



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

MHRC Case No. E17-0068

December 14, 2018

Mykayla McCann (Turner)

v.

St. Mary's Hospital¹ (Lewiston)

I. Summary of Case:

Complainant Mykayla McCann, who worked as a lab technician for St. Mary's Hospital, alleged that the hospital discriminated against her based on disability when Respondent subjected her to a hostile work environment and retaliated against her when it terminated her employment.² The Investigator conducted a preliminary investigation, which included reviewing all of the documents submitted by the parties and holding a Fact Finding Conference ("FFC"). Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Respondent discriminated against Complainant on the basis of disability and no reasonable grounds to believe that Respondent retaliated against Complainant.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: October 1, 2016 through January 12, 2017.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): February 9, 2017.
- 3) Respondent has more than 15 employees is subject to the Maine Human Rights Act ("MHRA"), the Whistleblowers' Protection Act ("WPA"), and the Americans with Disabilities Act ("ADA"), as well as state and federal employment regulations.
- 4) Complainant is represented by Verne E. Paradie, Esq. Respondent is represented by David Strock, Esq.

III. Development of Facts:

¹ Complainant named "St. Mary's Hospital" as the Respondent in her complaint; Respondent provided that its legal name is "St. Mary's Regional Medical Center". Because Complainant did not amend her complaint, the name she used has been retained.

² In her initial complaint, Complainant also appeared to allege a reasonable accommodation claim based on disability. Specifically, Complainant informally requested Respondent change her schedule to avoid coworker harassment. Because the record does not reflect Complainant conveyed her request to Respondent as related to a disability, a reasonable accommodation claim will not be analyzed by this report.

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

Prior to working for Respondent, Complainant was a patient at Respondent's hospital where she was treated for various conditions related to her disabilities. After Respondent hired Complainant, she discovered that her coworkers had created a workplace display that ridiculed disabled hospital patients. When coworkers started to make verbal comments that seemed to reference Complainant's undisclosed disabilities, Complainant told her supervisor ("Supervisor") she believed coworkers had improperly accessed her medical records. Complainant additionally reported coworker harassment and the discriminatory display. Supervisor agreed to investigate Complainant's reports but did not take prompt remedial action. When coworkers learned Complainant had reported them, the harassment worsened, which Complainant also complained about. Ultimately, Complainant had to go to Human Resources ("H.R.") who also failed to act. The continued harassment left Complainant no choice but to leave her job.

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

During Complainant's employment, she told Supervisor she believed a coworker had improperly accessed her medical records. Supervisor investigated with the help of Respondent's Information Technology Department ("IT Department"). The investigation took several weeks to complete, during which time Complainant reported she "felt" coworkers were harassing her. But when Respondent sought additional information, Complainant could not identify specific conduct or statements that constituted harassment. Respondent did find that three employees had improperly accessed Complainant's records and they were disciplined accordingly; one employee was discharged. Complainant subsequently met with H.R. to further describe her harassment, but this report added new, uninvestigated claims. H.R. offered to investigate, but Complainant declined and requested additional information about her improperly accessed medical records. When H.R. could not immediately produce that information, Complainant tendered her resignation.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties and the information gathered at the FFC³:

- a) Complainant suffers from [REDACTED]. Prior to her employment for Respondent, Complainant was admitted to Respondent's hospital and treated for medical conditions related to her disabilities.⁴
- b) In June 2015, Complainant started working for Respondent as a laboratory technician assistant.

³ Respondent failed to attend the FFC due to confusion in scheduling. The FFC proceeded as an interview with Complainant, and Respondent was provided with a detailed summary of the findings of the FFC. Respondent was then invited to provide a response within 18 days and failed to meet that deadline. Respondent was granted a short extension, but more than one month later, Respondent had still not responded. The Investigator contacted Respondent, again, and Respondent stated it was still preparing a comprehensive rebuttal. More than two months after Respondent's original extension had been granted, Respondent's counsel was notified evidence would be closing; seven days later, Respondent made its submission. Thereafter, the Investigator requested contact information for two of Respondent's key witnesses in order to corroborate information summarized by counsel. Respondent replied witnesses "could be contacted through counsel" and failed to provide the requested contact information to the investigation. The only direct source of information and contact Respondent afforded the Investigator was to Respondent's counsel.

⁴In 2011, Complainant was treated for a [REDACTED]; in 2015, she was treated for [REDACTED].

