



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT

**MHRC Case No. E17-0346**

April 4, 2019

**Kristin Robinson (Portland)**

v.

**Emilio Estates, Inc. (East Corinth)**

### **I. Summary of Case:**

Complainant Kristin Robinson, who worked as a certified residential medication aide ("CRMA"), alleged that Respondent retaliated against her when they discharged her for reporting unsafe activity. Respondent Emilio Estates, Inc., a residential care facility, denied retaliating against Complainant and stated Complainant was discharged when she violated the Health Insurance Portability and Accountability Act ("HIPAA"). Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Respondent retaliated against Complainant for engaging in protected activity.

### **II. Jurisdictional Data:**

- 1) Dates of alleged discrimination: January 27, 2017.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 26, 2017.
- 3) Respondent is subject to the Maine Whistleblowers' Protection Act ("WPA"), as well as state employment regulations.
- 4) Complainant is represented by Chad Hanson, Esq. Respondent is represented by Michael L. Rair, Esq.

### **III. Development of Facts:**

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

Complainant worked as a CRMA for Respondent for several years. As part of her employment, Complainant received periodic CRMA training from a third party. With her additional training, Complainant began to note many of Respondent's practices did not meet professional standards. Because Complainant also believed some practices were unsafe/illegal, she reported them to her supervisor ("Administrator"). When Administrator did not respond, Complainant reported to the owner ("Owner") and other persons in management. When Complainant's concerns were still not addressed, she reported to a state agency ("State Agency") who inspected Respondent's facility. Days later, Owner told Complainant she needed to "clean the rats out of her house" and discharged Complainant without explanation.

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

Complainant never reported illegal or unsafe activity to Administrator, Owner, or other management. Complainant brought a guest into Respondent's facility and into an area that was "restricted." Residents' Confidential medical information was on display in the restricted area and someone reported Complainant to the state for a violation of HIPAA. Complainant was discharged in connection with this violation.

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

- a) In October 2013, Respondent hired Complainant to work as a CRMA at its 18-bed residential care facility. In November 2015, Complainant became Respondent's "night supervisor," and Administrator was Respondent's "day supervisor."<sup>1</sup>
- b) In order for CRMAs to maintain certification, Respondent requires them to attend third-party training.
- c) After additional training, Complainant recognized Respondent's practices did not meet professional standards and were, in many cases, unsafe/illegal. According to Complainant, she specifically reported these concerns to Administrator. Reports were made on a daily basis, verbally and in writing, for several weeks. According to Complainant, she discussed her concerns on cigarette breaks<sup>2</sup> as well as formally documenting them<sup>3</sup> in her nightly shift reports. Administrator did not respond, so Complainant reported to Owner, and, in at least one instance, reported to other management ("Scheduler"). Respondent failed to address almost all of Complainant's reports.
  - i. Complainant reported resident medications that were expired and should have been discarded months prior by her Administrator. Complainant testified some labels with expiration dates were purposefully removed, which was first drew to her attention to the problem.
  - ii. Complainant reported resident medications that were left out on counters and purposefully placed in other unlocked storage areas, including an unlocked cabinet in a storage room adjacent to the kitchen and the laundry room and in a mini-fridge that did not lock. According to Complainant, this was of particular concern where Respondent had falsely held out to the state that all resident medication was kept in a locked medicine cart.
  - iii. Complainant reported rat poison that was left out on kitchen surfaces next to food.
  - iv. Complainant reported Respondent's failure to document the administration of medication to residents.
  - v. Complainant reported Respondent was using insulin needles paid for by one resident to administer medication to different residents who were out of insulin needles, which was effectively theft.

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<sup>1</sup> As supervisor of the night shift, Complainant lacked authority to discipline other employees and only had authority to report her concerns to Administrator for corrective action.

<sup>2</sup> Complainant provided that in one of her cigarette breaks she and a co-worker discussed the fact that Owner's ex-girlfriend often performed state inspections for Respondent's facility and that was the reason Respondent was permitted to be drastically out of compliance with state regulations.

<sup>3</sup> Complainant explained that at the end of each night shift, she created a shift report. Complainant would discuss the shift with Administrator before commemorating it into a written report. Complainant credibly testified that reports of unsafe/illegal activity would be reflected throughout weeks of shift reports leading up to her discharge. Respondent was asked and failed to produce shift reports.

