



Maine Human Rights Commission
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INVESTIGATOR'S REPORT
E11-0494

July 8, 2013

[REDACTED]

v.

[REDACTED]

I. Complaint:

Complainant [REDACTED] alleges that Respondent [REDACTED] discriminated against her on the basis of disability by failing to provide her with a reasonable accommodation. Complainant also alleges that Respondent terminated her employment for reporting unsafe activity in the workplace, in violation of the Maine Human Rights Act and the Maine Whistleblowers' Protection Act.

II. Respondent's Answer:

Respondent denies discrimination and retaliation, and alleges that Complainant did not request a reasonable accommodation and was terminated after her failure to notify Respondent whether or not she would be returning to work.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: April 18, 2011.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): August 18, 2011.
- 3) Respondent employs 90 people and is subject to the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act, the Maine Whistleblowers' Protection Act ("WPA"), and state and federal employment regulations.
- 4) Complainant is represented by Melissa O'Dea, Esq. Respondent is represented by [REDACTED] Esq.
- 5) Investigative methods used: A thorough review of the materials submitted by the parties, interviews. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

- 1) The relevant parties in this case are as follows:
 - a) Complainant has severe anxiety and alleges to have a disability under the MHRA. She worked for Respondent since 1998 as a program assistant and most recently as an operations manager / assistant director until April 18, 2011 when she was terminated.
 - b) Respondent operates a non-profit community agency offering a variety of programs and services to the community.
 - c) "Coworker" was Complainant's Coworker during her employment.
 - d) On April 13, 2011 Complainant had an altercation with Coworker after which she complained to human resources that she feared for her safety.
 - e) Complainant was treated by her doctor ("Doctor") following her termination on April 18, 2011. She was diagnosed with situational anxiety and prescribed medication. Doctor's note from the visit states that she was "Tearful & shaking and visibly upset." (See file.)

- 2) Complainant provided the following:
 - a) Coworker had a history of losing his temper and blowing up at her and other coworkers. During a staff meeting on February 23, 2010, Coworker screamed at her and told her, "f**king shut your mouth" while shaking his finger in her face. Coworker was mandated to take anger management classes after the incident and his temper outburst was documented by Respondent.
 - b) On April 13, 2011, Coworker became irate and yelled at her when she asked him for a file with vendor paperwork. He screamed at her to get them herself and shouted, "I'm too busy for this sh*t. You are always the same and not a team player." She followed him into her office and said loudly, "look who's calling the kettle black." Coworker repeatedly yelled at her while pointing his finger at the filing cabinet and stating, "they're right there" (referring to the files). She was scared after the incident and felt that Coworker was unpredictable and could lash out at her at any moment.
 - c) As a result of the incident she was visibly shaken, anxious and scared. She met that day with Respondent's Human Resources Director ("HR Director") to report the incident and to report that Coworker has a history of aggressive behavior. HR Director asked her if she felt safe, and Complainant responded that she thought she was okay. As she went back to her office, she realized that she was not able to calm down and really did not feel safe. She told HR Director that she was leaving.
 - d) On April 14, 2011 she called before the start of her shift and spoke to Respondent's Administrative Housing Director ("AHD"). She told her that her nerves were shattered and asked if Coworker was in the office that day. AHD responded affirmatively and told Complainant that an investigation was under way. Complainant told her that she would have to stay home until she could be assured of her safety in the workplace.

