Maine Human Rights Commission
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INVESTIGATOR'S REPORT
E15-0220
April 25, 2017

Mindi Peavey (Brooks, ME)

v.

Access Worldwide Communications, Inc. (Boca Raton, FL)

I. Summary of Case:

Complainant worked for Respondent as a Team Lead and Operations Manager from January of 2013 until December 10, 2014 when she resigned. Complainant alleged that Respondent discriminated against her on the basis of sex by subjecting her to a hostile work environment, and retaliated against her for reporting the unlawful harassment, leading to her constructive discharge. Respondent, a marketing and communications company, denied discrimination and retaliation, and alleged that Complainant resigned of her own accord. The Maine Human Rights Commission Investigator conducted a preliminary investigation, which included a thorough review of the materials submitted by the parties and interviews. Based on this information, the Investigator recommends that the Commission make a finding that there are reasonable grounds to believe that Respondent discriminated and retaliated against Complainant in this case.

II. Jurisdictional Data:

1) Date of alleged discrimination: December 10, 2014.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): May 14, 2015.

3) Respondent employs 230 people and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964, as amended, the Maine Whistleblowers' Protection Act ("WPA"), as well as state and federal employment regulations.

4) Complainant is represented by Carol Garvan, Esq. Respondent is represented by James Erwin, Esq.

IV. Development of Facts:

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

Complainant was subjected to a hostile work environment due to sexual harassment by her direct supervisor ("Supervisor") and her coworker ("Coworker"). Harassment occurred regularly for months and included inappropriate sexual remarks regarding her breasts and legs. Complainant did not report the harassment at first because Coworker was in a relationship with an employee in the human resources department ("HR Generalist"). Complainant went out on medical leave for work-related [redacted] due to the hostile environment, and finally reported the harassment to the Vice President of Operations ("Operations VP") in an email. Operations VP responded to her email by calling her and offering to demote her to her previous position, which she declined. Operations VP told her he would set up a meeting to address her concerns before she returned to work, but failed to do so. The day she returned, she was pulled into Supervisor's office and berated for reporting him to management. Supervisor told her that she "threw him under the bus" and threatened her employment if she did not improve her performance. Complainant felt that nothing would be done about her harassment complaints and that she could no longer reach out to Operations VP without being retaliated against. She felt no alternative but to resign from her employment due to the unlawful harassment and retaliation.

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

Complainant was not subjected to a hostile work environment based on sex and her allegations of sexual harassment are fabricated. At the time she emailed Operations VP she was experiencing a decline in job performance, and her complaints about her work environment were likely due to this factor. Complainant's email to Operations VP addressed numerous issues unrelated to sexual harassment, and when Operations VP called and spoke with her in response to the email, Complainant never raised allegations of sexual comments, and instead focused on her stress level and difficulty meeting production goals due to her work with difficult clients. Operations VP did not raise the sexual harassment allegations in this conversation and did not investigate them further because Complainant had not raised them subsequent to her email, and because she resigned almost immediately after returning to work after medical leave. Operations VP offered her the option of returning to her previous position at the same rate of pay in an attempt to help her due to the stress level she was reporting, not in retaliation for any complaint of harassment. Supervisor did not retaliate against Complainant when he met with her upon her return to work. The notes submitted by HR Generalist, who was present during the meeting, show that sexual allegations were not raised during the meeting. Also, Supervisor was not aware at the time that Complainant had made the allegations against him.[1]

3) The Investigator made the following Findings of Fact:

a) On November 30, 2014 Complainant sent an email to Operations VP reporting allegations of sexual comments made to her by Supervisor and Coworker. The relevant portion of the email states, "I have had an HR issue for a while now. But I don't dare to address the concern due to [HR Generalist] and [Coworker] being engaged. Several times that I have been in the office with [Coworker] and [Supervisor], comments are made about my breasts and legs. When it happens I walk out and go back to my office. I know that I have not a leg to stand on here due to the fact that [Coworker] and [Supervisor] would stand behind each other 100%. But it has gotten to the point, I don't want to meet with them unless absolutely necessary. Honestly, in my book, [they're] a bunch of pigs." The email also included various complaints unrelated to sexual harassment.

[1] Operations VP later stated in an interview with the Investigator that he told Supervisor about the sexual harassment allegations prior to Supervisor's meeting with Complainant, and that Supervisor denied them.

b) Operations VP called Complainant after receiving her email to discuss her complaints. The parties dispute whether or not Complainant brought up the allegations of sexual harassment during this conversation. Operations VP acknowledged that he did not address her sexual harassment concerns during this phone conversation and did not subsequently address or investigate them prior to her resignation.

c) Complainant returned to work on December 8, 2014 and met with Supervisor and HR Generalist. During this meeting Supervisor expressed disappointment that Complainant had reported concerns about him to Operations VP. Notes from HR Generalist show that Supervisor told Complainant that he felt that she "threw him under the bus" by reporting him to Operations VP before going to him first. The parties dispute whether or not the allegations of sexual comments were specifically addressed. Operations VP stated that he had told Supervisor about the allegations of sexual harassment prior to this meeting.

d) Complainant submitted a resignation letter on December 10, 2014 stating that she was resigning after seeing no improvement in the sexual harassment and hostile work environment complaints she had reported to Operations VP in her November 30th email. Complainant also wrote that the situation had become worse, and that Supervisor had made the above comment and threatened to discipline her if she did not improve her behavior.

e) Many of the details surrounding the specifics and extent of the allegations of sexual harassment in this case remain in dispute given the disagreement between the parties regarding what occurred, and the absence of significant documentary evidence. However, the record does reflect that Complainant reported significant allegations of sexual harassment in her November 30th email prior to her resignation and that Respondent did not address or investigate these allegations.

