Maine Human Rights Commission
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INVESTIGATOR'S REPORT
MHRC Case Number: E18-0359
June 19 2019

Tanya Van Rose (Naples)

v.

Thomas Yarcheski (Naples)

I. Summary of Case:

On September 26, 2018, Complainant, a former Nursing Aide/Caregiver, filed her Complaint with the Maine Human Rights Commission ("Commission") alleging that Respondent, who employed Complainant to care for his wife, retaliated against her in violation of the Maine Whistleblowers' Protection Act ("WPA") based on her reporting when it subjected her to a hostile working environment, resulting in her constructive discharge. Respondent did not deny retaliation or otherwise respond to the complaint.

II. Summary of Investigation:

The Investigator reviewed the Complaint filed by Complainant on September 26, 2018. The Commission sent Respondent a warning that if he did not submit an answer to the complaint, the Commission would make a summary determination; Respondent did not submit a Response.

III. Analysis:

The Maine Human Rights Act ("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.

On June 11, 2018, Complainant began working for Respondent as a Nursing Aide/Caregiver. On multiple occasions she confronted Respondent about discrepancies on her timesheet, including timesheets Respondent submitted without Complainant's knowledge or consent that did not accurately reflect time worked and wages earned; Complainant specifically told Respondent that she believed his actions constituted labor law violations. Respondent only responded with harassing language, in person and in email, that made Complainant feel threatened and then advised Complainant that future timesheets would be pinned to a door. Complainant reported two emails to a municipal sheriff's office, but ultimately felt forced to resign. Because Respondent provided no response, this report makes a summary determination, finding the facts as stated in Complainant's sworn complaint to be true and drawing inferences in her favor.

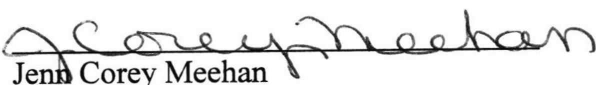
In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *Id.* at 1998 ME 227, ¶ 16, 719 A.2d at 514-15. The Commission treats a hostile work environment as an adverse employment action where the employee establishes severe or pervasive harassment that creates an abusive working environment. *See Blake v. State of Maine,* 2005 ME 32, ¶10 (assuming, without deciding, that a hostile work environment could be an adverse employment action). *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).

Complainant provided Respondent repeatedly used harassing language which, drawing an inference in favor of Complainant, there is at least an even chance could have been severe or pervasive. Complainant felt threatened to a degree that she could no longer work for Respondent. Because Respondent was the employer in this case, he is liable for his own harassing actions. Assuming the facts in Complainant's favor, she also established that she 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 in that she suffered an abusive environment and felt she could not return to work. The fact Complainant was not being paid her earned wages and Respondent would not permit her to meaningfully review or discuss her time sheets also suggests she had no reasonable alternative to resignation. Because Respondent did not provide any legitimate, nondiscriminatory reason for his actions, Complainant's claim for WPA retaliation has been established.

IV. Recommendation:

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

> There are **Reasonable Grounds** to believe that Thomas Yarcheski retaliated against Tanya Van Rose in employment in violation of the WPA, and the complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).



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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.