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- e) On April 15, 2011 she spoke to AHD first thing in the morning and to AHD and HR Director later in the day. HR Director told her that the investigation was concluded and that Respondent was not going to terminate Coworker since they had no grounds to do so. HR Director stated that the investigation had revealed that Complainant was the instigator of the altercation and that she had raised her voice before Coworker had. HR Director then asked Complainant what she wanted to do, and Complainant told them that she was still very anxious and scared, and that she needed some time to process. HR Director told her that she was a very valuable employee, and to decide what to do by Monday because Complainant was working on a time-sensitive contract. Also on Friday, Complainant sent an email to Respondent addressing the incident on April 13th and stating that she felt frightened and terrorized by Coworker's outbursts and did not feel safe in the workplace with him present.
 - f) On Monday, April 18, 2011 she left a message for AHD telling her that she would not be in for her scheduled shift because she had an appointment with her medical provider to address her anxiety as a result of the incident with Coworker and had not slept all weekend. AHD returned her call while she was not home and left a voice message. When Complainant called AHD back, AHD told her that she was being terminated because she had left a message stating that she was not coming into work that morning, and because she was a key player in a contract with a deadline coming up. Complainant explained to AHD that she would not have been a good employee that day because of her nerves and her lack of sleep. Complainant was crying during the conversation and had to hang up the phone. She never stated that she had decided to resign or not come back to work.
 - g) She was treated by Doctor that afternoon following her termination and was prescribed anti-anxiety medication for her severe emotional distress. Doctor told her that due to her situational anxiety she would have advised her to take a medical absence of at least two weeks. She had extreme difficulty sleeping due to her anxiety.
 - h) Instead of taking action to protect her, Respondent punished her for reporting unsafe activity by terminating her employment after a rushed and factually incorrect investigation into the incident with Coworker.
- 3) Respondent provided the following:
- a) Respondent had no knowledge of any disability during Complainant's employment. She never requested an accommodation. Complainant was visibly upset after the April 13th incident and did state that she was going to see a doctor regarding stress and anxiety as a result, but this was not regarded as a disability.
 - b) Respondent properly and thoroughly investigated Complainant's allegations surrounding the April 13th incident with Coworker. HR Director interviewed all of the employees present in the area at the time of the incident and concluded that Complainant had been heard raising her voice first, had matched Coworker in his yelling, and there were no grounds to terminate Coworker (see interview notes with 5 employees in file). HR Director conveyed this to Complainant over the phone on April 15th and asked Complainant for a response from her by Monday as to what she wanted to do about the situation. Complainant agreed and HR Director stated that if she did not hear back from her on Monday, she would assume that she had resigned and decided not to come back to work.

- c) Complainant called and left a message for AHD Monday morning stating that she would not be in for her shift and was going to see the doctor. In the message Complainant did not state what her decision was regarding whether she would be coming back to work. AHD called Complainant and left a message urging her to call back immediately. When Complainant called back, AHD stated that Complainant had not given a decision in her prior message, to which Complainant responded, "I would be no good to you right now." AHD stated that Complainant was a key employee and that due to the time crunch with Complainant's project deadlines, AHD felt it was in the best interest of everyone to terminate Complainant's employment effective that day. Complainant was very upset and ended up crying and hanging up the phone.
- d) Respondent valued Complainant as an employee, but she had a very key role in the office and was working at the time on important, time-sensitive projects, including a \$3,000,000 contract. Respondent needed to know if she was returning immediately so that it could make arrangements to have her work completed. Respondent could not afford to wait to find out when or if Complainant was returning.

V. 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.

Disability – Reasonable Accommodation

- 2) Pursuant to the MHRA, unlawful discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity." 5 M.R.S. §§ 4553(2)(E), 4572(2).
- 3) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that she is a "qualified individual with a disability" within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant's physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent's failure to do so affected the terms, conditions, or privileges of Complainant's employment. *See id.*
- 4) The MHRA, 5 M.R.S. § 4553-A, defines "physical or mental disability," in relevant part, as follows:

1. Physical or Mental Disability, defined. Physical or mental disability" means:

A. A physical or mental impairment that:

- (1) Substantially limits one or more of a person's major life activities;
- (2) Significantly impairs physical or mental health; or
- (3) Requires special education, vocational rehabilitation or related services;

B. Without regard to severity unless otherwise indicated: absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn's disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson's disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury;

C. With respect to an individual, having a record of any of the conditions in paragraph A or B; or

D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A or B.

2. Additional terms. For purposes of this section:

A. The existence of a physical or mental disability is determined without regard to the ameliorative effects of mitigating measures such as medication, auxiliary aids or prosthetic devices; and

B. "Significantly impairs physical or mental health" means having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population.

- 5) The term "qualified individual with a disability" means "an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." 5 M.R.S. § 4553(8-D). Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . ." 5 M.R.S. § 4553(9-A).
- 6) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." See *Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm'n Reg. 3.08(D)(1) (July 17, 1999). The term "undue hardship" means "an action requiring undue financial or administrative hardship." 5 M.R.S. § 4553(9-B).
- 7) Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. See *Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.
- 8) Here, Complainant could not establish a claim of disability discrimination:
- a) Complainant did not show that she has, had or was regarded as having a disability as defined by the MHRA. Complainant acknowledges that her anxiety was situational, and caused by the altercation with Coworker on August 13, 2011. She was diagnosed with situational anxiety only after her termination on August 18, 2011. Respondent had no knowledge of Complainant's disability and would not have regarded her as disabled at the time. The fact that

Complainant was visibly upset after the incident and acknowledged to Respondent that she had a doctor's appointment is not sufficient evidence to assume Respondent regarded her as having a disability.

b) Complainant did not show that she was refused an accommodation during her employment. Complainant claims that Respondent should have offered her a leave of absence after Complainant called to state that she was going to see a doctor, but again, there was insufficient evidence to show Respondent would have reason to believe Complainant had a disability, especially since by her own admission and by her doctor's opinion, her anxiety was situational and was caused by the incident that had occurred 5 days prior. Therefore, it cannot be substantiated that Respondent denied Complainant a reasonable accommodation, especially since Complainant did not ask for one.

