

874-0343

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-09-330 ✓

APR 25 2011

TRUDY LITTLE,

Plaintiff

v.

JUDGMENT

SAINT JOSEPH'S MANOR,

Defendant

STATE OF MAINE
Cumberland, ss, Clerk's Office

APR 22 2011

RECEIVED

BACKGROUND

On June 4, 2009, the plaintiff filed a four-count complaint and alleged sex discrimination, count I; hostile work environment, count II; constructive discharge, count III; and disclosure of confidential information, count IV. She based her allegations on the Civil Rights Act, the Americans with Disabilities Act, the Rehabilitation Act, and the Maine Human Rights Act.

On June 30, 2009, the case was removed to the United States District Court for the District of Maine. The defendant filed a motion for summary judgment. The motion was granted on all of the plaintiff's federal claims. On March 26, 2010, the case was remanded to this court for the plaintiff's remaining state claims.

On July 23, 2010, this court issued an order on the defendant's motion for summary judgment. The court determined that the facts in the record did not support a claim for gender-based discrimination and considered the plaintiff's claims in counts I and II as one for sexual harassment based on a hostile work environment. (MSJ Order at 15-16.) The court determined that the plaintiff was a member of a protected class and that she was subjected to conduct that was objectively offensive. (*Id.* at 17, 20.) The

court determined that the remaining requirements for the plaintiff's claim for sexual harassment based on hostile work environment were questions of fact. (Id. 18, 20-22.)

The court further determined that the allegations of constructive discharge in count III could not be considered absent a determination of the sexual harassment hostile work environment claim. The court granted the defendant's motion for summary judgment on count IV of the plaintiff's complaint.

Jury-waived trial was held on December 14-15, 2010. The court has considered the evidence, including the testimony of the plaintiff's eleven witnesses, the defendant's three witnesses, the parties' stipulations, the parties' exhibits, the LaRoche and Witmer depositions, and the defendant's interrogatory answer #20, read into the record, plaintiff's exhibit 17.

FINDINGS

In 1999, the plaintiff was diagnosed with anxiety disorder with panic attacks and began receiving disability benefits.¹ (Stip. ¶ 12.) She has been on medication, which helps her condition, since that time. She will take this medicine for the rest of her life. The panic attacks are very difficult to endure. She shakes, her heart races and skips beats, and she feels like she will die. She described her panic attacks as "torture." She has learned techniques to deal with these panic attacks.

The plaintiff also has had difficult periods in her personal life. She was abused by her father and aunt. She was abused also by her ex-husband, to whom she was married for eleven years and who was arrested on several occasions for domestic violence. (Def.'s Ex. 24 at 2-3.) She finally left her husband when he hit one of her children and lived in a shelter for a period of time. (Id. at 3.)

¹ The plaintiff's various Social Security records were admitted into evidence. (Def.'s Exs. 12-26.)

Because work serves as a distraction, the plaintiff tried to return to work. If she is comfortable in her environment, she is able to work. She worked at a pizza store one day per week. She was unemployed for three years because of her condition before she began working as a cook at Ruski's in late 2001 or early 2002. (Stip. ¶¶ 13-14.) She worked two days per week up to six hours per day. (Id. ¶ 13.)

The plaintiff applied for a job at the defendant, Saint Joseph's Manor (SJM), in 2006. The job included benefits, which were attractive to her. At this time, her anxiety disorder was under control.

The plaintiff was employed by SJM from May 29, 2006 to July 28, 2007 as a cook supervisor. The annual benefits provided by SJM totaled \$8,101.93. (Pl.'s Ex. 17.) Based on her last paycheck, she had earned \$17,294.20 for 2007 when she left her employment at SJM. (Pl.'s Ex. 14.)

At the beginning of her employment, the plaintiff received a general orientation and the SJM policy handbook from Mary Cote, SJM's Human Resources Manager. (Def.'s Ex. 2.) The plaintiff worked in the kitchen near Joe Mitchell, a cook supervisor at SJM. (Def.'s Exs. 4, 31.) Their shifts overlapped four days per week; she worked from 11:30 a.m. to 8:00 p.m. and Mr. Mitchell's shift ended at 1:00 p.m.

Mr. Mitchell began working at SJM in 1982. He became a cook supervisor in the early 1990s. He has no authority to hire or fire kitchen employees, such as the plaintiff. He reports to Adam Barrows and Jill Bookataub.

