



Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330

Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711

www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT

MHRC Case Numbers: E14-0592 & E14-0729

October 20, 2016

Falan Copage (Portland)

v.

Island View Motel¹ (Old Orchard Beach) & Mark Kramer (Old Orchard Beach)

Summary of Case:

Complainant Falan Copage worked for Respondent Island View Motel ("Motel") as a housekeeper between May and June 2014. She alleged that Respondents Motel and its manager Mark Kramer ("Kramer") discriminated against her based on her sex when they subjected her to sexual harassment in the workplace. Respondent Motel denied the allegations, stating that it was not informed of Complainant's complaints. Respondent Kramer denied the allegations, stating that Complainant failed to show up for work. The Investigator conducted a preliminary investigation, which included reviewing all documents submitted by the parties and an Issues and Resolution Conference ("IRC"). Based upon all of this information, the Investigator recommends that the Maine Human Rights Commission find reasonable grounds to believe that Respondent Motel unlawfully discriminated against Complainant based on her sex and that Respondent Kramer unlawfully interfered with Complainant's right to be free of sexual harassment in the workplace.

Jurisdictional Data:

- 1) Dates of alleged discrimination: May 2014 through June 2014.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): October 29, 2014.
- 3) Respondent has one employee and is subject to the Maine Human Rights Act ("MHRA"), as well as state employment regulations.
- 4) Complainant is represented by Robert A. Levine, Esq. Respondents are not represented by counsel.

IV. Development of Facts:

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

¹ Complainant's complaint listed Respondent's name as Island View Motel. Respondent Island View Motel provided that its legal name is the "Kramer Properties LLC" doing business as Island View Motel. Because Complainant has not amended her complaint to use Respondent's legal name, the name used by Complainant has been retained.

Complainant worked as a housekeeper for Respondents. Beginning on the second or third day of work, Kramer made unwanted sexual advances toward Complainant. Complainant told him to stop. Kramer's behavior upset Complainant. Complainant continued to work at the Motel until Kramer kissed her one day. Complainant did not return to work after that day.

2) The Motel provided the following in support of its position:

Complainant did not report to the owner ("Owner") of the Motel that she was harassed by Kramer. Complainant did not show up for work for a few days, returned briefly, and never returned. Complainant said she needed more hours that the Motel could not provide. Complainant reported that she had a full time job at a different business.

3) Kramer provided the following in support of his position:

Kramer denied ever making sexual advances toward Complainant, and provided a copy of a marriage certificate showing that he was married in 2001.

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

- a) Complainant worked for the Motel daily for about a month. Kramer, Motel's manager, supervised her.
- b) By the third day on the job, Kramer began making unwanted sexual advances (touching, grabbing, hugging, kissing, and making inappropriate statements) towards Complainant on a daily basis.² Complainant suffered from childhood sexual trauma and was impacted by Kramer's behavior. She suffered physical side effects from Kramer's behavior after work, often shaking and crying.
- c) Kramer asked Complainant if she would marry him. The proposition was unsolicited and unwelcome. Complainant told Kramer no, relaying that she had a boyfriend and that Complainant was not interested in Kramer in that way. Kramer told Complainant that he hoped she would continue to work. Complainant indicated that she would so long as she could do her work and be left alone.
- d) Kramer did not leave Complainant alone. Kramer subjected Complainant to unwelcome touching, gawking, and remarks (about how good Complainant looked, moving in with him, hanging out with him). Complainant asked Kramer to stop at least ten times.
- e) One day Kramer touched Complainant's buttocks.³ Complainant pushed him away, telling Kramer to stop. Kramer apologized and left. At the end of Complainant's shift, she stopped by the office to get her pay. Kramer grabbed her and kissed her. Complainant pushed Kramer away telling him to stop and ran out the door and did not go back to the job.
- f) Owner saw Complainant on a routine basis. Complainant did not report her concerns about Kramer to Owner because Kramer is Owner's father.
- g) Complainant asked for more hours at work, but the Motel did not have any more hours available.

² Kramer denied all of Complainant's allegations; Complainant never complained to Owner.

³ Kramer stated that he touched Complainant's shoulder.

Complainant told Kramer that she had another job because she needed more hours.

- h) Complainant was absent for a few days for personal reasons.
- i) Complainant left her Motel job after Kramer kissed her in the office, shortly after he had touched her buttocks in a Motel room. Complainant stated that she started running, and ran about halfway home.

V. Analysis:

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 M.R.S. (“Maine Revised Statutes”) § 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.

2) The Maine Human Rights Commission’s Employment Regulations provide, in part, as follows:

Harassment on the basis of sex is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when: . . .

- c) such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

Me. Hum. Rights Comm’n Reg., Ch. 3, § 10(1)(C) (September 24, 2014).

