



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT

H15-0527

April 24, 2016

**Heather Walsh (Augusta)**

v.

**Kathy and Vernon Bagley (Troy)**

### **I. Complaint:**

Complainant alleged that Respondents discriminated against her on the basis of sex by subjecting her to a hostile housing environment. Complainant also alleged that Respondents retaliated against her by subjecting her to less favorable terms and conditions of housing, including serving her with an eviction notice, after she asserted her rights under the Maine Human Rights Act ("MHRA") by complaining of unlawful sexual harassment.

### **II. Respondents' Answer:**

Respondents denied discrimination and retaliation, asserted that Complainant was not subjected to sexual harassment sufficient to create a hostile work environment, and stated that Complainant was served with an eviction notice after her partner attempted to assault Vernon Bagley.

### **III. Jurisdictional Data:**

- 1) Date of alleged discrimination: August 1, 2014 – August 29, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): December 8, 2015.
- 3) Respondents own two rental units and are subject to the MHRA and state housing regulations.
- 4) Complainant is represented by Patricia Ender, Esq. Respondents are not represented by counsel.
- 5) Investigative methods used: A thorough review of the materials submitted by the parties, requests for further information and documents. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

### **IV. Development of Facts:**

- 1) The relevant parties, facts, and documents in this case are as follows:

- a) Complainant rented a home from Respondents from August of 2014 until August of 2015, when she vacated the apartment after being served with an eviction notice. She lived in the home with her partner ("Partner"), her minor daughter, and Partner's minor stepson.
  - b) Respondent Kathy Bagley was the primary landlord with whom Complainant communicated. Mrs. Bagley alleged that her husband Vernon Bagley suffered a [REDACTED] [REDACTED] prior to 2014 that affected his behavior and his ability to act as a landlord and to care for himself.
  - c) On May 15, 2015, Complainant and Partner were involved in an altercation with Mr. Bagley. Mrs. Bagley called the police and Partner was issued a criminal summons for assault.
  - d) On May 29, 2015, Mrs. Bagley issued Complainant a Seven Day Notice to Vacate. The notice stated that Complainant was being asked to leave due to "Harassment, assault on disabled landlord with a baseball bat."
  - e) In or around the end of May, 2015, Mrs. Bagley called the fire department to report a fire in Complainant's home. Complainant alleged that Mrs. Bagley called the fire department in retaliation for Complainant reporting sexual harassment. Mrs. Bagley alleged that she called the fire department because her neighbor saw smoke coming out of Complainant's home.
- 2) Complainant provided the following:
- a) Respondent Vernon Bagley sexually harassed Complainant throughout her tenancy. His sexual harassment interfered with her enjoyment of the property and created an intimidating and abusive environment. On several occasions, Mr. Bagley grabbed Complainant's crotch, chased her around her home, asked her to perform explicit sexual acts with him, and made lewd comments about her.
  - b) The above behavior occurred on or around August 7, 2014, only a few days after she moved in. She went to Respondents' home to speak with Mrs. Bagley, but Mr. Bagley answered the door instead. During this interaction Mr. Bagley also told Complainant that he wanted her to make a sex movie with him and watch porn with him. He made comments such as, "you must have a sweet pussy." Complainant was horrified and called Mrs. Bagley after the event. Mrs. Bagley begged Complainant not to report Mr. Bagley and told Complainant to come by the next day when she would be home.
  - c) On or around August 8, 2014, Complainant returned to see Mrs. Bagley, who was not there. Mr. Bagley opened the door again and subjected Complainant to the same unwelcome sexual harassment. Complainant again called Mrs. Bagley to report the lewd conduct and Mrs. Bagley again begged Complainant not to report Mr. Bagley and stated that she would take care of the problem.
  - d) Mr. Bagley harassed Complainant again in mid-September of 2014 and later by chasing her around her home, making sexual comments, and propositioning her for sexual acts. Complainant again reported this to Mrs. Bagley and Mrs. Bagley stated she would take care of it.
  - e) On May 15, 2015, Mr. Bagley came to Complainant's yard while Partner was there with Complainant's daughter and a friend. Mr. Bagley began staring at the girls, and continued to stare even after Partner told him to stop. Partner walked over to Mr. Bagley with his baseball bat (he had been playing with his stepson at the time), and Mr. Bagley grabbed his bat, fell over and hit his head

on the ground. Partner never hit or attempted to assault Mr. Bagley. Mrs. Bagley came to Complainant's home later that day and began yelling and swearing. A police officer came by later and issued Partner a court summons.

