Maine Human Rights Commission
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Amy M. Sneirson
EXECUTIVE DIRECTOR

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INVESTIGATOR'S REPORT
MHRC Case Number: E16-0204
April 10 2018

Staci O'Leary (Gray)

v.

Maine Department of Public Safety (Augusta)[1]

I. Summary of Case:

Complainant, an emergency communications supervisor, alleged that Respondent, a state agency, subjected her to a hostile work environment because a male coworker ("Coworker") harassed her due to her sex and that, after she reported the mistreatment, Respondent retaliated against her by subjecting her to several adverse employment actions. Respondent stated that it took appropriate corrective action to stop the harassment and that it did not retaliate against Complainant. The Investigator conducted a preliminary investigation, which included reviewing all documents submitted by the parties, issuing written requests for additional information, and holding an Issues and Resolution Conference ("IRC"). Based upon this information, the Investigator recommends finding that there are no reasonable grounds to believe that Respondent subjected Complainant to a hostile work environment or unlawfully retaliated against her.

II. Jurisdictional Data:

1) Dates of alleged discrimination: January 2008[2] to November 2016.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): April 15, 2016.

3) Respondent is subject to the MHRA, Title VII of the Civil Rights Act of 1964, as amended, and the Maine Whistleblowers' Protection Act ("WPA"), as well as state and federal employment regulations.

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[1] Complainant named Respondent as "Maine Department of Public Safety"; Respondent stated that its legal name is "State of Maine, Department of Public Safety". Because Complainant did not amend her complaint, the name she used has been retained.

[2] The Maine Human Rights Act ("MHRA") provides that complaints must be filed with the Commission "not more than 300 days after the alleged act of unlawful discrimination." *See* 5 Maine Revised Statutes ("M.R.S.") § 4611. In cases involving discrete acts of discrimination (contrasted with hostile-environment claims), the filing deadline runs from the time that a reasonable person would have become aware of the facts supporting a claim of discrimination. *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 11. In this case, Complainant filed her sworn complaint on April 15, 2016; thus, the 300-day period in this case is considered to have begun on June 20, 2015. The Investigator did not analyze any discrete allegations of discrimination which occurred before June 20, 2015 in this Report; to the extent the events before that date could support a hostile environment claim, they are analyzed below.

4) Complainant is represented by Maria Fox, Esq. Respondent is represented by Valerie A. Wright, Esq.

III. Development of Facts:

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

> One day in 2015, Coworker harassed Complainant by making sexually suggestive comments and threatening to touch her in front of other colleagues; years earlier, Coworker slapped Complainant on her bottom and engaged in other inappropriate comments towards her. Complainant reported the harassment to Respondent, but Respondent ultimately allowed Coworker to return to work with Complainant. Respondent then retaliated against Complainant by changing her schedule to less desirable shifts, assigning her extra job duties, preventing her from attending professional meetings, and subjecting her to an abusive work environment. As a result, Complainant was compelled to transfer to a different location which negatively affected her compensation and other conditions of her employment.

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

> Respondent promptly investigated Complainant's reports of harassment in 2015 and implemented appropriate corrective measures to prevent similar misconduct. Respondent altered Complainant's schedule and changed its policies regarding attendance at professional meetings because Complainant requested that she have no contact with Coworker. The harassment Complainant reported was not based on sex, was not severe or pervasive, and was not connected to the misconduct Coworker engaged in years earlier. Complainant's allegations that Respondent otherwise retaliated against her are unfounded.

3) The Investigator made the following findings of fact based on the information in the record:

a) Respondent operated the Bureau of Consolidated Emergency Communications ("Bureau") for the purpose of providing consolidated services to local public safety agencies, including emergency dispatching services. Bureau operated four regional communication centers in Maine, including one in Gray, Maine ("Location"). Complainant began working for Respondent at the Location in 1999; the parties did not dispute that she performed her job satisfactorily throughout her employment.

b) In 2008, Coworker[3] slapped Complainant on her bottom when she bent over to pick up a stress ball from the ground. Complainant reported the incident to Respondent's human resources department ("Human Resources"). Respondent investigated the incident and ultimately determined that Coworker engaged in misconduct; Respondent placed Coworker on a Last Chance Agreement that stated he would be discharged if it he engaged in conduct of a similar nature in the future.

c) In 2011, Respondent promoted Complainant to a supervisory position at the Location; Complainant and Coworker were the two supervisors at Location until Complainant's sister ("Sister") was assigned to be a third supervisor around 2013. Complainant, Coworker, and Sister (collectively, the "Supervisors") reported to Director.

d) Between 2013 and January 2016, Director did not require the Supervisors to work under a fixed schedule; the Supervisors generally had the ability to arrange the time they spent at Location based on professional events in other locations and the needs of their personal lives. During this time,

[3] At the time of this incident, Coworker was Complainant's supervisor.

