



MAINE HUMAN RIGHTS COMMISSION
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September 30, 2011

JOHN P. GAUSE
COMMISSION COUNSEL
ACTING EXECUTIVE DIRECTOR

John F. Dana (Lewiston)

v.

Center for Behavioral Health ME, Inc. dba Discovery House (South Portland)

I. COMPLAINANT'S CHARGE

Complainant, John F. Dana, alleges that Respondent retaliated against him for reporting unlawful sexual harassment by terminating him and continued to retaliate after he filed his charge of discrimination by refusing to respond to multiple requests for certification paperwork.

II. RESPONDENT'S ANSWER

Respondent, Center for Behavioral Health ME, Inc. dba Discovery House ("Respondent"), denies any unlawful retaliation. Complainant was terminated for not being a good fit, exhibiting "constant negativity" and disrupting its business operations.

III. JURISDICTIONAL DATA

- 1) Date(s) of alleged discrimination: July 16, 2009.
- 2) Date of filing of complaint with the Maine Human Rights Commission: December 31, 2009. The complaint was amended on December 28, 2010.
- 3) Respondent employs 24 employees and is subject to the Maine Human Rights Act, the Whistleblowers' Protection Act, and state and federal employment regulations.
- 4) Chad T. Hansen, Esq. represents Complainant. Robert V. Hoy, Esq., represents Respondent.
- 5) Investigative methods used: A review of the parties' written submissions, responses to requests for information; and an issues and resolution conference. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of reasonable grounds or no reasonable grounds.

IV. DEVELOPMENT OF FACTS

1) The parties and issues are as follows:

- a) On or about March 7, 2007, Complainant started working as a substance abuse counselor at Respondent's clinic in Westbrook, Maine.
- b) Respondent operates treatment centers in Maine and other states and offers clinical services and outpatient treatment for persons affected by addiction.
- c) Relevant third parties: Clinical Supervisor LS ("Supervisor") directly supervised Complainant. Complainant also reported to Clinical Director RS ("Clinical Director"), HR Director KP ("HR") and Medical Director PJ ("Medical Director"). Chief Operating Officer MP ("COO") made the termination decision.
- d) Respondent contended that Complainant was terminated for exhibiting "constant negativity" and being disruptive of its business operations with his poor attitude. Complainant asserted that Respondent's stated reason is pretextual; he was terminated because he opposed and tried to address ongoing unlawful harassment, advocated coworkers' legal rights and reported violations to Respondent and other government agencies. Further, Respondent continued to retaliate against him by refusing to provide documentation necessary for his professional certification after he filed his charge of discrimination ("Charge").

2) Undisputed Facts:

- a) Respondent contracted with ACE Security (ACE) to provide services, and the security guard ("Guard") hired was an ACE employee.
- b) Two employees wrote comments regarding inappropriate behavior by Supervisor. In June 2009, Supervisor was terminated for "poor performance."
- c) Complainant met with Medical Director to discuss concerns about past and ongoing harassment and hostile environment in the work place. On July 15, 2009, Complainant also met with COO to discuss the same concerns.
- d) On July 16, 2009, Complainant was terminated.

3) Complainant's allegations:

- a) In the summer of 2008, Complainant expressed concerns to Supervisor about inappropriate, sexual and personalized comments made by the Guard toward patients. He also discussed the Guard's behavior with Director, who stated that nothing could be done.
- b) In or about November 2008, when some female coworkers ("Coworkers") reported that they, in addition to some patients, were subjected to unwelcome sexual harassment at

work, Complainant informed Coworkers of their legal rights (including the right to file a charge of discrimination) and offered to provide support. He was never informed that his actions caused them discomfort.

