# Maine Human Rights Commission

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**INVESTIGATOR'S REPORT**
**MHRC Case No. E17-0400**
August 1, 2018

**Adrian D. Moss (Winter Haven, FL)**

**v.**

**Brock Services LLC (Portland)**[1]

## I. Summary of Case:

Complainant Adrian Moss, who works as a scaffold builder for Respondent Brock Services LLC, an industrial services company, alleged that he was discriminated against due to his race and color when he was subjected to a hostile work environment. Respondent denied discrimination and asserted that Complainant was not subjected to a hostile work environment; Respondent further provided that if Complainant was harassed, it took prompt and appropriate action on the information he reported. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, holding an Issues and Resolution Conference ("IRC"), and requesting additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Respondent unlawfully discriminated against Complainant based on his race and color.

## II. Jurisdictional Data:

1) Dates of alleged discrimination: September 2010 to July 2017.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): November 2, 2017.

3) Respondent has more than 15 employees and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964, and state and federal employment regulations.

4) Complainant is represented by Lisa Butler, Esq. Respondent is represented by Travis Odom, Esq.

## III. Development of Facts:

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

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[1] Complainant named Respondent as "Brock Services LLC"; Respondent provided that its legal name is Brock Services, LLC. As Complainant did not amend his complaint, the name he used has been retained.

Complainant has worked for Respondent as a scaffold builder since 2010. Complainant worked in the Portland, Maine office from 2010 to August 2015, and again from July 2016 to July 2017; he worked for Respondent in Florida for a brief period in 2015, and again from July 2017 until present. During his time in Maine with Respondent, Complainant was subjected to racial remarks from coworkers and supervisors. Black people were constantly referred to as "niggers", or "nigger bitches" if they were female. Complainant was called "nigger" and "boy", and was referred to as "Africa". A supervisor told him he was not invited to a cookout because he was the "wrong color," and a supervisor telling him "I don't like niggers." The only action Respondent took to stop the behavior was a vague email about working together, which ended up being mocked and ridiculed.

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

The incidents as alleged do not amount to a hostile work environment. Even if they did, Complainant never gave Respondent enough specific information to thoroughly investigate the allegations as they occurred in order to remedy the situation. From the information Respondent had, it sent an email to the supervisors in the area letting them know the consequences of such behavior.

3) The Investigator made the following findings of fact:

a) Complainant has worked for Respondent as a builder since August 2010. Complainant worked for Respondent in Maine from August 2010 to July 2015 and again from July 2016 to July 2017.

b) During his time with Respondent in Maine, Complainant heard various supervisors and coworkers make racially-charge comments around him and directed to him on a regular basis.

c) Specifically, a supervisor ("Supervisor 1") told him "I don't like niggers," another supervisor ("Supervisor 2") called him by the nickname "Africa," another supervisor ("Supervisor 3") said to him "you're ok for a black guy", made racial jokes referencing slavery, and responded to a question about an invite to a barbeque with "sorry, you're the wrong color."

d) On a regular basis supervisors and other builders would use the words "nigger" and "boy" in conversation. Complainant was upset with the comments and believed it made the dangerous conditions when scaffolding even riskier because he felt that his coworkers valued him less than other people.

e) During Winter 2011, Complainant informed the scheduling coordinator that he did not want to be scheduled with Supervisor 1, Supervisor 3, and another builder because of their racial comments and because Complainant believed he might respond to further comments with violence.

f) In the Spring of 2015, Complainant told the operations manager ("Operations Manager") about the racist comments. Operations Manager told Complainant that the behavior was unacceptable, but Complainant believes nothing was done about it.

g) In the Summer of 2015, Complainant requested, and was granted, a transfer to Florida. Complainant's pay went from $18.95 per hour to $17 per hour. In October 2015, Complainant was discharged from Respondent in Florida. In July 2016, Complainant was rehired by Respondent in Maine.