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 Complainant prevailing in a civil action.

Sex Discrimination: Hostile Work Environment

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).

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 or union 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 [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.

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

7) 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.

8) Given the reasonable grounds standard above, Complainant succeeds in establishing a hostile work environment claim here by showing that she was subjected to unwelcome sex harassment in the form of sexual comments, the harassment was likely severe or pervasive enough to unreasonably interfere with her work performance, the comments made were both subjectively and objectively offensive, and that Respondent is liable for the harassment. Reasoning is as follows:

a) As stated above, while many of the details surrounding the specifics and extent of the allegations of sexual harassment in this case remain in dispute, it is undisputed that Complainant reported significant allegations of sexual harassment in her November 30th email prior to her resignation and that Respondent did not address or investigate these allegations.

b) Complainant emailed Operations VP on November 30, 2014 and reported allegations of sexual comments made to her by Supervisor and Coworker. In this email, Complainant specified that the comments were unwelcome and clearly inappropriate (comments about her breasts and legs), that this was an ongoing issue, that she had been afraid to bring the concerns forward, and that it was affecting her work. Complainant further noted, "...it has gotten to the point, I don't want to meet with them unless absolutely necessary."

c) The allegations in Complainant's email were serious in nature and reasonably warranted further investigation by Respondent. Respondent denied that harassment occurred, but Operations VP acknowledged that he did not address or investigate the allegations. As noted above, Respondent is liable for reported harassment unless it can show that it "exercised reasonable care to prevent and correct promptly any harassing behavior" (in the case of harassment by a supervisor)[2] or "took immediate and appropriate corrective action" (in the case of harassment by a coworker). It appears Respondent did neither in this case.

9) Discrimination on the basis of sex was found.

MHRA and WPA Retaliation

10) 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).

11) 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).

12) 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,

[2] As discussed below, it is found in this case that Complainant was constructively discharged. This constitutes a tangible adverse action, making Respondent vicariously liable for Supervisor's harassment.

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).

13) Here, Complainant establishes a prima-facie case of retaliation in violation of the MHRA and WPA by showing that she reported unlawful sexual harassment, she was verbally reprimanded by Supervisor shortly after she reported the harassment and was constructively discharged.[3]

14) Respondent provided a legitimate, nondiscriminatory for its action: Complainant was reprimanded because of her declining performance and she voluntarily resigned within two days of her return from leave.

15) Complainant showed that there was a causal connection between her report of unlawful sexual harassment and the adverse employment actions, with reasoning as follows:

a) Respondent provided notes drafted by HR Generalist showing that Supervisor told Complainant that he felt she had "thrown him under the bus" by complaining to Operations VP without going to him first. Respondent initially alleged that Supervisor had no knowledge of Complainant's sexual harassment allegations at the time and therefore could not have retaliated based on these complaints, but Operations VP later acknowledged that he had told Supervisor about the claims prior to the meeting. The fact that Complainant was verbally reprimanded by Supervisor shortly after she reported him for unlawful harassment, and the fact that he was aware of her report at the time, is enough for Complainant to prevail in showing a causal connection between her protected activity and the reprimand.

b) Complainant alleged that she was constructively discharged due to intolerable working conditions created by unlawful sexual harassment as well as due to the retaliation she experienced for reporting the harassment. An employee is constructively discharged when she has no reasonable alternative to resignation because of intolerable working conditions caused by unlawful discrimination.[4] *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.* At the time she left employment, Complainant had reported sexual harassment, had her complaint ignored, and suffered a retaliatory reprimand within two days of her return to work. Under these circumstances, it is found that Complainant was constructively discharged.

16) MHRA and WPA retaliation was found.

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[3] Complainant's allegation that Operations VP "offered her a demotion" is not being considered a separate adverse job action here given that Complainant was only offered her previous position and was not threatened to be demoted.

[4] 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 she was constructively discharged because of intolerable working conditions caused by unlawful discrimination, she may be entitled to damages flowing from the loss of her job. *Id.* at ¶18; *Levesque,* 2012 ME 114 at ¶8.

VI. Recommendations:

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

1) There are **Reasonable Grounds** to believe that Access Worldwide Communications, Inc. discriminated against Mindi Peavey on the basis of sex by subjecting her to a hostile work environment;

2) There are **Reasonable Grounds** to believe that Access Worldwide Communications, Inc. retaliated against Mindi Peavey in violation of the MHRA and WPA; and

3) Conciliation of the charge should be attempted in accordance with 5 M.R.S. § 4612(3).

Amy M Sneirson /BAH
Amy M. Sneirson, Executive Director

Angela Tizon, Investigator