



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

MHRC No. E18-0294-A/B/C

November 13, 2019

Sharon Murphy (Bangor)

v.

Membership Holdings (Bangor)¹
Membership Auto, LLC (Bangor)
Ultimate Equity Holdings, Inc. (Bangor)

I. Summary of the Case:

Complainant alleged that Respondent made unwanted sexual advances and subjected her to a hostile work environment.² Respondent denied discrimination and provided that Complainant did not return to work after a conversation outside of work that ceased as soon as Complainant indicated unwelcomeness. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, an Issues and Resolution Conference (“IRC”), and requests for additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that Respondent discriminated against Complainant based on sex.

II. Jurisdictional Data:

- 1) Date of alleged discrimination: December 23, 2017.
- 2) Date complaint filed with the Maine Human Rights Commission (“Commission”): August 6, 2018.

¹ Complainant named three Respondents which are businesses all owned by the individual (“Owner”) who is the subject of her sex discrimination claim. Owner provided that Complainant was only employed by Ultimate Equity Holdings, LLC. Complainant maintained that in addition to Ultimate Equity Holdings, LLC she was doing work for Membership Auto, LLC. In addition, the job advertisement provided in the record lists Membership Auto as the employer. This is enough to support her claim against both Ultimate Equity Holdings and Membership Auto, LLC. Ultimate Equity Holdings, LLC and Membership Auto, LLC will be referred to collectively as “Respondent” in the report. Because Complainant does not dispute Respondents’ argument that Membership Holdings is not her employer, the claim against that Respondent fails and will not be analyzed in the report.

² Complainant left her employment as a result of the incident but did not make a claim of constructive discharge.

- 3) Respondent has fewer than 15 employees and is subject to the Maine Human Rights Act ("MHRA") as well as state and federal employment regulations.
- 4) Respondent is not represented by counsel. Complainant is represented by Daniel Monahan, Esq. and Nicole Bouchard, Esq.

III. Development of Facts:

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

Complainant responded to an advertisement for a job as a personal assistant on December 19, 2017. Owner interviewed Complainant and they discussed the various job duties including personal massages. Complainant was hired and began working on December 21, 2017. A few days into her employment she texted Owner and offered to do some work from home. During this conversation, Owner made sexual remarks that made Complainant very uncomfortable. These comments continued even after she communicated that she wanted their relationship to remain professional. Complainant no longer felt safe and decided not to return to work.

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

Respondent hired Complainant as a personal assistant. One of her job duties was to occasionally provide Owner massages of the neck and shoulder area while he was seated at his desk at work. Owner [REDACTED]. Complainant performed this type of massage at work on at least one occasion without incident. On December 23, 2017, Complainant offered to do some work from home. Owner said it would not be necessary, but then made a suggestion that she could massage him from home. Owner and Complainant then engaged in banter back and forth until Complainant made it clear that she wanted their relationship to remain professional. Owner assured her the conversation would not affect her job and made no further suggestive comments. Complainant never returned to work and never provided a reason for leaving.

- 3) The Investigator made the following findings of fact:

- a) Complainant was hired as a personal assistant on December 21, 2019. One of her job duties was to give Owner massages. Complainant had no issue giving Owner a shoulder and neck massage at his desk and did so once during her employment.
- b) On December 23, 2017, Complainant initiated a text conversation with Owner stating, "If you want to send me things to research while I'm home this week, please don't hesitate..." Owner responded that the work is more easily performed in the office.³
- c) Immediately following this exchange, Owner sent the following text "To bad you can give me messages from Home lol (sic)." Complainant replied, "Haha. I mean I technically could when my kiddo isn't around, but I don't have a proper table." Complainant provided that she felt uncomfortable but was afraid to tell Owner no directly.

³ The entire text message chain at issue in this complaint is attached at Exhibit A.

