Maine Human Rights Commission
51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330
Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711
www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT
COMMISSION No. E18-0431-A & -B
March 27, 2020

Erin Hodgkins (Ellsworth)

v.

Charlie's Pizza (Ellsworth) and Melvin Lambert (Winterport)

I. Summary of the Case:

Erin Hodgkins alleged that Charlie's Pizza and Melvin Lambert discriminated against her based on her sex and retaliated against her for engaging in protected activity by interfering with her right to be free from sexual harassment in work, by subjecting her to a hostile work environment, and by constructively discharging her. Respondents denied discrimination and retaliation, stating that Complainant's employment was terminated because she sold cigarettes to a minor. The Investigator conducted a preliminary investigation, which included reviewing the documents by the parties and requests for information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that Melvin Lambert discriminated against Complainant by interfering with her right to be free from sexual harassment. Furthermore, there are no reasonable grounds to believe that Respondents subjected Complainant to a hostile work environment and no reasonable grounds to believe that Respondents retaliated against Complainant for engaging in protected activity.

II. Jurisdictional Data:

1) Dates of alleged discrimination: July 23, 2018 – October 3, 2018

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): October 30, 2018.

3) Respondent Charlie's Pizza has approximately four employees and is subject to the Maine Human Rights Act ("MHRA") and the Maine Whistleblowers' Protection Act ("WPA") as well as state employment regulations. Respondent Melvin Lambert[1] is an individual and is subject to the interference and retaliation prohibitions in the MHRA.

[1] The Maine Supreme Judicial Court, sitting as the Law Court, has held that individual supervisory employees cannot be held liable as "employers" under the MHRA, *see Fuhrmann v. Staples the Office Superstore East, Inc.* 2012 ME 135. Similarly, coworkers cannot be held liable as "employers". Nonetheless, individuals may be

4) Neither party is represented by counsel.

III. Development of Facts:

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

Complainant was employed by Charlie's Pizza ("Restaurant"). While she was employed for Restaurant, she started a consensual relationship with Melvin Lambert ("Coworker"). After Complainant broke up with Coworker, Coworker began harassing her at work. Coworker would often threaten to quit work and say things like, "I'm in love with you." Once, Coworker told her, "Don't sit that beautiful ass on those dirty steps." Complainant reported Coworker's behavior to the owner ("Owner"). In response, Owner told Complainant to deal with it because Coworker will get over it eventually. On September 10, 2018, Complainant filed a police report. After Complainant filed her police report, Owner reduced her hours. Complainant resigned on October 3, 2018, due to stress.

2) Respondents provided the following in support of their position:

Complainant was hired as a cook and cashier. Owner advised Complainant and Coworker against dating each other, but they did so anyway. After the relationship ended, Complainant reported to Owner that Coworker kept telling her he loved her and that it made her uncomfortable. Owner asked Coworker to stop, and he complied. Complainant also told Owner that she did not want to work with Coworker anymore. Owner offered to put Complainant and Coworker on different schedules, and they both agreed to the change. On September 22, 2018, Complainant sold cigarettes to a minor, after improperly failing to check their age. Because of this, Owner received a written warning from the tobacco company. In response, Owner terminated Complainant's employment.

3) The Investigator made the following findings of fact based on the submissions:

a) Complainant and Coworker were in a consensual relationship. After Complainant and Coworker broke up on or around July 23, 2018, Coworker began making inappropriate comments towards Complainant. The comments included repeatedly telling her that he loved her, questioning her about the breakup, and commenting on her "beautiful ass".

b) On or around August 10, 2018, Complainant reported Coworker's behavior to Owner. Complainant threatened to quit, but agreed to stay if Respondent changed the schedule so that Complainant and Coworker did not work at the same time. Respondent did so.

c) On or around September 22, 2018, Complainant sold cigarettes to a minor. Complainant did not respond to inquiries, including whether she in fact had sold cigarettes without checking the customer's age. She did generally state that she was under stress from the situation with Coworker, which caused her "to forget to do certain menial tasks".

---

held liable for interference with a complainant's rights under the MHRA, *see* 5 M.R.S. § 4633(2), in cases where the individual takes separate, intentional individual action that interferes with those protected rights.

d) On or around October 3, 2018, Complainant was discharged. Respondent provided that it discharged Complainant after receiving a warning from the tobacco company for selling its products to a minor.