- c) On May 19, 2009, Complainant filed a complaint with Maine Board of Alcohol and Drug Counselors ("Board") concerning Supervisor's sexually harassing conduct.
 - d) In or about June 2009, Medical Director advised Complainant not to meet or discuss the alleged sexual harassment and hostile environment directly with Supervisor or Clinical Director.
 - e) In late May and early June 2009, Complainant reported the company's ongoing sexual harassment and hostile environment to Medical Director.
 - f) On June 3, 2009, he forwarded a copy of the Board's complaint to Medical Director. On June 12, 2009, he submitted a written complaint to HR about ongoing harassment and intimidation at work. Clinical Director was angry with him when he refused to meet during his bereavement leave.
 - g) Medical Director advised Complainant to discuss the sexual harassment issues with COO during his visit to Maine. Medical Director assured him that he would not be penalized for raising these issues.
 - h) On July 15, 2009, Complainant met with COO to express his concerns about past and ongoing sexual harassment and hostile environment at the company and the need to address the past incidents experienced by the staff.
 - i) Respondent's initial explanation for his termination was that he was "not a good fit." Subsequently, Respondent stated that the reason for the termination was that he was "disruptive" and "negatively impacted the environment at the clinic."
 - j) After filing the Charge with the Maine Human Rights Commission ("Commission"), Respondent failed to certify his clinically supervised experience despite multiple written requests. On November 29, 2010, his attorney informed Respondent's attorney in writing of Complainant's requests for Respondent to complete the certification forms ("Forms") required for his certification. Respondent refused to respond to any requests.
- 4) Respondent's allegations:
- a) Employees review the general policy against sexual harassment in the Associate Handbook at the time of hire. The HR Director or Director provides subsequent in house training, which includes a short video presentation on diversity and harassment.
 - b) Complainant was terminated because he was not a "good fit" for the organization. His behavior continued to be disruptive and negatively impacted the workplace. The two employees, Coworkers, directly affected by Supervisor's inappropriate actions were

satisfied with his termination and other company actions taken as a result of reporting of the incidents. But, Complainant refused to put the matter behind and focus on the company's ongoing business.

- c) Respondent knew only that Complainant filed a complaint to the Board in May 2009, which was mentioned in several different email communications. It did not know of the nature and substance of the complaint.
- d) Although not the primary reason for termination, Complainant DJ struggled with completing direct services. His March 2009 evaluation documented time management issues, poor peer relationships, and negativity. Respondent would characterize him as a "strong performer."
- e) With respect to Complainant's requests for the Forms, Respondent never received them and had no opportunity to respond to them before receipt of the amended Charge. Respondent's counsel denied receiving any forms after he entered his appearance in May 2010. Counsel never received any follow-up email or call enquiring about Respondent's lack of response. Upon receipt of the forms and the amended complaint in January 2011, Respondent's counsel had caused such forms to be completed and mailed to Complainant's attorney.

5) Relevant documents:

- a) Copy of Respondent's Personnel Policies in the Associate Handbook - Employees are notified of the sexual harassment policy at the time of hire, during training and upon any updates to the Handbook. Signature pages are collected from each employee indicating receipt and understanding of the policy. Types of disciplinary action include verbal warning, written warning, and termination. Respondent has the right to use progressive discipline at its own discretion and can bypass any of the steps any time. The section "Associated Grievance Process" allows employees the opportunity to pursue a resolution to any concerns. (Resp. Ex. A.)
- b) Copy of Investigation Notes (2/12/09) regarding Supervisor (Resp. Ex. B) – HR recommended a written warning for Supervisor. He also observed the staff to be "fractured" and no have confidence in management's ability to resolve issues. Further, one employee felt that speaking up would result in being labeled "troublemaker."
- c) Copy of Complainant's Performance Evaluations – The evaluation for March 2009, by Program/Clinical Director RS indicates Complainant's "attitudes tend to impair peer relationships." In response, Complainant clarified that management took issue with his "attitudes" toward management. (Resp. Ex. C)
- d) Copy of Notes of Employee Interviews (6/24/2009) and Email Communications – Documentation of interviews of various employees regarding Supervisor and work environment. Employees expressed a tense work environment and management issues. On May 25, 2010, MA noted that he received frequent complaints about Complainant's

behavior at staff meetings. When Complainant requested a transfer of supervision from Supervisor, RCG indicated in an email (5/28/2009) that Complainant exhibited "constant negativity" and was frequently criticizing employer about policies, procedures and software among other things beyond Respondent's control. (Resp. Exhs. E & F.)

- e) Copy of Letters of Termination - HR stated the reason for termination was "because his behavior was disruptive, and negatively impacted the environment at the clinic." (Resp. Ex. C, See also, Ex. D.)
- f) Copy of Forms Submitted to Maine Bureau of Unemployment Compensation (7/30/2009) – Respondent listed the reason for Complainant's separation as "Discharge." (Resp. Ex. G.)
- g) List of Other employees who have been separated in the past 2 years and reasons for their separation – Supervisor was terminated on June 12, 2009, for "Poor Performance." Program Director was terminated on June 25, 2009, for "Poor Performance." (Resp. Ex. H.)

V. ANALYSIS

- 1) The Maine Human Rights Act ("MHRA") requires the Commission to "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.A. § 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.

