



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

E17-0091

January 14, 2019

Lauren Kennett (Cape Elizabeth)

v.

Noble Home Health Care (Portland)

Summary of Case:

Complainant, who worked as a clinical director for Respondent, a home healthcare provider, alleged that she was subjected to unlawful discrimination in employment because of her sex, and that she was subjected to retaliation for refusing to submit fraudulent billing. Respondent denied discrimination or retaliation and stated that Complainant was discharged for removing files from the owner's office. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and request for additional information. Based upon this information, the Investigator recommends a finding that there are no reasonable grounds to believe Complainant was discriminated against on the basis of sex, but there are reasonable grounds to believe Complainant was subjected to retaliation for engaging in protected activity.

Jurisdictional Data:

- 1) Dates of alleged discrimination: 4/29/2016.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 2/27/2017.
- 3) Respondent is subject to the Maine Human Rights Act ("MHRA"), the Maine Whistleblowers' Protection Act ("WPA"), Title VII of the Civil Rights Act of 1964, as amended, and state and federal employment regulations.
- 4) Complainant is represented by Sarah A. Churchill, Esq. Respondent is represented by Michael F. Vaillancourt, Esq.

IV. Development of Facts:

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

Complainant, who is female, coordinated in-home services for low income children. Reimbursement for these services by the state required that an adult in the home sign off on Complainant's progress reports.

Many times, there was no adult in the home at the time Complainant provided services. She reported this problem to the owner ("Owner"), who pressured Complainant to sign off on the services anyway so that billing could occur. Complainant refused to do this because she believed it to be illegal. This occurred two weeks before her discharge. Owner also make derogatory comments about Complainant's gender, such the routinely saying that, "The man is in charge," and, "you must obey me," which Complainant interpreted as Owner insisting that she obey him, even if his request might violate the law. Owner also refused to provide Complainant with her personnel file and owed wages when she was discharged.

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

Complainant initially performed well, but then began to leave work early and missed some days at work. Owner confronted Complainant about this, who informed Owner she was having marital issues, so Owner tried to be accommodating. In late April 2016, Complainant and the Director of Nursing ("DON") entered Owner's office and removed client¹ files without his consent. The DON admitted that Complainant had removed files from Owner's office. Complainant's employment was terminated that day due to the unauthorized removal of those files.²

3) The Investigator made the following findings of fact:

- a) On 1/19/2016, Complainant was hired by Respondent as clinical director of children's behavioral health. Respondent provided that Complainant performed well during her first two months of employment.
- b) Complainant alleged that the state required an adult to sign off on Complainant's progress notes for in-home healthcare services she provided. This is not disputed by Respondent, although they do deny that the agency ever engaged in any fraudulent billing for state reimbursement.
- c) Complainant claimed that she felt Owner wanted her to "obey" him because she was female, based upon alleged comments he made. Owner denied making any gender related comments.
- d) On 4/29/2016, Complainant's employment was terminated. She filed for unemployment compensation. Complainant's request for unemployment benefits was initially denied, on the basis that she had voluntarily left her employment without good cause attributable to the employment. Complainant appealed that decision, which was later overturned based upon a finding that Respondent's claim that Complainant had stolen files was not found to be credible.

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

¹ Respondent alleged that in addition to Complainant taking client files, she also took her personnel file from the office.

² Complainant denied that she ever took any files Owner's office, or that she entered his office on the day of the alleged incident, and claimed that she was away from the office, at a conference, that day.