Mr. Mitchell read but was not trained on SJM's sexual harassment policy. (Pl.'s Ex. 1 at 3, ¶¶ 2 & 10-11; Def.'s Ex. 9.) He testified first that he did not understand that he had any obligation to enforce the policy. He believed the administration and management had to enforce the policy. He was then shown, during his testimony, the language requiring supervisors' responsibility for "monitoring behavior which can be

construed to be harassment and for initiating necessary action to eliminate such behavior." (Pl.'s Ex. 1 at 11.) He then testified that he did have a duty to make sure the policy is followed but also stated it was not up to him to decide if there was a violation. Instead, he would report to Mr. Barrows. He had never reported an incident of sexual harassment at SJM. Ms. Cote also had to refresh her recollection of the reporting requirements of the SJM sexual harassment policy while she was on the witness stand. (Def.'s Ex. 9.)

According to Mr. Mitchell, the plaintiff and he discussed family, boyfriends, sex, and the plaintiff's breasts. He agreed he made sexual comments but did not know if they were offensive. He agreed he sent the texts to the plaintiff. (Pl.'s Exs. 2-7.) He did not consider these texts a violation of the SJM policy. He agreed he told her the plaintiff was ugly but testified that he did not say this in a mean way; he thought it was funny. She laughed but he later learned she was really hurt. He agreed he might have said to the plaintiff, "Fuck it. I call it as I see it." He agreed that he wrote notes to the plaintiff and thought they were funny. (Pl.'s Exs. 8-10.)

Mr. Mitchell testified that the plaintiff called him her special little Joe-Joe, called him "a fag," called him "pee-pee puffer," and swore frequently, using the "F word" often. He testified that the plaintiff's response to the texts was, "my God, you are funny" and her fiancé's response to the note was that Mr. Mitchell was "a crazy shit." (Pl.'s Exs. 8, 10.) Mr. Mitchell testified that the plaintiff discussed her son's penis size and said it would be "awesome" and "funny" if Mr. Mitchell sent a card and underwear to her son. Mr. Mitchell stated he received texts from the plaintiff but deleted them. He received no notes from her.

No one from SJM discussed the notes with Mr. Mitchell while the plaintiff was employed at SJM. After she left, management discussed his inappropriate behavior.

Mr. Mitchell was suspended for three days. He has received a total of three written warnings during his employment at SJM. In retrospect, Mr. Mitchell testified that he does not think his conduct was funny.

The plaintiff agreed that she and Mr. Mitchell engaged in banter but denied sexual connotations. During her first week at work at SJM, she sprayed water around her work area. Mr. Mitchell said to her, "you are so fucking stupid." As a result, she felt hurt and stupid. She did not say anything because she did not know him. During a thunderstorm, Mr. Mitchell threw his arms around the plaintiff and said he was terrified of storms.

During the first weeks of her employment, there was no discussion between the plaintiff and Mr. Mitchell about the plaintiff's fiancé, George Asali, or her intimate life. Eventually Mr. Mitchell began to engage in conduct the plaintiff found offensive. He talked about sexual things to the plaintiff and others that she found inappropriate. He folded an offensive and vulgar letter on wax paper² and told the plaintiff to give the letter to her fiancé. (Pl.'s Ex. 10.) The plaintiff read the letter and was shocked and began having problems with panic attacks. She showed the letter to co-worker Melissa Libby, who was disgusted.

The plaintiff next showed the letter to Faith Stilphen, the SJM Director of Nursing from 1997 to 2009. Ms. Stilphen advised the plaintiff to show the letter to Mr. Barrows, the SJM Food Service Director and direct supervisor of the plaintiff and Mr. Mitchell. The plaintiff spoke to Mr. Barrows about the letter and believed she showed him the letter. She told him that she was offended and upset. She explained her panic disorder to him and told him she was having a hard time dealing with the incident. Mr. Barrows said he would take care of it.

PLN 23 2011 12:00 NICHOLS WEBB 2012034500 P.01

The plaintiff knew Ms. Cote, who had conducted the plaintiff's orientation. The plaintiff had never worked previously in any place that had a human relations department. The plaintiff thought she should report the problems with Mr. Mitchell to Mr. Barrows, her direct supervisor.

The next day, the plaintiff told Mr. Mitchell that she thought the letter was disgusting. He replied that she could not take a joke and that the letter was a joke. She continued to try to maintain a civil relationship with Mr. Mitchell because she had to work with him.

During the next day, Mr. Mitchell inquired regarding the plaintiff's mental condition. The plaintiff admitted she swore at Mr. Mitchell. He then told other SJM employees to be nice to the plaintiff because of her mental condition.³ She told him again that his conduct was disgusting.

Mr. Mitchell gave the plaintiff another offensive letter and told her to give it to Mr. Asali. (Pl.'s Ex. 8.) Once again, she read the letter and was disgusted. She had not encouraged Mr. Mitchell to write letters. She did not complain to management because nothing had been done about the first letter.