- c) On Complainant's first day of work, Complainant discovered a display her coworkers ("Coworkers") had fashioned on the inside of cabinet door. It was labeled "Wall of Shame" ("Shame Wall") and consisted of a cut and taped collage of patients' confidential medical records. Shame Wall included information detailing patients' sexual activity, genital dysfunction, bowel movements, bodily odors, and other personal maladies. Complainant was initially concerned that Shame Wall was an illegal Health Insurance Portability and Accountability Act ("HIPPA") violation, but because Complainant was a new employee, she did not immediately report Shame Wall. Complainant also worried reporting would identify her as a person Respondent had treated for a disability and caused her to be targeted.
- d) In April 2016, Complainant took a leave of absence from work related to her [REDACTED] and worsening symptoms of [REDACTED]. Complainant specifically sought treatment from hospitals other than Respondent's hospital because she feared she would be ridiculed by Coworkers.
- e) In June 2016, Complainant returned to work and felt Coworkers were treating her differently. Three laboratory technicians ("Lab Tech 1, Lab Tech 2, and Lab Tech 3"), in particular, asked Complainant notable questions such as, "Do you drink a lot?", "Do you party a lot?", "Do you drink and drive?", and "This person overdosed, isn't that weird?" The specific nature of the remarks made Complainant suspect Coworkers had improperly accessed her electronic medical files ("EMR"). Complainant asserted, and Respondent denied she specifically reported these statements.
- f) In or around September 2016, Complainant told Supervisor that she believed Coworkers had improperly accessed her EMR and that she was the subject of workplace harassment. The written record is devoid of evidence Complainant expressly tied Coworkers' harassing comments to her disability.⁵ Still, it is plain that Complainant and Supervisor had some conversation about her disabilities so that Complainant could describe the reasons for her suspicions surrounding EMR access.⁶ Complainant also reported the existence of Shame Wall.⁷ After Complainant reported to Supervisor, Supervisor agreed she would investigate Complainant's claims.
- g) According to Respondent, the investigation was a complicated process requiring Supervisor to work with Respondent's Information Technology Department and investigation took significant time to complete.
- h) On Friday, October 14, 2016, Complainant sent Supervisor text messages stating that she felt uncomfortable working with certain coworkers and that she wished to be separated from them. The text messages did not connect the reason for Complainant's request to disability-related harassment. Complainant texted Supervisor over the weekend to state she was working out a resolution with Coworkers, and, accordingly, Respondent did not make adjustments to Complainant's schedule.

⁵ Contemporaneous text messages only reflect Complainant complained about Lab Tech 1 criticizing her job performance and the distribution of duties.

⁶ Complainant provided she explained to Supervisor that she had been hospitalized for mental health issues at Respondent's hospital and provided Supervisor with her dates of institutionalization in order to aid any investigation.

⁷ Respondent provided that Supervisor denied that Complainant reported disability related harassment and also denied that Complainant reported Shame Wall as early as September 2016. Supervisor recalled Complainant first reported conflict with coworkers that "felt like" generalized harassment in October 2016.

- i) On October 21, 2016, Supervisor spoke with Complainant and a coworker, separately, to determine whether their earlier interpersonal conflict had improved. Complainant stated interactions were “awkward” but did not indicate there were serious, on-going concerns related to disability harassment.
- j) In November 2016, Supervisor met with Complainant to update her on the investigation and told her the audit information had indicated Coworkers had improperly accessed her EMR but that Respondent was still working to confirm this. Complainant demanded a list of the people who gained access, but Supervisor declined to provide the list where the investigation was on-going.
- k) When Complainant hadn’t heard back from Supervisor by December 6, 2016 at approximately 5:00 p.m., Complainant emailed Respondent’s Director of Human Resources and Learning (“H.R. Director”). Complainant told H.R. Director that she was contacting her because she had already reported to Supervisor that Coworkers “[had] gone into [her] private records at the hospital and [had] been mocking [her] for what they think is a disability (██████████)”. Complainant stated she believed this was a violation of law and that, “[Coworkers were] taunting [her] saying things like, ‘do you drink a lot? etc.’” Complainant continued: “That is disability harassment and I want it to stop. I also want the illegal looking into my records to stop. What do I need to make this happen?”
- l) On December 7, 2016, H.R. Director responded to Complainant via email to ask for her phone number to schedule an appointment to speak with Complainant. She replied the next day, and H.R. Director scheduled a time to speak the following day.
- m) On December 9, 2017, H.R. Director and Complainant spoke on the phone. Complainant was primarily concerned with concluding the EMR investigation. According to Respondent, H.R. Director explained review of the EMR was taking longer than expected but that she anticipated she would have more information the following week.
- n) On December 22, 2016, Supervisor and Respondent’s Director of Laboratory Services (“Lab Director”) met with Complainant in person.⁸ She was told Respondent was acting to discipline those employees who had improperly accessed her EMR. Complainant asked, again, for a list of all persons who had gained improper access; Supervisor stated she would have to speak with R.M. Director to determine if she could provide this information.
- o) On December 28, 2016, Supervisor met with Complainant based on a coworker’s complaint that there had been a workplace disagreement. The record does not reflect Complainant reported disability related harassment connected with this incident.
- p) On December 27, 2016, Respondent discharged Lab Tech 1, warned a second coworker who had gained improper access, and removed Shame Wall from display. According to Complainant’s written submissions, other Coworkers then intensified their harassment in retaliation for Lab Tech 1’s discharge. In this investigation, however, Complainant could only provide that Coworkers inquired about Lab Tech 1’s termination and whispered in front of her; she could not testify to other examples of increased harassment.