- d) Owner then sent the following text "Bed ?" Complainant replied, "That I do have." And Owner responded, "Oh my". The conversation continued with a discussion of the logistics of performing a massage at Complainant's home.
- e) After they had determined when Complainant could perform an at home massage, Owner wrote "What do we do if I get aroused though [emoji of two eyes looking up] you are a beautiful woman." Complainant replied, "I appreciate your honesty and compliment. In my experience though I end up with the short end of the stick and broke/jobless...." Complainant provided that she attempted to politely refuse Owner's advances because she was distressed by the comment. At the IRC, Respondent maintained that the texts do not show Complainant was "shocked" by the exchange, but responded that the comment was "off color" and he "shouldn't have said it".
- f) The text messages that followed were described differently by Owner and Complainant. Owner provided that he clarified that the massage did not have to cross any professional boundaries and could be "strictly business." Complainant provided that when she received the text that the massages would be "strictly business" and would be to "release [Owner's] stress," she felt Owner was telling her she would have to engage in sexual acts as part of her professional duties.
- g) Complainant communicated that she wanted their relationship to remain professional and that she hoped it would not affect her job. Owner assured her that her job was not in jeopardy.
- h) Complainant did not communicate any further with Owner and did not return to work.

IV. Analysis:

- 1) The MHRA requires the Commission 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 this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA provides that it is unlawful to discriminate on the basis of sex with respect to the terms, conditions, or privileges of 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 (e.g., sexual advances or requests for sexual favors), 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 she is a member of a protected class; (2) that she was subject to unwelcome sex based 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 [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, 902-903.

6) The fact that the conduct complained of is unwelcome must be communicated directly or indirectly to the perpetrator of the conduct. *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 also be relieved of the responsibility for directly communicating unwelcomeness when she reasonably perceives that doing so may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the business. *Id.*

7) Complainant has established her claim of a hostile work environment based on sex based on the following:

- a. The comments made by Owner are objectively offensive and sexual in nature. At the IRC Owner admitted that the comments were "off color" and he should not have made at least one of the comments. The comments are also considered severe, since they involved specific discussion of Owner wanting physical contact in Complainant's bed and his becoming aroused.
- b. Respondent argued that he and Complainant were engaging in "banter," suggesting that Complainant was participating and was not offended by the comments. However, Owner made two unsolicited sexually suggestive comments during a work conversation. Complainant's continued communication must be viewed in light of the power dynamics involved. Owner is disregarding the context of sexual comments made during a work-related conversation by an Owner to a subordinate employee. Complainant continued to participate in the conversation but remained focused on the professional logistics of a massage at her home.

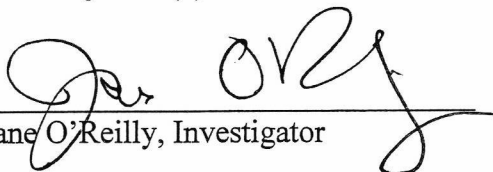
- c. Complainant provided that from the first comment she was uncomfortable but had "high hopes" for her job and was afraid to immediately refuse Owner's suggestion of a massage in her home. Complainant had reason to believe that communicating immediately that she was uncomfortable would have resulted in an adverse employment action given that she was speaking with the Owner of the company and had only been working for two days. The obligation to communicate unwelcomeness is not required when an individual "reasonable perceived" that doing so could result in discharge.
- d. Even if Complainant had initially participated, the parties agree that at a certain point Complainant did directly communicate that she wanted their relationship to remain professional. The remaining dispute is over the communications that occurred after Complainant indicated she did not want a romantic relationship with Owner. Complainant credibly supported her claim that she was subjectively offended when she received the final text messages. Owner also credibly provided that he was speaking solely about a professional massage and not suggesting any sexual acts. The specific messages are in the record Complainant's interpretation of the messages is reasonable. Even if Owner did not intend them to be offensive, intent is not relevant to the analysis of severity of the conduct. Therefore, Complainant has established that she has at least an even chance of prevailing on her claims in a civil action.

8) Hostile work environment based on sex is found.