- 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) The Commission's Employment Regulations provide that an employer "is responsible for its acts and those of its agents and supervisory employees with respect to unlawful harassment." When the supervisor's harassment results in a tangible adverse employment action, "liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer." When no tangible adverse employment action results, the employer may raise an affirmative defense by proving by a preponderance of the evidence both that it "exercised reasonable care to prevent and correct promptly any harassing behavior" and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Me. Hum. Rights Comm'n Reg. Ch. 3, §10(2).
- 6) Here, Complainant failed established her hostile work environment claim, with reasoning as follows:
 - a) Complainant based her sex/gender harassment claim upon alleged comments Owner made indicating that she needed to follow his instructions because he was a man. However, Complainant has offered no evidence suggesting that Owner would did not (or would not) have expressed the exact same expectation from a male employee. Although this in no way compelled Complainant to engage in illegal conduct at Owner's insistence, she has offered no objective evidence that he expected her to

follow his directions because of her sex/gender, or that any of the comments Owner allegedly made would be considered severe or pervasive under a hostile work environment analysis.

- 7) It is not found that Respondent is liable for subjecting Complainant to a hostile work environment on the basis of sex.

Retaliation – 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).
- 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.
- 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 (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).
- 11) Here, Complainant established a prima-facie case by showing that she allegedly refused to submit fraudulent progress reports to obtain reimbursement for services by the state.³ Respondent, in turn, provided a nondiscriminatory reason for Complainant’s separation: that she separated from employment after entering a locked office without permission and removing files.
- 12) In the final analysis, Complainant has established that Respondent’s reason was pretextual and that the real reason for her discharge was her protected activity, with reasoning as follows:
- a) Complainant has admittedly offered little evidence to support her claim that she was pressured, but refused, to submit fraudulent progress notes in order to be reimbursed for services by the state. However, this claim was largely consistent throughout the Commission and unemployment process.
 - b) Respondent’s credibility is called into question because its explanation for Complainant’s separation from employment is repeatedly inconsistent. In its July 2017 answer to Complainant’s Commission complaint, it provided that, “On 4/28/2016, [Owner] terminated [Complainant]’s employment due to her unauthorized removal of the referenced files.” Yet during the initial stage of the unemployment process,

³ Although this is disputed by Respondent, Complainant’s sworn Commission complaint alleging that this occurred is sufficient, solely for purposes of establishing a prima-facie case.

in May 2016, Respondent claimed that Complainant "left the job on her own." After Complainant appealed that decision, at a subsequent hearing, findings of fact included that, "On April 29, 2016, the employer ended claimant's job because the administrator felt that the claimant stole some private files from his office."

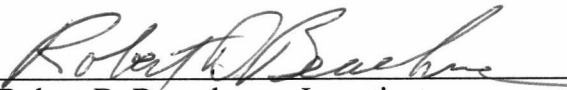
- c) Further, the administrative hearing officer who overturned the deputy's decision expressly found that Respondent's claim that Complainant had stolen files was not found to be, "credible because the administrator sent the deputy copies of papers, which allegedly came from the stolen files."
- d) Respondent has also been inconsistent in what files (if any), that Complainant actually took from Owner's office. At the initial stage of the unemployment process, Respondent claimed that Complainant, "took her personal file without permission." There was also no reference to Complainant taking any other files during the subsequent unemployment appeal. However, in Respondent's answer to the Commission complaint, Respondent claimed that in addition to taking her own personnel file, she also allegedly "removed other client files from [Owner's] office. It is unlikely that Respondent would not have made this arguably even more serious assertion during the unemployment process, if it was in fact true.
- e) In sum, Complainant has established that Respondent's asserted reason for her separation from employment is pretext, and that she would have at least an even chance of prevailing in a civil action.

13) Retaliation in violation of the WPA is found.

VI. Recommendation:

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

- 1) There are **No Reasonable Grounds** to believe that Noble Home Health Care discriminated against Lauren Kennett on the basis of sex (hostile work environment); and that portion of the claim should be dismissed in accordance with 5 M.R.S. § 4612(2); and
- 2) There are **Reasonable Grounds** to believe that Noble Home Health Care retaliated against Lauren Kennett for engaging in WPA-protected conduct; and conciliation should be attempted in keeping with 5 M.R.S. § 4612(3).


Robert D. Beauchesne, Investigator