⁸ Complainant suggested there was also a meeting with Risk Management Director (“R.M. Director”) around this time. However, R.M. Director was out of the office until January 3, 2017.

- q) On January 3, 2017, Complainant met with R.M. Director, Supervisor, and Lab Director. They discussed the discipline Respondent had pursued for the three individuals who had improperly accessed Complainant's EMR. Complainant was also provided with the actual electronic records audit Respondent conducted and provided with the names of the three individuals disciplined.
- r) On January 6, 2017, Supervisor met with Complainant after she complained Coworkers were "talking behind her back." Complainant described a situation in which Coworkers stopped speaking when she approached. The record does not reflect Complainant reported this was disability related harassment.
- s) Complainant testified Shame Wall was still in tact and was not removed until January 2017. Respondent disputed this timeline and claimed Supervisor removed Shame Wall a matter of weeks after it was first reported. Complainant produced credible evidence⁹ to refute this.
- t) On January 12, 2017, Complainant or Complainant's counsel prepared a letter of resignation ("Resignation Letter") which Complainant presented to H.R. Director. The Resignation Letter used legal language to state Complainant was resigning due to the "hostile work environment" and "HIPPA violations" previously reported, Respondent's failure to take corrective action,¹⁰ and "intolerable" work conditions. Resignation Letter also specifically stated Complainant had newly retained an attorney. According to Respondent, Complainant came into H.R. office, insisted she be provided a complete list of names of every person who had accessed her EMR, and when H.R. Director told Complainant she did not have that information available,¹¹ Complainant presented Resignation Letter to H.R. Director and walked out before H.R. Director could review it.
- u) On January 13, 2017, H.R. Director sent Complainant a letter ("Response Letter") commemorating their last meeting. Response Letter confirms that the substance of H.R. Director's previous conversations with Complainant were addressing her EMR access concerns. Response letter corroborates Respondent's assertion that H.R. Director only read Resignation Letter after Complainant left H.R. office and clearly states Resignation Letter contained new allegations (of retaliatory hostile work environment), which required investigation. When Complainant was invited to delay her resignation and discuss this with H.R. Director, she declined.¹²
- v) It is notable, at the FFC Complainant presented as anxious to an extreme and genuinely struggled to articulate her experience. Rather than affecting Complainant's credibility, the Investigator took this as support of Respondent's account that Complainant's reporting was often difficult to follow. Complainant's thin communication makes it more likely than not that she had difficulty describing disability-related and retaliatory harassment to Respondent.

IV. Analysis:

⁹ Complainant produced photographic evidence of Shame Wall that was electronically dated December 26, 2017 in addition to a third-party witness statement that corroborated Shame Wall was displayed into January.

¹⁰ Complainant does not dispute that at this time, Respondent had taken corrective action to remove Shame Wall and to discharge and discipline, respectively, at least two Coworkers who had improperly accessed Complainant's medical files.

¹¹ Just as Supervisor had told Complainant previously, H.R. Director told Complainant that R.M. Director was in control of the information she was seeking and suggested Complainant contact R.M. Director.

¹² Respondent gave Complainant until January 20, 2017 to contact H.R. for further discussion and Complainant did not.

- 1) The 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 Maine Revised Statutes (“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.

Disability Discrimination – Hostile Work Environment

- 2) The MHRA provides that it is unlawful for an employer to discriminate with respect to the terms and conditions of employment on the basis of physical or mental disability. 5 M.R.S. § 4572(1)(A).
- 3) Harassment on the basis of protected class is a violation of this section 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., 94-348 Code of Maine Regulations (“C.M.R.”) 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 disability harassment; (3) that the harassment was based upon disability; (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, 902-03.

- 6) 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.

