



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT

E16-0281

November 18, 2016

**Jessica L. Locklear (Westbrook)**

v.

**AJ's Market (Westbrook)**

### Summary of Case:

Complainant, who applied for and briefly worked in a cashier position at Respondent's store, alleged that Respondent's ("Owner") sexually harassed her repeatedly over her first few days of employment, which forced her to quit her job. Respondent did not file any response to Complainant's Maine Human Rights Commission charge. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by Complainant. Based upon this information, the Investigator recommends that the Commission find reasonable grounds to believe that Complainant was discriminated against on the basis of her sex.

### Jurisdictional Data:

- 1) Dates of alleged discrimination: 3/19/2016.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 6/6/2016.
- 3) Respondent employs fewer than 15 individuals and is required to abide by the non-discrimination provisions of the Maine Human Rights Act ("MHRA") and state employment regulations.
- 4) Neither party is represented by legal counsel.

### IV. Development of Facts:

- 1) Complainant provided the following in support of her claims:
  - a) In mid-March 2016, she went to Respondent's store to see if they were hiring, and asked Owner to call her if a position became available. Three days later, Owner called to advise her to come in for training on 3/13/2016. Two days later, she dropped off requested documents at the store.
  - b) On 3/17/2016, Owner called Complainant to advise her that he would be coming to her home to drop off her documents. When he arrived, he asked her to go with him to a sports bar to talk about the job.

At the bar, Owner kept insisting that Complainant do shots with him. He also flirted with her, stating "you're pretty," and he had "heard that you (Italian) girls are good with your hands." Owner stated that he wanted Complainant to work alone with him in the back office, even though she had not applied for an office position.

- c) Owner drove Complainant back to her house, and locked her car door, saying "don't leave yet." Owner then said, "You're making me hard," took out his penis, and wanted her to perform oral sex. Complainant protested, saying that it was not right, that he was her boss and that he had a wife. Owner eventually let her out of his vehicle. About 15 minutes later, Owner texted Complainant and messaged her on Facebook with inappropriate comments.
  - d) On 3/29/2016, Complainant went to work at the store even though she felt uncomfortable. While she was making a sandwich for a customer, Owner came up from behind her and rubbed himself on her behind and grabbed her waist. Complainant froze and could not say anything. Owner left the store at 3:30 pm and said that he would come back and close later, alone with Complainant. She did not feel comfortable with that, so she left Owner a note indicating that she quit.
- 2) Respondent was provided with notice of the complaint. Respondent chose not to respond to or controvert any of the claims Complainant raised in her Commission complaint.
  - 3) The Investigator made the following findings of fact:
    - a) By letter dated 6/9/2016, Respondent was notified of and received a copy of Complainant's complaint. A response was requested within 60 days. That notification, sent via U.S. mail, was not returned, and is deemed received by Respondent.
    - b) By letter dated 8/19/2016, notification was also sent to Respondent's clerk/registered agent, as listed in the state Bureau of Corporations. A response was requested within 30 days.
    - c) By letter dated 10/17/2016, the parties both were notified by this Investigator that any final information either party wished to submit must be received no later than 5:00 P.M. on 10/31/2016.
    - d) Despite these multiple notifications, Respondent submitted no response to the complaint.

#### **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.
- 2) The MHRA provides, in relevant part, that it is unlawful MHRA employment discrimination for an employer to discriminate "with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment" because of sex. 5 M.R.S. § 4572(1)(A).
- 3) Harassment on the basis of sex is a violation of § 4572 of the MHRA. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when "such 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. Chapter 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 sexually 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 Regulations provide the following standard for determining employer liability for sexual harassment committed by a supervisor:

An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment. When the supervisor's harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, 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. . . .

Me. Hum. Rights Comm'n Reg. Ch. 3, §10 (2) (Sept. 24, 2014).

- 7) Complainant has established that Respondent subjected her to unlawful sexual harassment, with reasoning as follows:
- a) Complainant's sworn complaint – to which Respondent did not respond – establishes that Complainant was subjected to egregious sexual harassment, including Owner exposing his genitals to her. This conduct was severe, offensive, and created an abusive working environment.
- b) With regard to liability, Respondent obviously knew of the harassment and did nothing to stop it, since Respondent's Owner was the perpetrator. Liability is also clear because Complainant has established that she suffered an adverse employment action when she was constructively discharged.

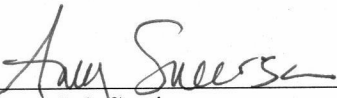
- i. An employee is not constructively discharged when, although not formally terminated, an employee has no reasonable alternative to resignation because of intolerable working conditions. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "The test is whether a reasonable person facing such unpleasant conditions would feel compelled to resign." *Id.* In addition, "an employee can be constructively discharged only if the underlying working conditions were themselves unlawful (i.e., discriminatory in some fashion)." *Sweeney v. West*, 149 F.3d 550, 557-558 (7<sup>th</sup> Cir. 1998).
- ii. In this case, Complainant resigned her position the same day that Owner rubbed himself against her at work, and indicated that he would be back later that night to close with her, alone. This was also just a couple days after Owner had exposed his genitalia and requested that she perform oral sex on him. It is found that Complainant had no reasonable option but to resign, given Owner's repeated sexual actions toward her.


4) Based upon these facts, a constructive discharge is found in this case.

## **VI. Recommendations**

Based upon the information contained herein, the following recommendations are made to the Maine Human Rights Commission:

- 1) There are **REASONABLE GROUNDS** to believe that Respondent AJ's Variety unlawfully discriminated against Jessica L. Locklear on the basis of sex in violation of the MHRA; and
- 2) Conciliation should be attempted on this claim in keeping with 5 M.R.S. § 4612(3).

  
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