- f) Respondents retaliated against Complainant by: issuing her an eviction notice shortly after the May 15<sup>th</sup> incident; calling the fire department and falsely reporting a fire in her home; removing her washer and dryer without her consent<sup>1</sup>; and locking Complainant out and refusing to let her retrieve the remainder of her belongings after she moved out. Complainant left several messages for Respondents asking to retrieve her belongings but none of her messages were returned. Respondents retaliated against her because she asserted her rights under the MHRA by opposing unlawful sexual harassment.
- 3) Respondent Kathy Bagley provided the following:
- a) Mrs. Bagley does not deny that Mr. Bagley likely acted in the way Complainant alleged, but he could not help it since he suffered from a [REDACTED] [REDACTED]. Mrs. Bagley warned Complainant ahead of time that she should not interact with Mr. Bagley. Also, Complainant never reported sexual harassment by Mr. Bagley prior to the May 15<sup>th</sup> incident, so Mrs. Bagley could not have acted to correct the harassment since she did not know if it.
- b) On May 15, 2015, Partner attempted to assault Mr. Bagley with a baseball bat when he saw Mr. Bagley staring at his daughter. Mr. Bagley sometimes stares due to his [REDACTED] [REDACTED] and cannot help himself. Complainant reported that day for the first time that Mr. Bagley had harassed her two times prior when Complainant had gone to Respondents' house while Mrs. Bagley was at work to ask for cigarettes. Mrs. Bagley told Complainant that she had no knowledge of this and asked her why she had not reported the incidents sooner. Complainant told her that she did not want to cause trouble, and Mrs. Bagley responded that she could not fix what she was unaware of. Mrs. Bagley told Complainant that she would speak to Mr. Bagley (which she then did) and that Complainant should contact her immediately if it happened again.
- c) Respondents did not retaliate against Complainant for reporting sexual harassment. Mrs. Bagley called the fire department because she and her friend noticed smoke coming out of Complainant's house and was worried Complainant may have been making some illegal drugs. There were always rough people around and traffic going in and out of Complainant's home all day.
- d) Complainant never called Respondents to retrieve items she left behind. Mrs. Bagley wanted those items gone so that she could clean the place, and was waiting for Complainant to get in touch with her, but she did not. Respondents owned the washer and dryer in Complainant's home and allowed Complainant to use them until they needed them back. Mrs. Bagley told Complainant this when she started renting to her, and she made arrangements with Partner to pick up the machine two days prior to doing so.
- e) Mrs. Bagley issued Complainant a seven-day notice to vacate because Partner attempted to assault her disabled husband with a baseball bat. This is outlined in the notice. Complainant was not issued the notice in retaliation for reporting sexual harassment. Complainant did not report harassment by Mr. Bagley until the incident on May 15<sup>th</sup> which resulted in Partner attempting to assault Mr.

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<sup>1</sup> Respondents owned the washer and dryer, but Complainant alleged that they did not inform her that they would be entering the apartment as required by law.

Bagley. As soon as Complainant reported it, Mrs. Bagley acted to correct the behavior.

Complainant was also issued an eviction notice because she never paid rent on time, used too much electricity, and damaged the property.

**V. Analysis:**

- 1) The MHRA requires the Commission 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 this standard to mean that there is at least an even chance of Complainants prevailing in a civil action.

Sexual harassment – hostile housing environment

- 2) The MHRA makes it unlawful for any owner or managing agent to evict or otherwise discriminate against any individual because of sex in the “price, terms, conditions or privileges of the sale, rental or lease of any housing accommodations.” 5 M.R.S. § 4582.
- 3) The Commission’s regulations provide that it is unlawful to “threaten, intimidate, or interfere” with persons in their enjoyment of a dwelling because of the sex of such persons, or of visitors or associates of such persons. Me. Hum. Rights Comm’n Reg. § 8.09(B)(2).
- 4) A hostile housing environment claim is analyzed similarly to a hostile work environment claim. *See, e.g., Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364-365 (8th Cir. 2003); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993).
- 5) Such a claim is actionable when unwelcome behavior because of protected class status unreasonably interferes with Complainant’s use and enjoyment of the premises. *See Honce*, 1 F.3d at 1090. “Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive [housing] environment.” *Doyle v. Dep’t of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57 (employment case). In determining whether an actionable hostile housing environment 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. . . .” *Doyle*, 2003 ME 61, ¶ 23, 824 A.2d at 57. It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the housing environment to become hostile or abusive. *Id.*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996) (employment). “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.
- 6) The fact that the conduct complained of is unwelcome must be communicated directly or indirectly to the perpetrator of the conduct. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1<sup>st</sup> Cir. 1988) (employment).
- 7) Here, Complainant was able to establish a hostile housing environment claim because she was able to show that she was subjected to sexual harassment severe or pervasive enough to unreasonably interfere with her enjoyment of her housing and cause her environment to be both objectively and subjectively abusive. Reasoning is as follows:
  - a) Mrs. Bagley does not dispute that the sexual comments and actions Complainant alleged as having been made by Vernon Bagley likely occurred. These include Mr. Bagley asking Complainant for



explicit sexual acts, chasing her around her home, grabbing her crotch, calling her sexual names and suggesting they make a movie of sex acts together.