h) In February 2017, Complainant again reported to Operations Manager that the racial comments were continuing constantly.

i) On March 22, 2017, Operations Manager sent an email (Exhibit A) to the supervisors referencing treating other employees with respect.

j) Supervisor 3 read the email out loud to several employees in what Complainant believed was a mocking tone. After reading it, Supervisor 3 called Complainant a snitch.

k) On June 22, 2017, Operations Manager asked Complainant via text message if he was transferring. Complainant responded, "Back down to Florida Brock, if possible. I'm tired [Operations Manager]. I bite my tongue and keep my hands in my pocket… I'm seriously going to end up putting my hands on somebody because of the racist remarks that continue (day in and day out, pretty much none [sic] stop. Thought I could just work and let the ignorance be, but it's taxing."

l) In July 2017, Complainant transferred back to Respondent's operations in Florida.

m) Respondents' policy on protected class harassment states in relevant part, "any supervisor or manager who receives a report of harassment or illegal discrimination must report such to the Human Resources Department immediately." Respondent concedes that Operations Manager did not report this to Human Resources ("HR") until September 2017, after this complaint was filed.

n) Once notified, HR conducted an internal investigation into the matter. The investigation report summary noted that "[Complainant] did not name names, but there were several Supervisors who [Operations Manager] thought may have made racist comments as [Operations Manager] had heard some comments from those individuals in the past."

## IV. Analysis:

1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 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, in part, that it is unlawful, based on protected-class status, to "discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to 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, 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 he is a member of a protected class; (2) that he was subject to unwelcome harassment; (3) that the harassment was based upon his race; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of his 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 he 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) With regard to employer liability:

   a. Supervisors: 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).

   b. Coworkers: 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) Here, Complainant has met his burden of showing that he was subjected to a hostile work environment based on race and color, with reasoning as follows:

   a. In total, the behavior Complainant asserted meets the standard for severe or pervasive conduct. Complainant provided that he heard race/color-based comments virtually every day. While Respondent correctly points out that some of the comments were not directed at him, most were; the comments directed at or about others also tend to suggest that because of his similar immutable traits, Complainant was held with lower regard in the workplace. Being called "nigger" or "boy" regularly in the workplace is both severe and pervasive conduct.

   b. Respondent's argument that it is entitled to the affirmative defense precluding liability for the acts of its supervisors is not wholly without merit. However, it cannot fairly be said that Respondent exercised reasonable care to correct the behavior at issue or that Complainant unreasonably failed to take

advantage of corrective opportunities. Complainant reported the harassing behavior to a supervisor on multiple occasions, but the supervisor admittedly did not report the behavior to HR as required by Respondent's policy. Having the policy is one thing; ensuring that it is followed is another.

c. Respondent argues that Complainant's reports were not detailed and therefore it was unable to take any more stringent corrective action. The lack of specifics in Complainant's reports to Respondent and during the earlier stages of the Commission process is certainly an issue. However, the record supports a finding that the majority of supervisors and coworkers at Complainant's worksite were contributing to the harassment on a regular basis, which provides an explanation for Complainant's lack of detailed report. Operations Manager was aware that supervisors at that site had made racist comments in the past. However, Respondent's only action was to send a vague email to those supervisors. That email was mocked and Complainant was called a snitch. Complainant's reluctance to supply more directed accusations is not surprising.

d. Respondent similarly argues that liability should not attach under the standard for coworker liability. However, again, it appears that Respondent was well aware of the racial comments being made, yet the sole action Respondent took (the email) was not appropriate corrective action. The email was sent only to supervisors, and did not mention harassment at all.

8) Discrimination on the basis of race and color is found.

**V. <u>Recommendation:</u>**

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

There are **Reasonable Grounds** to believe that Brock Services LLC discriminated against Adrian Moss based on his race and color, and the claim should be conciliated in accordance with 5 M.R.S. § 4612(3).

Amy M. Sneirson, Executive Director

Joseph H. Hensley, Investigator