Complainant typically worked the day shift on Sunday and Monday, and the evening shift on Tuesday and Wednesday. Coworker typically worked the day shift from Monday through Thursday.

e) Complainant alleged that, around 2013, she was driving Coworker and Sister to a work function. Complainant stated that Coworker complained she was not driving fast enough and then pushed her right leg down on the accelerator with his left hand; Complainant stated that she told Coworker to never touch her again. Complainant also alleged that, around the same time, Coworker asked Complainant to rub his finger to see if she could feel metal in it. Complainant stated that she refused Coworker's request and that both incidents made her uncomfortable. Complainant further stated that Coworker told her that he preferred blondes to brunettes when she changed her hair color from brunette to blond. Complainant did not report these three incidents until October 2015.

f) On the morning of September 30, 2015, Complainant greeted a visiting law enforcement officer ("Officer") and gave him coffee in Location's garage. When Complainant returned to her office, Coworker approached her and stated he wished he had been watching her on Location's security cameras to see what she had been up to with Officer. At the IRC, Complainant stated that she perceived Coworker's comments as being laced with sexual innuendo because she had previously been involved in a personal relationship with Officer and Coworker was aware of that relationship.

g) Later in the day, Complainant stopped to talk to other staff members in a hallway. Coworker came out of his office, approached Complainant, and stated, "Get over here and let me show you what some drunk did to my wife." Complainant provided that she did not know what had happened to Coworker's wife, but she believed Coworker was going to try to touch her. Complainant told Coworker not to touch her; he again called her over to him. Complainant then left the area and Coworker followed her to her office, repeatedly calling her a coward. Sister reported the incident to Human Resources the next day.

h) On October 8, 2015, Complainant sent a formal complaint about the incident to Director and Human Resources. Respondent began an investigation shortly thereafter and conducted interviews over the course of the next month.[4] During the investigation, Complainant informed Respondent that she was not comfortable having contact with Coworker in the future.

i) Respondent ultimately determined that Coworker had attempted to physically touch Complainant and made inappropriate comments to her on September 30, 2015. After holding a hearing with Complainant and his union representative, Respondent issued Coworker a four-day suspension in January 2016. Director learned that Coworker would be returning to work at Location around the same time.[5]

j) Director stated that he then worked with Human Resources to create a new schedule for the Supervisors to accommodate Complainant's request not to have any contact with Coworker. On January 5, 2016, Director promulgated a new, fixed schedule for the Supervisors ("Schedule 1"). A copy of Schedule 1 is

[4] It is apparent that the scope of Respondent's initial interview was limited to the events that took place on September 30, 2015. During the course of the investigation, Complainant first reported the incidents that took place in 2013 and Respondent then interviewed some employees for a second time concerning the additional allegations of harassment.

[5] At the IRC, Director stated that he was not involved in Respondent's decision about whether to discipline Coworker or about what kind of discipline to issue. Director stated he had no involvement in the investigation after he requested that Human Resources conduct an investigation into Complainant's allegations.

attached to this Report as **Exhibit 1**.[6] Complainant learned of the schedule change two days later while on vacation; she immediately emailed Director stating that she had major concerns about Schedule 1 and that she did not feel comfortable being around Coworker.[7] Director responded that the purpose of implementing Schedule 1 was to keep her away from Coworker. Complainant then took medical leave for the next several weeks; she alleged she took leave because of anxiety related to potentially working with Coworker again.[8]

k) Complainant did not attend work while Schedule 1 was in effect. While on leave, Complainant grieved the schedule change. In late February 2016, Complainant and her union representative met with Respondent about her grievance. Respondent offered Complainant two choices for a revised schedule. At the IRC, Director stated he believed he had made it clear to Complainant that she could have proposed a schedule of her own instead of choosing between the two options offered by Respondent; Complainant disputed this assertion. Director subsequently promulgated a revised schedule ("Schedule 2") and implemented a policy that only one Supervisor could attend professional meetings at a time (the "Meeting Policy"). A copy of Schedule 2 is attached to this Report as **Exhibit 2**.

