# Maine Human Rights Commission

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**INVESTIGATOR'S REPORT**
**MHRC Case No. E16-0117**
October 12, 2017

**Andre Vanpoelvoorde (Augusta)**

**v.**

**Neighborhood Redemption[1] (Augusta)**

## I. Summary of Case:

Complainant Andre Vanpoelvoorde worked as a janitor/cashier/counter-person for Respondent Neighborhood Redemption, a bottle redemption center and retail store, and alleged that Respondent discriminated against him based on sex/sexual orientation and disability by permitting/creating a hostile work environment and retaliated against him for complaining about the discrimination, leading to his constructive discharge.[2] Respondent denied discriminating or retaliating against Complainant and stated that Complainant took workplace comments out of context and, after a medical absence, did not attempt to return to work. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, holding an Issues & Resolution Conference ("IRC"), and requesting supplemental information. Based upon this information, the Investigator recommends that the Commission find that there are reasonable grounds to believe Respondent subjected Complainant to an unlawful hostile environment and constructively discharged him, and also find that there are no reasonable grounds to believe that Respondent retaliated against Complainant.

## II. Jurisdictional Data:

1) Dates of alleged discrimination: September 2015 to February 3, 2016.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): March 4, 2016.

3) Respondent is subject to the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 (as amended), and state and federal employment

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[1] Complainant named Neighborhood Redemption as the Respondent in his complaint; Respondent referred to itself as Neighborhood Redemption Center, but did not specifically provide its legal name. Accordingly, the name Complainant used has been retained.

[2] At the Issues and Resolution Conference, Complainant alleged that he was denied a reasonable accommodation when he asked to be allowed to track his bottle count at work differently or take more time. Complainant, however, did not supply facts to support this claim, and did not amend his complaint. In any event, both parties stated that Complainant was allowed to make marks to count bottles, which effectively granted his request.

regulations.

4) Complainant is represented by Aaron B. Rowden, Esq. Respondent is not represented by counsel.

**III. Development of Facts:**

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

> Complainant, who is male, was subjected to crude and offensive sexual remarks in the workplace. After he told the business's owner ("Owner") and his son ("Son") that he had [redacted] they began treating him differently. Owner made jokes suggesting Complainant was gay, and said he did not want "some fucking faggot" working for him.[3] Owner also routinely degraded Complainant's intelligence, calling him a "fucking moron" and "really fucking stupid" whenever he made mistakes counting bottles. Owner, in front of Son, suggested Complainant might have sex with his dog when his dog was ill. Complainant objected to this language, but if anything, the comments intensified, and his work hours were reduced. Complainant became so disturbed that he was ultimately hospitalized for an [redacted]. While Complainant was hospitalized, Respondent retaliated against Complainant by giving away all of his hours to effectively terminate his employment. At the same time, Complainant did not feel he could return to work anyway due to the intense harassment he had been experiencing.

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

> Respondent hired Complainant as a part-time employee. Within a couple of weeks of hire, Respondent observed that Complainant had problems working with numbers; counting with accuracy was essential to the job. Respondent shared performance concerns with Complainant's mother ("Mother"), who informed Respondent that Complainant's [redacted] sometimes caused him to transpose numbers. Respondent continued to employ Complainant, and spent considerable time training and retraining him, but Complainant never reached a point where he could work independently. Complainant became increasingly distracted at work due to ongoing personal issues, and ultimately became so hypersensitive he began to imagine he was the target of workplace jokes. The environment at the store is admittedly crude, but it is a natural part of animated discussion. However, when Complainant complained, Son responded by offering to separate Owner and Complainant to different shifts. After his hospitalization, Complainant did not want to return to work.

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) Since Respondent hired Complainant in October 2014, Complainant has struggled working with numbers; counting is an important function of Complainant's job. After nine months, Respondent still harbored concerns about Complainant's performance. Owner provided Complainant extra training, including assigning his Son to individually supervise Complainant.

      i. Complainant and Mother were aware of Respondent's performance concerns. In the fall of 2015, Complainant was sent home mid-shift due to counting errors. Respondent contends this happened on three separate occasions; Complainant concedes it happened at least twice.

[3]At the IRC, when Complainant's attorney was contemplating whether Complainant's actual sexual orientation was relevant, and Investigator stated it was not, Owner laughed audibly.