- 7) Complainant has established that she was subjected to a hostile work environment on the basis of disability, with reasoning as follows:
- a) She is a member of a protected class (disabled or perceived as disabled) and experienced unwelcome conduct related to disability harassment. Complainant was specifically targeted when Coworkers improperly accessed her EMR. It is irrelevant whether Shame Wall targeted Complainant; Coworkers constructed a workplace display ridiculing patients with disabilities. Complainant encountered the display every day as part of her regular environment, making harassment pervasive.
 - b) Complainant was subjectively offended by her Coworkers' conduct, which (at least in respect to Shame Wall) was also objectively offensive. The information posted on Shame Wall was intended to demean and humiliate and included supposed "jokes" about the hospital's physically and mentally disabled patients. Complainant's work performance was likely impacted by stress over the work environment,¹³ and the fact that Complainant felt she could not continue her job, due at least in part to this stress, is evidence it was disruptive.
 - c) Complainant argued she suffered a tangible adverse employment action when 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, ¶ 8.¹⁴ 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 not met this standard. Although she suffered an abusive environment, Respondent eventually took corrective action to allow her to continue to work. Given the fact that conditions did change, it was not reasonable for Complainant to feel that she had no choice but to leave her job.
 - d) Even in the absence of a tangible employment action, employer liability is established here. Respondent was unable to prove that it took prompt and effective action to eliminate harassment. With respect to Coworkers' improper access to Complainant's EMR, there is evidence Respondent took necessary steps to investigate and discipline Co-Workers, which was a complicated process.¹⁵ However, Respondent took 3-4 months after learning of Shame Wall to investigate and remove it,¹⁶ which is an unacceptable delay.

¹³ The persistence of Complainant's emotional distress was also easily observable through questioning at the FFC.

¹⁴ 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.

¹⁵ Coworker comments that Complainant reported to Supervisor were not sufficiently linked to her disability for Respondent to perceive them as unlawful harassment. Instead, the record reflects Complainant reported interpersonal disputes related to seniority, distribution of work, and other non-discriminatory power dynamics in the workplace. While it is possible Coworkers asked questions of a disability-related nature, Respondent was not on notice Coworker comments contributed to a hostile work environment until Complainant presented Resignation Letter to Respondent's H.R.

¹⁶ It is notable that The Wall was a preserved (and easily investigable) display, recording Coworkers' abusive commentary.

- 8) It is found that Respondent subjected Complainant to a hostile work environment based on disability.

MHRA and WPA Retaliation

- 9) 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).
- 10) 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).
- 11) 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).
- 12) Complainant has established a prima-facie case by showing that she raised concerns about discrimination, that Coworker’s comments persisted and allegedly worsened, and that her employment subsequently ended.
- 13) Respondent has provided a legitimate, nondiscriminatory reason for its actions: Complainant did not describe worsening conduct sufficient for investigation and she chose to separate her employment.
- 14) In the final analysis, Complainant has not established that there is a causal connection between her alleged protected activity and any adverse action she experienced, with reasoning as follows:
- a) As previously discussed, Complainant alleged that Coworkers abused and berated her throughout her employment, which she reported to Respondent. Complainant then claimed harassment worsened after Respondent took corrective action, but she could not provide credible testimony to support this claim. While a hostile work environment may constitute a retaliatory adverse action, Complainant has not described conduct meeting that standard here. Although it is likely Coworkers questioned Complainant about Lab Tec 1’s discharge or whispered about their speculations, normal workplace gossip does not amount to unlawful harassment.

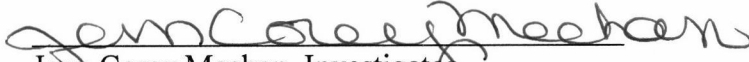
- b) Respondent took no other adverse action against Complainant. According to this report's earlier analysis, Complainant was not constructively discharged and Respondent did not terminate her employment.¹⁷ Instead, Complainant chose to leave her job.

15) Retaliation in violation of the MHRA and WPA is not found.

V. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that St. Mary's Hospital discriminated against MyKayla McCann based on disability when it subjected her to a hostile work environment, and this claim should be conciliated in accordance with 5 M.R.S. § 4612(3).
- 2) There are **No Reasonable Grounds** to believe that St. Mary's Hospital retaliated against MyKayla McCann for protected activity when it terminated her employment, and this claim should be dismissed in accordance with 5 M.R.S. § 4612(2).


Jenn Corey Meehan, Investigator

¹⁷ Complainant quit her job in H.R. meeting in which H.R. invited her to describe her claims of *on-going* harassment with specifics about Coworkers' continuing conduct. Instead of providing a description, Complainant decide she had no reasonable alternative but to leave her job.