IV. Analysis:

1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

Individual Liability: Respondent Lambert

2) The MHRA provides as follows: "It is unlawful for a person to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted or protected by this Act or because that individuals has exercised or enjoyed, or has aided or encouraged another individual in the exercise or enjoyment of, those rights." 5 M.R.S. § 4633(2).

3) While Coworker is not individual liable as Complainant's "employer", *see Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, 58 A.3d 1083, he can be found individually liable as a "person" for interfering with Complainant's rights under the MHRA.

4) Here, Coworker's actions as a person are found to have interfered with Complainant's rights under the MHRA by engaging in an ongoing pattern of harassment that led Complainant to feel that she was unable to continue working. Complainant alleged that his comments were daily occurrences, and that she was unable to focus due to the stress of his constant harassment. The individual actions attributable to Coworker include: threatening to quit and making inappropriate comments, such as: "I am in love with you"; "Don't sit that beautiful ass on those dirty steps"; and "I'm just admiring a beautiful woman."

5) Coworker did not rebut any of Complainant's allegations against him, or provide any explanation for his conduct. Accordingly, it is established that Coworker should be held liable for any employment discrimination against Complainant.

Hostile Work Environment: Charlie's Pizza

6) 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).

7) 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) (Sept. 24, 2014).

8) "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.

9) 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 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.

10) 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. Ch. 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.

11) Complainant has not established that she was subjected to a hostile work environment on the basis of sex, because Complainant failed to establish grounds for employer liability. Complainant did report Coworker's inappropriate comments, but Owner acted promptly by telling Coworker to stop and by changing their work schedules, so Complainant and Coworker did not work the same shifts. Complainant did not allege ongoing harassment after Respondent adjusted the schedule so she and Coworker did not work together.

12) It is found that Complainant has not established her hostile work environment claim against Restaurant.

Retaliation[2]: Charlie's Pizza

13) 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). 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).

14) 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 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).

15) 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).

16) Complainant has established a prima-facie case by showing that she engaged in protected activity by reporting harassment. After reporting Coworker's harassment to Owner, Complainant alleged that her hours were cut and then she was discharged.

17) Respondent provided legitimate, nondiscriminatory reasons for the alleged adverse actions, namely that they changed the schedule to separate Complainant and Coworker, and Complainant inappropriately sold cigarettes to a minor.

18) In the final analysis, Complainant has not met her burden of showing that the real reason for the adverse actions was her alleged protected activity, with reasoning as follows:

---

[2] Complainant alleged only WPA retaliation on her original charge form, but it is clear that the alleged unlawful activity she reported was what she reasonably believed to be sexual harassment by Coworker. Accordingly, her claim has been treated as one for both WPA- and MHRA-retaliation.

a) Complainant reported her concerns regarding the alleged harassment to Owner. Owner acknowledged Complainant's concerns and told Coworker to stop making inappropriate comments to Complainant. Owner also ensured that Complainant and Coworker would be working different schedules so they would not have to interact. Any change in hours resulted from the schedule change, which Complainant agreed to.

b) Respondent posited that the reason Complainant was discharged was because she sold cigarettes to a minor. Complainant did not deny selling cigarettes to a minor and stated that she forgot "to do certain menial tasks." Her discharge followed shortly after Respondent was warned by a tobacco company about this incident. It is far more likely that this incident was the cause of Complainant's discharge, not her earlier complaint.

c) Moreover, Complainant was threatening to quit her job when she reported the harassment to Owner. If Owner was inclined to retaliate against Complainant for her reporting, it could simply have agreed to her resignation. Instead, it took action to stop the harassment, including implementing scheduling changes to keep Complainant from quitting her job. This tends to undermine the allegation that Restaurant retaliated against Complainant.

19) Retaliation for WPA- and MHRA-protected activity is not found.

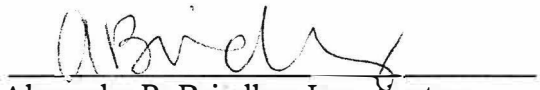
V. <u>Recommendation:</u>

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

1. There are **Reasonable Grounds** to believe that Melvin Lambert discriminated against Erin Hodgkins when he intentionally interfered with Complainant's right to be free of sexual harassment in the workplace, and this portion of the complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).

2. There are **No Reasonable Grounds** to believe that Charlie's Pizza discriminated against Erin Hodgkins on the basis of sex by subjecting her to a hostile work environment, and this portion of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).

3. There are **No Reasonable Grounds** to believe that Charlie's Pizza and Melvin Lambert retaliated against her for asserting her rights under the MHRA, and this portion of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).



Alexandra R. Brindley, Investigator