l) Complainant returned to work under Schedule 2 in March 2016. Complainant alleged that she perceived the schedule as retaliatory because she was required to work three evening shifts while Coworker was able to work the day shifts he worked prior to his misconduct in September 2015; she also stated that she perceived Coworker as being rewarded for engaging in the misconduct. It is apparent that Complainant made Respondent aware of her perceptions about Schedule 2. In April 2016, Director promulgated a newly revised schedule which returned Complainant to the shifts she worked prior to the Coworker's misconduct ("Schedule 3"). Complainant argued that the fact that Respondent returned her to her original schedule demonstrated that Schedules 1 and 2 had been unnecessary.

m) Complainant argued that the schedule changes negatively affected her ability to communicate with others (*e.g.* law enforcement agencies, district attorneys) because she was mostly required to work non-business hours. Complainant further alleged that the Meeting Policy had a negative impact on her professional reputation and development; Complainant stated that the Meeting Policy prohibited her from attending a number of meetings that she would have otherwise been able to attend.

n) Complainant also alleged that Respondent retaliated against her by taking away work duties from Coworker and giving them to her after she reported the harassment in 2015. Complainant argued that this unfairly burdened her and rewarded Coworker for his misconduct. Respondent denied retaliation and stated that Director had to reassign Coworker's duties while Coworker was on administrative leave, and that Complainant voluntarily assumed these duties[9]; Respondent also stated that Complainant had

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[6] The names of third parties and other confidential information have been redacted from all exhibits.

[7] Complainant's email also noted that she believed that she would have difficulty finding child care for one of her children under Schedule 1.

[8] Complainant argued that Schedule 1 did not ensure she would not see Coworker at Location because there were two days on which their shift changes overlapped. At the IRC, Director stated that he erroneously mixed up Complainant with Sister on Schedule 1 and that he became aware of his error when Complainant filed a grievance.

[9] Director emailed Complainant and Sister on October 21, 2015 asking them which one wanted the additional duties and indicated that he wanted to know their preference before he made the final decision on the matter.

the ability to delegate many of the additional duties to subordinates and disputed that she had significantly more duties than Coworker upon his return.

o) Complainant further alleged that Coworker and Director retaliated against her in early 2016 by creating a hostile work environment. Complainant described a number of allegedly hostile events that occurred in March and April 2016, including the following: (i) an incident where Coworker restricted her use of a procurement card, thus effecting her ability to purchase products for Location; (ii) an incident where Director threatened to micromanage Complainant in front of her colleagues and referred to Coworker by a nickname; (iii) Director sending Complainant emails in a negative tone that sided with Coworker and/or accused her of wrongdoing; and (iv) Coworker refusing to communicate with Complainant with respect to information critical for her to complete her job duties. On more than one occasion, Complainant emailed Director stating that she felt she was being retaliated against; there is no indication that Respondent conducted an investigation into Complainant's reports of retaliation.

p) Around August 1, 2016, Respondent required the Supervisors to attend a mandatory mediation session. Through the Mediator, the Supervisors reached an agreement that addressed how they would communicate and interact with one another in the future; the Supervisors also agreed to implement a new work schedule. Shortly after the meeting, Complainant contacted the Mediator to request that the restrictions the Supervisors agreed to regarding visiting each other's offices be loosened so she could communicate with Coworker more easily.

q) Complainant alleged that she continued to fear that she was at risk for sexual harassment because Coworker engaged in retaliatory behavior toward her and harassed others[10] without consequence. In November 2016, Complainant transferred to a Bureau location in Augusta. Complainant argued that she had no choice but to transfer and that the transfer resulted in a loss in compensation, as well as a longer commute.[11]

r) At the IRC, Complainant stated that she believed Coworker's harassment in September 2015 occurred due to her sex because Coworker did not treat males the same way. Complainant further explained that Coworker did not engage in harassment between 2008 and 2015 because Coworker knew that she was in a committed relationship. Complainant also alleged that Coworker made sexualized comments (described above) and, on one occasion, asked Complainant if she had pictures of Sister nude after Sister had reconstructive surgery.

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 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.

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[10] There is evidence in the record that indicates Coworker harassed and/or engaged in inappropriate conduct towards other employees throughout much of his recent tenure with Respondent. Complainant argued that Coworker exclusively targeted women, men he perceived as homosexuals, and employees who reported Coworker's misconduct. At the IRC, Complainant described an incident where Coworker recently struck a male subordinate in the arm while at Location. Complainant also stated that Coworker liked to be in charge and feel like he had power over others.