Retaliation and Whistleblower Retaliation

- 2) The MHRA makes it unlawful for "an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of [the MHRA] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S.A. § 4572(1)(E).
- 3) The MHRA further defines unlawful discrimination to include "punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act. . . ." 5 M.R.S.A. § 4553(10)(D).
- 4) The Maine Whistleblowers Protection Act ("WPA") prohibits discrimination against an employee in compensation or the terms, conditions or privileges of employment because the employee reports what she had a reasonable cause to believe is a violation of local, state or federal laws or rules. 26 M.R.S.A. § 833(1)(A). The MHRA prohibits employment discrimination because of previous actions that are protected under the WPA.
- 5) Protected activity includes if "[t]he 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

- 11) The *prima facie* case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wyrwal 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 action. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry her overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See Id.*
- 12) Respondent has provided a nondiscriminatory reason for Complainant's termination, namely, that Complainant was constantly negative and posed an ongoing disruption of its business operations.
- 13) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason was false or irrelevant and that unlawful retaliation brought about his termination, with reasoning as follows:
 - a) Complainant alleged retaliation when he spoke up and tried to address and eliminate the unlawful sexual harassment and ongoing hostile work environment. He felt that management had failed to adequately address complaints of sexual harassment. Further, he was retaliated for counseling Coworkers about their rights with respect to unlawful harassment at work.
 - b) Respondent offered different explanations for terminating Complainant. Respondent showed evidence of pretext by its shifting reasons for terminating Complainant. Pretext can be shown with "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons such that a fact finder could infer that the employer did not act for the asserted non-discriminatory reasons." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000). The unemployment paperwork indicates that Complainant was simply discharged. Respondent clarified that Complainant was terminated for "pressuring" Coworkers into filing sexual harassment complaints. Coworkers were uncomfortable because he allegedly "pressured" them to file charges. Complainant allegedly contributed to the ongoing hostile environment by agitating Coworkers. Respondent acknowledged terminating Complainant for being "unable to put" the past incidents of harassment "behind [him]." Further, termination was allegedly justified because he continued to question the company's corrective measures and disrupt its operations.
 - c) Complainant denied that he unduly pressured any Coworkers into filing complaints with the MHRC or to contact other agencies. He simply informed them of their rights and advocated for the protection of those rights. Here, encouraging another employee to file a valid claim did not justify termination. Advocating for others' rights also did not justify termination. Given Complainant's dispute, Respondent had not provided any competent evidence to support its position that Complainant contributed to the hostile environment by acting inappropriately or unreasonably pressuring coworkers.

- d) Respondent did not follow its progressive discipline as stated in its employment policies. Before termination, Complainant received positive reviews and did not have any prior discipline. Respondent did not discuss with Complainant any alleged discomfort experienced by any coworkers. Respondent seems to have disciplined Complainant differently than Supervisor, who was investigated for unlawful harassment yet received a mere warning. He was eventually terminated for "poor performance." With Complainant, Respondent seemed to have bypassed many of the disciplinary steps. Respondent's different application of progressive discipline is suspect given Complainant's alleged misconduct as compared to Supervisor's harassing acts.
- e) The sequence of Complainant's various discussions with management relating to any concerns and the company's remedial measures and his termination after meeting with the COO supports a causal connection between Complainant's protected activities and retaliation. Respondent admittedly took issue with how Complainant engaged and continued to engage in protected activities. But, engaging in protected activities which might create discomfort in the workplace does not justify Respondent's actions here.
- f) With regard to Complainant's allegation that Respondent's failure to return the Forms timely despite multiple good faith requests, Respondent denied that it had disregarded Complainant's requests to complete the Forms. Respondent's counsel did respond within a reasonable time after receipt of the Amended Charge notifying him of Complainant's unsuccessful efforts. Given that some requests were initially directed to incorrect third parties with no follow-up calls nor email, and Respondent's acknowledgement of its flawed internal recordkeeping system, it is not possible to ascertain at this time that Respondent continued to retaliate against Complainant because she filed the Charge.

VI. RECOMMENDATION

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

- 1) There are **Reasonable Grounds** to believe that Respondent, Center for Behavioral Health ME, Inc. dba Discovery House, retaliated against Complainant, John F. Dana, for engaging in protected activity under the Whistleblowers' Protection Act and the Maine Human Rights Act, by terminating his employment; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).
- 3) There are **No Reasonable Grounds** to believe that Respondent, Center for Behavioral Health ME, Inc. dba Discovery House, unlawfully retaliate against Complainant, John F. Dana, by refusing his requests for certification paperwork after his termination.
- 4) This portion of the case should be dismissed in accordance with 5 M.R.S.A. §4612(2).

John P. Gause
Commission Counsel
Acting Executive Director

Domini Pham, Investigator