9) Disability discrimination is not found.

Whistleblower Retaliation

1) The MHRA prohibits discrimination in the terms and conditions of employment and termination because of previous actions that are protected under the WPA. *See* 5 M.R.S. § 4572(1)(A).

2) The WPA provides, in part, that it is unlawful, based on protected activity, to "discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment. . . ." 26 M.R.S. § 833(1).

3) Protected activity includes:

The employee, acting in good faith, or a person acting on behalf of the employee, reports to the employer or a public body, orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual.

26 M.R.S. § 833(1)(B).

4) 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 employment action. *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). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *See DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.

5) 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 (1st 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, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*

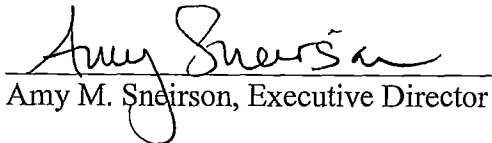
- 6) In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant's protected activity, although protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 2013 WL 3155234, *16 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).
- 7) Here, Complainant establishes a prima-facie case of retaliation in violation of the WPA by first showing that she engaged in protected activity by reporting what she felt was an unsafe work environment (Complainant stated to Respondent that she felt unsafe around Coworker, and her report is being considered genuine given the fact that she was visibly shaken from the incident and was treated for situational anxiety). Complainant also showed that she was terminated only 5 days following her report of protected activity, a time span that in this case indicates a causal link.
- 8) Respondent produced probative evidence to show that Complainant was terminated for a legitimate reason and not as a result of her protected activity. Both Complainant and Respondent acknowledge that HR Director asked Complainant to decide whether she was coming back to work by Monday, April 18, 2011, and emphasized the importance of her return because she was a crucial employee working on large contracts with deadlines in the near future. Respondent alleges that Complainant was terminated because she did not state when she would return to work, and her work needed to be completed.
- 9) Complainant was able to show, however, that were it not for her complaint about Coworker, she would not have been terminated. Reasoning is as follows:
 - a) It is undisputed that Complainant was out of work directly following her report to human resources about the incident with Coworker, and that she was unable to return to work on Monday, April 18th because she was suffering from situational anxiety as a result of the incident and was going to see her doctor. Respondent claims that Complainant was terminated that day because she had not given an answer as to whether she would return to work. Both parties and AHD's notes from that day, however, corroborate that Complainant was not given a chance to discuss her return and was terminated immediately.
 - b) Complainant had left a message prior to her shift stating that she would not be in for a legitimate reason. She did not state that she did not intend to return to work or that it would not be in the near future. When AHD and Human Resources Director spoke to her a few hours later, the decision had already been made to terminate her employment. There is no indication that Complainant was asked at this point when she planned on returning or if it was in the near future. As far as Respondent knew, Complainant could have planned on returning the following day or week.
 - c) While the importance of Complainant's swift return was emphasized during the call, it does seem sudden, and unusual, that after many years of employment with no disciplinary or work performance issues, Complainant would abruptly be terminated without further discussion. This is particularly true since it presumably would be easier for Respondent to have Complainant come back to complete her work (if in the near future), then hire a temporary worker or replacement to start anew on the same work.

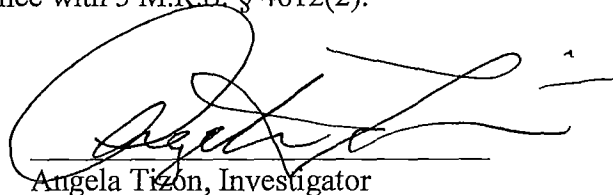
- d) Given that timing of her return was not discussed during the call, it is less plausible that Respondent terminated her for her inability to return to work to complete her projects against a deadline, as it claims, and more plausible that she was terminated because of her report of the April 13th incident which prompted an investigation and resulted in her temporary leave from work.
- 10) It is found that it is more likely than not – the Commission's "reasonable grounds" standard – that Respondent retaliated against Complainant for her WPA-protected activity when it terminated her employment.

VI. Recommendation:

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

- 1) There are **No Reasonable Grounds** to believe that [REDACTED] discriminated against [REDACTED] on the basis of disability by denying her a reasonable accommodation.
- 2) There are **REASONABLE GROUNDS** to believe that [REDACTED] retaliated against [REDACTED] in violation of the WPA by terminating her employment after she reported unsafe activity in the workplace.
- 3) The complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).


Amy M. Sneirson, Executive Director


Angela Tizon, Investigator