[11] Complainant first raised this argument at the IRC on March 16, 2018.

Hostile Work Environment

2) The MHRA provides that it is unlawful to discriminate on the basis of sex in the terms and conditions of employment. 5 M.R.S. § 4572(1)(A).

3) The Commission's Employment Regulations provide, in part, that: "[h]arassment on the basis of protected class is a violation of Section 4572 of the Act. Unwelcome advances because of protected class (e.g., sexual advances or requests for sexual favors), comments, jokes, acts and other verbal or physical conduct related to protected class (e.g., of a sexual, racial, or religious nature) or directed toward a person because of protected class constitute unlawful harassment when . . . [s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working [] environment." Me. Hum. Rights Comm'n Reg. 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 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.

6) 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) (Sept. 24, 2014). "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.

7) Here, Complainant failed established that she was subjected to a hostile work environment on the basis of her sex, with reasoning as follows:

a) As an initial note, Complainant's argument that the incident on September 30, 2015 was part of continuing pattern of sexual harassment that began in 2008 is not persuasive. The incident in 2008 occurred more than seven years before the 2015 incident, so there is no real temporal proximity between the events. Further, at the IRC, Complainant herself explained that the mistreatment from Coworker stopped for a number of years between 2008 and 2015. The two incidents that allegedly occurred in 2013 (*i.e.* Coworker pushing Complainant's leg and Coworker asking her to touch metal in his finger) are similarly remote in time from 2008 and, while inappropriate, do not appear to be related to Complainant's sex.

b) With respect to the incident in 2015, there is not sufficient evidence to conclude that the harassment occurred because of sex. Complainant failed to show that Coworker targeted her because of her sex. Complainant also provided evidence at the IRC that Coworker harassed or intimated others in the office because he liked to be in charge – which is arguably a reason unrelated to Complainant's membership in a protected class. There is also evidence in the record that Coworker harassed or mistreated male employees of Respondent; while Complainant argued that he only targeted males he perceived as being homosexual, she did not substantiate this argument, which is, in any event, insufficient to overcome the undisputed fact that Coworker engaged in similar conduct toward employees outside Complainant's protected class. Overall, it appears that Coworker's intent was to use Complainant as a prop when conveying a story; while this such behavior could be characterized as boorish, without more it is difficult to conclude that the attempted touching was due to Complainant's sex.

c) Coworker's behavior on the day in question consisted of one comment of an allegedly sexual nature and attempting to touch Complainant in a non-sexual manner later the same day. This appears to be an isolated event where Coworker did not actually make physical contact with Complainant; while this was clearly inappropriate, it does not appear to rise to the level of "severe" harassment. Moreover, even if one considers the events that allegedly occurred in 2013 in conjunction with the events of 2015, the events do not appear to amount to "pervasive" harassment.

d) It is certainly understandable that Complainant would perceive the incident to be sexual harassment, in light of her prior experience with Coworker in 2008. That incident was severe and was committed at a time when Coworker was her supervisor. While the 2015 incident was subjectively offensive, it does not appear to have been objectively offensive, in that a reasonable person experiencing the attempted touching as an isolated incident likely would not consider it to be sex-based harassment.

e) Complainant also failed to establish a basis for employer liability in this case. It must be acknowledged that, overall, Respondent's response to the Complainant's reports of harassment was not ideal and left Complainant with the perception that Coworker was immune from discharge for his poor behavior. However, the evidence indicates that Respondent likely met its *legal* obligations in this case. Respondent placed Coworker on administrative leave and began its investigation into the allegations of harassment within one week of learning of the incident. Respondent subsequently disciplined Complainant and took steps to keep Coworker from having contact with Complainant. There is no indication that Coworker continued to engage in sex-based harassment after Respondent implemented these measures.

8) Hostile work environment discrimination on the basis of sex is not found in this case.

MHRA & WPA[12] Retaliation

9) 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); 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). Unlawful retaliation includes discrimination in the terms and conditions of an individual's employment. 5 M.R.S. § 4572(1)(A); 26 M.R.S. § 833(1).[13]

10) 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 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 for a claim of MHRA retaliation requires, in addition, that the adverse employment action be "material," which 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 & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).

11) 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 (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 discrimination claim).