VI. Recommendation:

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

1. There are **Reasonable Grounds** to believe that Respondents Ultimate Equity Holdings, LLC and Membership Auto, LLC discriminated against Sharon Murphy on the basis of sex; and conciliation of these claims should be attempted in accordance with 5 M.R.S. § 4612(3).
2. There are **No Reasonable Grounds** to believe that Respondent Membership Holdings discriminated against Sharon Murphy on the basis of sex; and this claim should be dismissed in accordance with 5 M.R.S. § 4612(2).


Jane O'Reilly, Investigator



Nathan



If you want to send me things to research while I'm home this week, please don't hesitate. My email is MyBangorCareer@gmail.com if you'd like to send a list that way .



Dec 23, 7:24PM



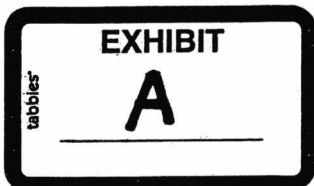
I'm home now. It's hard to do the stuff we need from Home. It's a lot easier form office

Dec 23, 7:30PM

Ok. Just wanted to extend the offer :)



Dec 23, 7:31PM



Send message





Nathan



N

I appreciate it 😁

Dec 23, 7:32PM

N

To bad you can give me messages from Home lol 😁

Dec 23, 7:32PM

N

Massages

Dec 23, 7:32PM

Haha. I mean I technically could when my kiddo isn't around but I don't have a proper table.

Dec 23, 7:35PM

M

N



Dec 23, 7:35PM



Send message





Nathan



N

Bed ?

Dec 23, 7:36PM

That I do have.

Dec 23, 7:38PM

M

N

Oh my

Dec 23, 7:38PM

N

So the question is when is he kiddo not around?

Dec 23, 7:44PM

Monday night but I have commitments at my grandmother's house. So it would have to be Tuesday and I can probably only do 20/30 minutes as my hands

M



Send message





Nathan



cramp up . If they didn't I'd of already pursued a career in massage therapy.

Dec 23, 7:47PM



So tues after I'm done at work come over?

Dec 23, 7:48PM

Monday the first of January

Dec 23, 7:49PM



I'd when I don't have her anymore.

Dec 23, 7:49PM

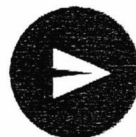


What time?

Dec 23, 7:49PM



Send message





Nathan



M

I plan on being at work with you that day (1/2/18) so we can just leave from there when your done if you'd like.

Dec 23, 7:50PM

N

Ok well let me know a time.

Dec 23, 7:50PM

N

I have a table at the office.

Dec 23, 7:51PM

N

I was thinking before you came back to work. That's fine tho

Dec 23, 7:51PM

Sorry about that! I have her straight through til the first of the year. The office would

M



Send message





Nathan



be ok as well.

Dec 23, 7:52PM

N

Ok 

Dec 23, 7:53PM

N

What do we do if I get aroused though >> you are a beautiful woman

Dec 23, 7:53PM

I appreciate your honesty and compliment. In my experience though I end up with the short end of the stick and broke/ jobless. Not to mention you are otherwise committed, and at the moment I am smitten elsewhere.

Dec 23, 7:59PM

M



Send message





Nathan



N

If we keep it strictly business? It just releasing my stress

Dec 23, 8:00PM

Strictly business meaning?

Dec 23, 8:23PM

M

N

It's a massage. Full body but it's a massage. Just a job. Not romantic

Dec 23, 8:24PM

I'm more than happy to massage you boss but at this time I'm not comfortable with it including more.

Dec 23, 8:27PM

M

N

Understood



Send message





Nathan



NOT FORWARDED

Dec 23, 8:24PM

I'm more than happy to
massage you boss but at
this time I'm not comfortable
with it including more.

Dec 23, 8:27PM



Understood

Dec 23, 8:28PM

I really sincerely hope this
conversation is not going
to affect the status of my
employment with you.

Dec 23, 8:40PM



No worries

Dec 23, 8:40PM



Send message