Complainant had no formal counseling, but was sent home because he was having a "bad day".

b) According to Respondent, until Fall 2015, Complainant was part of the "rock 'n roll male culture" at the workplace, and got along with everyone. Complainant started to experience personal stressors, and suddenly became more sensitive to working conditions. [4]

c) Owner made remarks at work which were offensive to Complainant. Respondent did not deny that some of the comments were made, but characterized the statements as "gallows humor" not intended to target Complainant. Respondent argued the comments required contextualization.
   i. According to Complainant, Owner called him "retarded" or "a fucking moron" or made other references to his intelligence on almost a daily basis. On occasion, Respondent would say things like, "You can't get a job at Hannaford's you're so stupid. You need to stay here" or, "Are you fucking stupid?" Respondent conceded Owner might have used some of these phrases, but no more with Complainant than other employees.
   ii. Complainant alleged that Owner said he didn't think Complainant had any talent. Respondent provided he remembered stating Complainant did not have a talent for numbers.
   iii. Complainant alleged Owner began calling him Sexy Andre. Respondent provided that one of Owner's sons coined the name after Complainant grew out his hair and began wearing it in a disheveled ponytail.
   iv. Later, Complainant alleged Owner asked him, "Have you ever sucked someone's dick? You can't knock it til you try it you fucking cocksucker," and "Are you gay? If you never had a dick in your mouth, how would you know?"; Owner also called him a "faggot." Respondent provided that the word "faggot" may have been used in store, but not by Owner. Respondent provided that the questions about how to know if you were gay were intended as a joke, which was initially made by a customer and asked of Owner
   v. Owner made a joke about being "snowed in" with Complainant, which Complainant took to be a joke that Owner was going to have sex with him. Respondent provided that this was a joke, intended as a funny reference to the film *Brokeback Mountain*, made in the context of sending people home early during a snow storm and ending up stranded alone with Complainant.
   vi. Owner has also allegedly discussed how much he hates gay people; Owner purportedly said anyone who watches Ellen Degeneres is going to hell. Respondent admitted this was said, but stated it was "ribbing" related to a light political debate.
   vii. The parties agree that most employees were treated in a similar manner by Owner. The record does not show that anyone else complained about the work environment.

d) At some point, Complainant objected to Owner's remarks and stated that Owner made him insecure. According to Complainant, one month later, the comments worsened.

e) Complainant alleged that after he complained, his hours were reduced. Respondent provided that this was due to a seasonal change (summer to fall) and Complainant returning to school.

f) Complainant alleged that on January 16, 2016, Owner joked that Complainant wanted to have sex with his dog. Respondent agreed that Owner made comments about bestiality, but stated that they related to a radio show segment about a man who wanted to marry his dog, and were not directed at Complaint.

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[4] Respondent provided that throughout Complainant's period of employment, he experienced major personal stress, which caused him to miss work and which Respondent believes perpetuated his poor performance. At the same time, Complainant began to ask to work additional hours.

g) After the dog comment, Complainant complained to Son, who promised to talk to Owner. Complainant observed no change in Owner's behavior after complaining.

h) On January 19, 2016, Complainant texted Respondent that his dog had died, he was very upset and needed "time to heal." When Respondent asked when Complainant thought that he would be ready to return to work, Complainant said he thought the following weekend.

i) On January 22, 2016, Complainant wrote Respondent to say that he had been sick for two days and that he had "been anxious about work." Complainant assured Respondent he would be back in touch "in the near future," and apologized for missing work. Complainant was hospitalized from January 24, 2016 through January 28, 2016.

j) On February 2, 2016, Complainant and Mother came into Respondent's store to explain Complainant had been hospitalized for an [redacted] related to stress. Complainant also stated he believed Owner's remarks had contributed to his condition.[5]

k) On February 3, 2016, Complainant and Mother returned to the store and talked to Son about Complainant's absences. Son stated he was not sure how to proceed; since Complainant had been out of touch for about two weeks, others had been assigned to his shifts. Ultimately, Son asked Complainant if he was prepared to return to work; Complainant could not provide an answer. Son invited Complainant to think about it and return with an answer.

   i. Both parties agreed that during this conversation, Respondent advised Complainant it might not be a good idea for him to return to work, given the working conditions.

l) One hour later, Mother returned without Complainant, and Mother and Son had a heated exchange. Mother stated Complainant would not be returning to the store. Complainant never attempted to return to work for Respondent.

## IV. 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/Sexual Orientation and Disability Discrimination –Hostile Work Environment*

2) The MHRA provides that it is unlawful for an employer to discriminate with respect to the terms and conditions of employment on the basis of sex, sexual orientation, and physical or mental disability. 5 M.R.S. § 4572(1)(A).

3) Harassment on the basis of protected class is a violation of this section when "[s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an

[5] Respondent contends this is the first time Complainant complained specifically about a hostile work environment, as previously he had said only that he was intimidated by Owner.

intimidating, hostile, or offensive working or union environment." Me. Hum. Rights Comm'n Reg., 94-348 Code of Maine Regulations ("C.M.R.") Ch. 3, §10(1)(C) (Sept. 24, 2014).

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 [he] is a member of a protected class; (2) that [he] was subject to unwelcome sexual harassment; (3) that the harassment was based upon [protected class status]; (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 [protected class basis] 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, 902-03.