12) Here, Complainant established a prima-facie case of unlawful MHRA and WPA retaliation by showing that she engaged in protected activity by reporting unlawful harassment. Complainant also alleged that Respondent subjected her to the following adverse acts: (i) repeated schedule changes; (ii) giving her additional job duties; and, (iii) prohibiting her from attending professional meetings.[14] It is assumed that

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[12] Complainant did not specifically allege that Respondent retaliated against her in violation of the WPA, but here it is clear that her report of harassment would be considered protected activity under both the MHRA and WPA.

[13] The phrase "terms, conditions or privileges of employment" is broad and not limited to discrimination that has an economic or tangible impact. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "An employee has suffered an adverse employment action when the employee has been deprived either of 'something of consequence' as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld 'an accouterment of the employment relationship, say, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.'" *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20 (citations omitted). An abusive reprimand may also be actionable. *See King,* 611 A.2d at 82.

[14] The Law Court has not yet opined whether a hostile work environment can constitute an adverse employment action for the purposes of an employee's retaliation claim. *See Blake v. State of Maine,* 2005 ME 32, ¶10 (assuming, without deciding, that a hostile work environment could be an adverse employment action). Absent contrary authority, the

these allegations and the temporal proximity between the events (less than three months) are sufficient to establish a prima-facie case of unlawful retaliation.

13) Respondent articulated legitimate, nondiscriminatory reasons for the adverse acts, namely, that it implemented the schedule changes and the Meeting Policy in an effort to comply with Complainant's request not to have contact with Coworker. Respondent further stated that Complainant voluntarily assumed Coworker's duties while he was on leave and that she did not have significantly more duties than he did upon his return from leave.

14) Ultimately, Complainant did not meet her overall burden of showing that Respondent unlawfully retaliated against her, with reasoning as follows:

a) It is apparent that Respondent engaged in much of the conduct Complainant has characterized as retaliatory in an effort to satisfy Complainant's request that she have no contact with Coworker; this tends to show that Respondent did not have retaliatory animus when taking these actions. Rather, it seems that Respondent attempted to make a good faith effort to comply with Complainant's request and to ensure Complainant was insulated from future inappropriate conduct. Though Complainant was dissatisfied with the changes and how Respondent communicated with her during the process, there is insufficient evidence to conclude Respondent acted with a retaliatory motive.

b) There is also not sufficient evidence to conclude that Respondent singled Complainant out for the changes it made after the incident in September 2015. It is apparent that Director split the additional job duties between Complainant and Sister rather than assigning them to Complainant alone. Further, the schedule changes and Meeting Policy affected all three Supervisors, not just Complainant. Though Complainant believed Schedule 2 unfairly favored Coworker over her, it is clear that Respondent only implemented this change in response to Complainant's grievance. In general, the changes Respondent implemented affected all three Supervisors, not only Complainant.

c) Additionally, there is arguably not sufficient evidence to conclude that the changes Respondent implemented were adverse employment actions. The additional duties Complainant received remained within the scope of her job description and there is not enough reliable evidence in the record to conclude that Respondent assigned her significantly more duties than Coworker. Similarly, though a schedule change could be an adverse act, here Respondent changed all Supervisors' schedules, each on multiple occasions; it is also apparent that Complainant could still perform most of her job duties while working under the different schedules. There is also not persuasive evidence in the record to conclude that the Meeting Policy qualifies as an adverse act because the Supervisors were all still able to attend some meetings and Respondent did not punish Supervisors for attending meetings less often.

Commission will treat a hostile work environment as an adverse employment action where the employee establishes severe or pervasive harassment that creates an abusive working environment. *Id. See also Bodman v. Maine Dept. of Health and Human Services,* 720 F.Supp. 2d 115, 125-26 & n.13 (D.Me. 2010) (assuming hostile work environment can be adverse action in WPA claim); *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 22, 969 A.2d 897, 902-903 (elements of a hostile work environment claim). However, in this case, Complainant failed to provide sufficient evidence to show that Respondent retaliated against her by subjecting her to a hostile environment. The conduct Complainant described (*e.g.* lack of communication from Coworker, negative emails from Director) was sporadic and could not reasonably be characterized as sufficiently hostile or abusive to support this type of claim. In fact, some of the conduct Complainant argued was part of Director's retaliation appears to have been responsive to somewhat sharply-worded emails she sent to Director. Overall, the conduct Complainant alleged occurred, while arguably unpleasant, did not rise to the level of 'severe' or 'pervasive' required to sustain a hostile work environment claim.

d) It is clear that Complainant felt frustrated by Respondent's solutions to Coworker's inappropriate behavior and that she perceived those solutions as having a disproportionately negative impact on her rather than Coworker. As noted above, Respondent could likely have done much better at communicating with Complainant and seeking her imput into how it implemented policy changes after the 2015 incident. However, without more, there is not sufficient evidence to conclude that Respondent retaliated against Complainant or otherwise violated the laws which the Commission enforces.