Complainant produced text messages between her and Administrator in which Administrator acknowledges this practice and jokes about it.

- d) Another CRMA (“Co-Worker”) shared Complainant’s concerns and made similar reports to Administrator and, later, State Agency. Co-Worker worked alongside Complainant, observed her nightly reports, and testified as a credible witness to substantiate many of the specific details of her claims.
- e) When Complainant realized Respondent did not plan to take corrective action, on or around January 13, 2017, Complainant contacted State Agency and reported a list of her safety/legal concerns for the state’s review.<sup>4</sup>
- f) Between January 18, 2017 to January 24, 2017, State Agency inspected Respondent’s facility. Complainant was not at work while the inspection was taking place. After the inspection, Co-Worker noticed Owner had removed Complainant from the work schedule. According to Complainant, Co-Worker objected to Owner, “You realize you can’t do that because [Complainant] called the state.” State Agency found several violations at the facility, which Respondent was instructed to address.
- g) After the inspection and before Complainant’s next shift, Complainant was removed from the work schedule and instructed to call Owner. On January 27, 2017, Complainant spoke to Owner by phone, and Owner told Complainant she was discharged and stated something to the effect of, “I don’t need a reason to fire you. I’m cleaning the rats out of my place; I suggest you do the same.”<sup>5</sup> Complainant believed this to mean Owner was firing her for being a “rat” and reporting Respondent to State Agency.<sup>6</sup>
  - i. At the time of Complainant’s discharge, Owner did not give any other reason for termination. Owner only broadly stated, Complainant could not continue to work for Respondent because of unspecified “misconduct.”<sup>7</sup>
  - ii. Respondent never asserted Complainant was discharged due to a HIPAA violation until after she filed this WPA complaint. Complainant flatly denied she ever brought a guest into contact with confidential resident medical information, which Co-Worker stated she also would have observed. Respondent failed to provide even the most basic detail which would allow Complainant to respond to its alleged legitimate reason for termination. Among other summary submissions, Respondent failed to provide who reported Complainant to the state, what state agency investigated the report, what investigation took place, or the results of any investigation. Egregiously, Respondent did not

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<sup>4</sup> It is notable Complainant’s written report to State Agency substantiates the list of unsafe/illegal activity she described in great detail at the IRC.

<sup>5</sup> Complainant’s boyfriend produced a witness statement that Complainant discussed this statement with him at the time it was made and testified to Complainant’s reaction to her discharge.

<sup>6</sup> In Respondent’s only written submission it asserted, in this phone conversation, Owner told Complainant that she was the one being investigated by the state for HIPAA violations, and stated the open investigation was the reason for her discharge. Respondent never provided how any alleged investigation was concluded or, based on the investigation’s resolution, why it decided to end Complainant’s employment.

<sup>7</sup> Complainant disputes she engaged in misconduct and the record reflects Respondent’s evidence, which could not be cross-examined, was all produced ex post facto.

even identify what “restricted” area it was referencing in its claims to permit Complainant to respond.<sup>8</sup>

- iii. Respondent was asked to provide *credible* evidence Complainant had been reported and/or investigated for a HIPAA violation.<sup>9</sup> It did not submit responsive documents (or additional, qualifying information). In fact, Respondent refused to engage with the investigation after it provided its initial answer to Complainant’s charges. According to Complainant, a Freedom of Access Act (“FOAA”) request it made to the state concluded Complainant had never been reported for HIPAA violations.
- h) Complainant understood her employment to be terminated and did not return to work. She was never contacted by the state related to any HIPAA violation investigation and Respondent never asked her any questions about this alleged violation.
- i) Notably, after Complainant was discharged, Respondent also terminated Co-Worker’s employment. According to Complainant, this was because Respondent learned Co-Worker had also been reporting to State Agency and had objected to Owner’s retaliation.