3) “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.

4) Accordingly, to succeed on such a claim, Complainant must demonstrate the following:

- (1) that she (or he) 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.

- 5) The fact that the complained-of conduct is unwelcome must be communicated directly or indirectly to the conduct's perpetrator. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988). In some instances, Complainant may have the responsibility for telling the alleged harasser directly that his or her comments or conduct is unwelcome. In other instances, however, Complainant's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the conduct is unwelcome. *Id.* Where Complainant never verbally rejects a supervisor's sexual advances, yet there is no contention or evidence that Complainant ever invited them, evidence that Complainant consistently demonstrated unalterable resistance to all sexual advances is enough to establish their unwelcomeness. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1990). Complainant may be relieved of the duty to directly communicate unwelcomeness when she reasonably perceives that doing so may prompt the termination of her employment, especially when the sexual overtures are made by the business's owner. *Id.*
- 6) The Commission's Employment Regulations provide the following standard for determining employer liability for sexual harassment committed by a supervisor:

An employer ...is responsible for its acts and those of its agents and supervisory employees with respect to physical or mental disability 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. When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

- (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- (b) that the employee 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) (September 24, 2014).

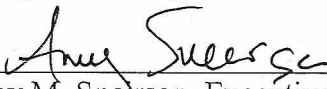
- 7) An employee suffers an adverse employment action if, although not formally terminated, an employee is constructively discharged, meaning that the employee has no reasonable alternative to resignation because of intolerable working conditions. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 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 (7th Cir. 1998).
- 8) Complainant has established her claim of unlawful sexual harassment. She has shown that it is at least as likely as not that she was subjected to sexual harassment, with reasoning as follows:
- a) She is a member of a protected class as a woman.
 - b) She experienced unwelcome conduct related to sex. Kramer grabbed, touched, hugged, and kissed Complainant without her permission. Kramer made comments about her body and made overtures about having a relationship and moving in together. Complainant found Kramer's behavior offensive and told Kramer to stop the behavior multiple times.

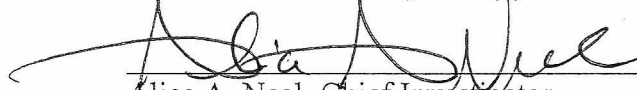
- c) The harassment was severe and pervasive, altered the conditions of Complainant's employment, and created an abusive work environment. Complainant was subjected to inappropriate behavior (touching, hugging, grabbing, kissing) and statements about her body, asked to marry Kramer, and asked to spend time together outside of work. The behavior Complainant experienced was objectively offensive; a reasonable person would find the behavior hostile and abusive.
 - d) Complainant was affected mentally and physically, often shaking and crying after work. Complainant suffered an adverse employment action when she was constructively discharged from her employment.
 - e) Employer liability attached because Complainant experienced an adverse action: the facts of this case support a finding of constructive discharge. A reasonable person would have felt compelled to resign in these circumstances, where Complainant's manager was both physically and verbally harassing her every day. Complainant repeatedly told him to stop, including by pushing him away from her; he responded by continuing to harass her, even escalating to kissing her against her will.
 - f) It is worth noting that even if Complainant had not experienced an adverse employment action, Respondent would not have been able to take advantage of the affirmative defense, since it did not exercise reasonable care to prevent or correct the harassment. The Motel did not provide any policies prohibiting sexual harassment or providing a means of reporting it, and Complainant tried to stop the harassment as best she could. Kramer had no incentive to pass Complainant's complaints to Owner (his daughter), and Complainant's belief that going to Owner would have been futile because she would not stop the harassment being perpetrated by her father is reasonable under the circumstances.
- 9) In the particular circumstances of this case, Kramer's ongoing, intentional pattern of harassment created a hostile work environment, subjecting him to individual liability. While he is not an "employer" within the meaning of the MHRA, *see Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME135, 58 A.3d 1083, he is individually liable for his own intentional conduct that interfered with Complainant's right to be free from sexual harassment in the workplace. *See* 5 M.R.S. § 4633(2); *see also MHRC Commission Counsel Memo*, available at: http://www.maine.gov/mhrc/guidance/memo/20130411_g.pdf.
- 10) It is found that Respondents are liable for subjecting Complainant to unlawful sexual harassment.

VI. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that Respondent Island View Motel discriminated against Complainant Falan Copage based upon her sex in violation of the MHRA when it subjected her to a hostile work environment; and
- 2) There are **Reasonable Grounds** to believe that Respondent Mark Kramer discriminated against Complainant Falan Copage based upon her sex in violation of the MHRA when he intentionally interfered with Complainant's right to be free of sexual harassment in the workplace; and
- 3) The complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).


Amy M. Snerson, Executive Director


Alice A. Neal, Chief Investigator