15) Unlawful retaliation in violation of the MHRA and WPA is not found.[15]

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 Maine Department of Public Safety subjected Staci O'Leary to a hostile work environment on the basis of her sex;

2) There are **No Reasonable Grounds** to believe that the Maine Department of Public Safety unlawfully retaliated against Staci O'Leary in violation of the MHRA and/or WPA; and

3) The complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).

Amy M. Sneirson, Executive Director

Stuart W. Evans, Investigator

[15] Complainant alleged that she had no alternative but to transfer to a position away from Location in 2016, which she argued was a "constructive transfer" that is analogous to a constructive discharge. 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. Since this report concludes that Complainant was not subjected to unlawful harassment or retaliation, her constructive transfer allegation must also fail. In addition, an employee is constructively discharged (in this case, constructively transferred) when she has no reasonable alternative to resignation (in this case no alternative to transfer) 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). Given that Respondent hired a mediator for the Supervisors to attempt to solve their problems and Complainant subsequently asked to have more contact with Coworker, Complainant's decision to transfer does not meet this standard.

Communications Bureau Memorandum

Phone:
FAX:
Email:

To: **ECSS Staci O'Leary and**

From: Director

Date: **January 5, 2016**

Subject: Schedules and Meetings

Effective Tuesday, January 12, 2016, you each will be working a ten hour shift, four on – three off schedule. Your work schedule will be as follows;

	Tuesday and Wednesday, day shift 0600-1600
	Thursday and Friday, evening shift 1600-0200
Staci O'Leary	Thursday and Friday, day shift 0600-1600
	Saturday and Sunday, evening shift 1600-0200
	Saturday and Sunday, day shift 0600-1600
	Monday and Tuesday, evening shift 1600-0200

These will be your regular hours, should you need to leave the building for personal matters other than lunch, you will need to use the appropriate leave time for those matters. This schedule will be evaluated in early April. Also, you are no longer authorized to work from home. In the event you need to attend a meeting or training session, these conditions shall prevail; if a single supervisor is attending, take the state car. If more than one supervisor attends the same meeting/training, the state car is left at the building and you take your personal vehicles and submit an expense report.

Communications Bureau Memorandum

Phone:
FAX:
Email:

EXHIBIT 2

PENGAD-Bayonne, N. J.

To: **ECSS**
ECSS Staci O'Leary
ECSS

From: **Director**

Date: **February 29, 2016**

Subject: **Schedules, Training and Meetings**

Recognizing the feelings of some of the Gray RCC Supervisors, and the need to address those concerns, certain changes need to occur to help deal with those conditions.

Effective with the start of a new pay period on March 13, 2016, your schedules shall be as follows;

ECSS	Day shift Monday, Tuesday, Wednesday and Thursday
ECSS Staci O'Leary	Day Shift Sunday, Evening Shift Monday, Tuesday, and Wednesday
ECSS	Evening shift Sunday and Monday, Day shift Friday and Saturday

Day shift – 0600 to 1600 Evening Shift – 1700 to 0300

These schedules have been established to eliminate overlapping shifts of Supervisors and to make every effort to eliminate unnecessary contact and any uncomfortable work situations. Each of you shall adhere to these schedules. Any overtime that is worked will be in relation to attending meetings and trainings, where possible, that you are specifically responsible to attend. Any shift over time worked will be limited to ensure that ECSS is not in the building when either ECSS is working in the center. As stated in my memo of January 5, 2016, you are not authorized to work from home, so your laptops need to be left docked in your offices.

The Gray Supervisors shall ensure that ECSS and ECSS and ECSS O'Leary do not attend meetings and training sessions at the same time, so each of you will be required to submit training requests to my office for consideration. As for any association meetings and training, I will be maintaining a rotating list and will work to ensure that each of you have an opportunity to attend those meetings and trainings. As each of you are a member of , I will maintain a rotating list for your attendance at their meetings also.

ECSS Timothy shall be responsible for the

ECSS Staci O'Leary shall be responsible for the meetings as well as and meetings.

ECSS shall be responsible for the center scheduling. Information exchange in regard to these affairs and center business shall take place through a phone call or an email.