#### IV. Analysis:

- 1) 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).
- 2) To establish a prima-facie case of WPA retaliation,<sup>10</sup> 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 employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514. One method of proving the causal link is if the adverse job action happens in “close proximity” to the protected conduct. *Id.* at 1998 ME 227, ¶ 16, 719 A.2d at 514-15. The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA protected activity. *See Wytrwal 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 employment action.” *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, then Complainant must carry her overall burden of proving that “there was, in fact, a causal connection between

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<sup>8</sup> Both Complainant and Co-Worker testified there was no commonly known “restricted area” at the facility. They speculated whether Respondent was referring to the facility’s kitchen where (due to Respondent’s own bad practices) resident medication was sometimes left out. According to Complainant, however, a church group meets regularly at Respondent’s facility and are permitted access to the kitchen, which seems to negate the idea Respondent perceived kitchen as a “restricted” area.

<sup>9</sup> Respondent did produce a letter dated February 6, 2017 written by Owner that stated Complainant was being discharged for alleged HIPAA violations. Because Respondent did not participate in the Commission’s investigation, the investigator could not examine whether this was produced contemporaneously. Complainant denied she had ever seen this letter prior to the Commission’s investigation.

<sup>10</sup> To determine whether Complainant has met the reasonable grounds standard, the Commission must determine whether he has at least an even chance of succeeding *at trial*. Accordingly, *Brady v. Cumberland County*, 2015 ME 143, ¶39 which holds that the burden-shifting analysis used here is unnecessary when a court is deciding a motion for summary judgment, is inapplicable. *Id.* at ¶ 39, n.9 (expressly not considering applicability of burden-shifting structure at trial).

the protected activity and the adverse employment action." *Id.* To prevail, Complainant must show that Respondent would not have taken the adverse employment action but for her protected activity, although protected activity need not be the only reason for the decision. *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).

- 3) Complainant has established a prima-facie case by reporting reported what she believed to be unsafe/illegal activity just shortly before her discharge. The proximity of the timing is a strong indicia of a causal connection. Respondent provided legitimate, nondiscriminatory reasons for Complainant's discharge by claiming Complainant, herself, was being investigated by the state for a HIPAA violation.
- 4) In the final analysis, Complainant has met her burden of showing that the real reason for her discharge was her alleged protected activity, with reasoning as follows:
  - a) Complainant performed her job satisfactorily and Respondent has not produced evidence it had concerns about her work performance until her discharge. It is telling Complainant's dismissal immediately followed State Agency's investigation. At the time of Complainant discharge, Owner stated, "I don't need a reason to fire you. I'm cleaning the rats out of my place," and did not explain what "misconduct" she suspected Complainant of. Respondent did not produce Owner for cross-examination.
  - b) There is substantial corroborating evidence Complainant engaged in protected activity, verbally and in writing. This is succinctly reflected in the written report Complainant made to State Agency and is supported by Co-Worker. Reports of unsafe/illegal activity would also likely be recorded in Complainant's nightly shift reports, over the course of several weeks, had Respondent been willing to produce them.
  - c) Despite the investigator's many invitations,<sup>11</sup> after Respondent's initial answer to the MHRC complaint, it refused to participate, whatsoever, in the Commission's investigation. If Respondent legitimately suspected Complainant of violating HIPAA, it would have been obligated to report a complaint to the state. Respondent failed to produce evidence the state had received any reports concerning Complainant. According to Complainant, her FOAA request revealed the state had no record of any HIPAA complaint or subsequent investigation. Beyond this dearth of evidence, it is undisputed Owner never interviewed Complainant to determine what was allegedly reported as a HIPAA violation. Even if a HIPAA complaint existed, this fact, by itself, suggests pretext for retaliation.
- 5) Retaliation for engaging in WPA-protected conduct is found.

## **V. Recommendation:**

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

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<sup>11</sup> Respondent and its Witnesses were invited to participate at the IRC, which ultimately took place as an interview with Complainant on January 17, 2019; Respondent chose not to appear. Respondent was invited to provide a written response to a summary of that interview by February 14, 2019 and did not. Additional written Requests for Information were made on February 6, 2019, also due February 14, 2019, and Respondent was specifically invited to respond to Complainant's individual submissions on four other occasions throughout the investigation, and provided no response.

There are **Reasonable Grounds** to believe Respondent Emilio Estates, Inc. retaliated against Complainant Kristin Robinson in violation of the WPA because she engaged in protected activity, and the complaint should be conciliated in accordance with 5 M.R.S. § 4612(2).

  
Jenn Corey Meehan, Investigator