6) With regard to harassment by a supervisor, "[w]hen the supervisor's harassment culminates in a tangible employment or union membership 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." Me. Hum. Rights Comm'n Reg. Ch. 3, § 10(2).

7) Complainant has established that he was subjected to a hostile work environment on the basis of sex/sexual orientation, and disability:

   a. He is a member of a protected class (male, perceived homosexual, and disabled) and experienced unwelcome conduct related to sex/sexual orientation and disability harassment. It is irrelevant whether Complainant was specifically targeted; Owner admittedly made lewd and abusive comments related to Complainant's perceived sexuality and disability. These comments occurred virtually every day, making them pervasive; Owner viewed them as just part of the regular work environment, whether "crude" or part of a so-called "rock 'n roll male culture".

   b. Complainant was subjectively offended by the conduct, which was also objectively offensive. The comments were demeaning, and included supposed "jokes" about Complainant committing sexual acts with his dying dog. The work environment was abusive: the parties agreed that Complainant's work performance was likely impacted by stress over the work environment, and Complainant ultimately developed an [redacted] due at least in part to this stress.

c. In this case, Complainant suffered a tangible adverse employment action when he was constructively discharged. 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.[6] An employee is constructively discharged when he has 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.* Complainant has met this standard. He suffered an abusive environment which led him to be hospitalized and ultimately decide he could not return to work. Son acknowledged that it might not be a good idea for Complainant to return, given the working conditions. Given this, Complainant could not reasonably expect conditions to change, and it was reasonable for him to feel that he had no choice but to leave his employment.[7]

8) It is found that Respondent subjected Complainant to a hostile work environment based on sex/sexual orientation and disability, including by constructively discharging him.

*Retaliation*

9) 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 MHRA] 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). The MHRA further defines unlawful discrimination to include "punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act". 5 M.R.S. § 4553(10)(D).[8]

10) In order to establish a prima-facie case of retaliation, Complainant must show that he engaged in statutorily protected activity, he 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). One method of proving the causal link is if the adverse action happens in "close proximity" to the protected conduct. *Id.*

11) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily 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. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry his overall burden of proving that there was, in fact, a causal connection between

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[6] 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 he was constructively discharged because of intolerable working conditions caused by unlawful discrimination, he may be entitled to damages flowing from the loss of his job. *Id.* at ¶18; *Levesque,* 2012 ME 114 at ¶8.

[7] Even in the absence of a tangible employment action, employer liability would be established here, since there is no evidence to allow Respondent to prove that it took prompt and effective action to eliminate the harassment. To the contrary, Respondent felt its crude atmosphere was acceptable, and did nothing to change it.

[8] Complainant did not allege a violation of the Maine Whistleblowers' Protection Act ("WPA"), although his protected activity in this case would also be protected as a report of unlawful activity under the WPA. In any event, the outcome would be the same under the WPA as it is for the MHRA retaliation claim.

the protected activity and the adverse action. *See id.* Complainant must show that he would not have suffered the adverse action but for his 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).

12) Complainant has established his prima-facie case of MHRA retaliation. He has shown that he objected to Owner's unwelcome behavior to both Owner and Son, and he was constructively discharged. It is assumed, solely for the purposes of his prima-facie case, that the relatively short time between the complaints and the termination of Complainant's employment suggests a causal link between them.

13) Respondent has articulated a legitimate, nondiscriminatory reason for Complainant's separation: Respondent needed to fill shifts while Complainant was unavailable, and Complainant ultimately did not return to work after being given time to decide whether he wished to return.

14) At the final stage of the analysis, Complainant has not demonstrated that Respondent's reason was false or irrelevant, with reasoning as follows:

   a. Complainant did not demonstrate a causal link between his *reports* of harassment and his constructive discharge. To be clear, Complainant did establish that the discharge was the result of unlawful harassment, but not that it resulted from his complaints about that harassment. Rather, it appears that the harassment continued unabated, both before and after Complainant's complaints.

   b. Complainant never stated a concrete desire to return to work. After a progression of missed shifts (for various medical reasons), Respondent invited Complainant to give it a return to work date, and Complainant told it he could not. The record shows that this was because of the ongoing harassment, not any change in circumstances made because of his protected activity.

15) Retaliation in violation of the MHRA is not found.

**VI. Recommendations:**

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

1) There are **Reasonable Grounds** to believe that Respondent Neighborhood Redemption discriminated against Complainant Andre Vanpoelvoorde on the basis of sex/sexual orientation and disability by subjecting him to a hostile work environment, including by constructively discharging him, and that portion of the complaint should be conciliated in accordance with 5 M.R.S. § 4612(3); and

2) There are **No Reasonable Grounds** to believe that Respondent Neighborhood Redemption retaliated against Complainant Andre Vanpoelvoorde for asserting rights under the Maine Human Rights Act, and that portion of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).

Amy M. Sneirson, Executive Director

Jenn Corey, Investigator