy to a sexually hostile work environment in violation of the MHRA;

3. There are **Reasonable Grounds** to believe that Respondent Theodore's Seamless Gutters retaliated against Complainant Shasta Roy in violation of the MHRA and WPA because she engaged in protected activity; and

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



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