- b) Mrs. Bagley acknowledged that the allegations likely occurred, but argued that they could not be helped, as Mr. Bagley has a [REDACTED] [REDACTED] and cannot control his actions. Regardless of the reasons for Mr. Bagley's actions, however, the fact remains that Complainant was subjected to sexual harassment, and that the harassment rises to the level of having been severe and pervasive. A reasonable person would find the environment abusive.
  - c) Ms. Bagley alleged that she warned Complainant of Mr. Bagley's [REDACTED] [REDACTED] and that Complainant failed to report the harassment in a timely manner, preventing Mrs. Bagley from acting to correct the harassment sooner. Even if this is true, the fact remains that Mr. Bagley was Complainant's landlord and he acted unlawfully by subjecting Complainant to unwelcome explicit sexual statements and actions.
- 8) It was found that Complainant was subjected to a hostile housing environment based on sex.

#### Retaliation

- 9) The MHRA provides that “[a] person may not discriminate against any individual because that individual has opposed any act or practice that is unlawful under this Act or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this Act.” 5 M.R.S. § 4633(1).
- 10) In order to establish a prima-facie case of retaliation, Complainant must show that she engaged in statutorily protected activity, she 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 (employment case); *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006) (same). The term “materially adverse action” covers actions that are harmful to the point that they would dissuade a reasonable person from making or supporting a charge of discrimination. *See Burlington Northern*, 126 S. Ct. 2405. One method of proving the causal link is if the adverse action happens in “close proximity” to the protected conduct. *See Id.*
- 11) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wyrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> 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 her overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.*
- 12) Here, Complainant establishes a prima-facie case of retaliation by showing that she engaged in statutorily protected activity by opposing and reporting unlawful sexual harassment by Mr. Bagley, and she was served with an eviction notice shortly after opposing unlawful harassment by Mr. Bagley.
- 13) Respondents produced probative evidence to show that they issued Complainant an eviction notice because Complainant's boyfriend attempted to assault Mr. Bagley on May 15, 2015 (Respondent listed other reasons as well, but acknowledged in her statement and in the eviction notice that the assault was the primary reason).

14) Complainant could not carry her overall burden of proving that she was issued the eviction notice in retaliation for opposing and reporting unlawful sexual harassment. Reasoning is as follows:

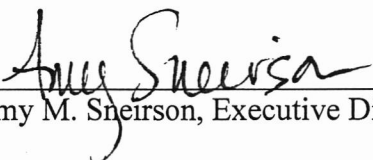
- a) It is undisputed that Partner was involved in an altercation with Mr. Bagley on May 15, 2015, after which he was issued a criminal summons for assault. Two weeks later, Mrs. Bagley issued Complainant a Seven Day Notice to Vacate. The notice states that Complainant was being asked to leave due to "Harassment, assault on disabled landlord with a baseball bat."
- b) The fact that the eviction notice was issued only 14 days after the incident, that the notice explicitly states the incident was the reason, and the fact that Partner was issued a criminal summons, all support Mrs. Bagley's position that Complainant was issued an eviction notice due to the assault. This is a legitimate, nondiscriminatory reason for issuing an eviction notice.
- c) Complainant acknowledges that Mrs. Bagley told her she would take action when Complainant reported the harassment. Mrs. Bagley acknowledged that the harassment likely occurred and did not show hostility toward Complainant for reporting it. It is more likely that Mrs. Bagley wanted Complainant gone after Partner was involved in the altercation with her husband.
- d) Regarding the call to the fire department, this does not appear to rise to the level of a materially adverse action. When the fire department arrived and saw no fire, they left. Complainant suffered nothing of consequence. There was also no evidence to support the fact that this was an act of retaliation.
- e) Complainant did not provide evidence to show that the removal of the washer and dryer was retaliatory. She also did not corroborate her claim that Respondents refused to allow her to access her belongings after she moved, or that any lack of access was retaliatory.


15) Retaliation was not found.

**VI. Recommendation:**

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

- 1) There are **Reasonable Grounds** to believe that Respondents Kathy and Vernon Bagley discriminated against Complainant Heather Walsh on the basis of sex by subjecting her to a hostile housing environment, and conciliation of this portion of the charge should be attempted in accordance with 5 M.R.S. § 4612(3);
- 2) There are **No Reasonable Grounds** to believe that Respondents retaliated against Complainant for asserting her rights under the MHRA, and this portion of the charge should be dismissed in accordance with 5 M.R.S. § 4612(2).

  
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Amy M. Sneerson, Executive Director

  
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Angela Tizon, Investigator