Just prior to Christmas, Mr. Mitchell gave a present to the plaintiff and a present for her son, Scott. She thought that Mr. Mitchell's giving a present to her son was odd but it looked like the boxes of chocolates Mr. Mitchell was giving everyone else. The present was an offensive card and underwear. (Pl.'s Ex. 9.)

The plaintiff had discussed her son with her co-workers in general terms. The plaintiff asked Mr. Mitchell what he was thinking when he sent the card. He replied

² The plaintiff was not sure of the order in which the letters were given.

³ ³ Mr. Mitchell testified that Ms. Stilphen and the plaintiff told him about the plaintiff's mental disorders. He agreed he could have said that people should be nice to the plaintiff because she is "crazy."

that he and Ms. Bookataub,⁴ who was a member of management, thought it was funny and it was a joke. The plaintiff complained about the card to Ms. Stilphen. Ms. Stilphen agreed that the plaintiff complained to Ms. Stilphen about a Christmas card with sexual connotations sent by Mr. Mitchell to the plaintiff's son. Ms. Stilphen determined that SJM's policies required further action. She spoke to Mr. Barrows and told him what the plaintiff had told her. Ms. Stilphen made clear that the plaintiff was upset and embarrassed about the sexual nature of the card.⁵ Mr. Barrows later told Ms. Stilphen that he had taken care of the issue. During his testimony, Mr. Barrows did not recall hearing about the card containing sexual references. He agreed that if he had, he would have had a duty to investigate and pass the information on the Human Resources. He did not recall seeing the card to plaintiff's son. Nothing was done by management regarding this card.

Mr. Mitchell began telling the plaintiff she was ugly and that she could not "hide ugly." She complained to Mr. Barrows that this was embarrassing and mean. Mr. Mitchell then called her ugly in front of Mr. Barrows, who spoke to Mr. Mitchell and told him to "knock it off." Mr. Mitchell responded that it was not his fault that the plaintiff could not take a "fucking joke." He said he calls it like he sees it, he always has, and Mr. Barrows knows that.

The plaintiff brought photographs of her children and grandchildren to show co-workers. Mr. Mitchell showed the photos to others and asked them how someone so ugly could have such good-looking kids and grandchildren. The plaintiff was embarrassed by these comments.

⁴ Ms. Bookataub did not testify.

⁵ Mr. Barrows denied this conversation. In fact, Mr. Barrows had little recall of events at SJM during the plaintiff's employment.

Mr. Mitchell referred to the plaintiff's breasts as big and told her she looked like a "floozie." He told the plaintiff to get her breasts out of his face at a meeting in front of other employees. Mr. Barrows witnessed this incident. Mr. Mitchell commented on the breasts of others, including Ms. Bookataub.

Mr. Mitchell sent texts to the plaintiff two or three times per week. Some had sexual connotations. (Pl.'s Exs. 2-6.) He once lay on the floor and said he would stick a broom handle "up his butt."

Mr. Mitchell made a statement to Sue LaRoche regarding a penis. She complained to Mr. Barrows and Ms. Bookataub. Ms. Bookataub told Mr. Mitchell to stop. (LaRoche Dep. at 6.)

Mr. Mitchell sent a text about Sherry Poitras. (Pl.'s Ex. 7.) The plaintiff showed the text to Ms. Poitras, who did not seem upset and stated, "that's Joe." He referred to having sex with Ms. Bookataub in front of her and the plaintiff. Ms. Bookataub joked about it and did not seem offended.

At some point, the plaintiff had a house-warming party. She put an invitation on the wall for everyone at work. Mr. Mitchell attended the party. Neither the plaintiff nor Mr. Asali confronted Mr. Mitchell about his conduct.

Several current employees of SJM testified, in general, that nothing amiss occurred between the plaintiff and Mr. Mitchell and that he was a good person to work with. Most of the SJM employees who testified appeared concerned about the ramifications of their testimony. The court found Mr. Mitchell, in particular, to be not credible and Mr. Barrows had either a selective memory or no memory at all regarding the events at SJM during the plaintiff's employment.

In spite of that theme, some current employees' testimony supported the plaintiff's allegations. Sally Butland worked with the plaintiff and Mr. Mitchell. Ms.

Butland did not hear the plaintiff make sexual comments at work or to Mr. Mitchell. Ms. Poitras, a reluctant witness, was shown the letter from Mr. Mitchell to the plaintiff's son. (Pl.'s Ex. 9.) Ms. Poitras was not surprised to see the letter based on the way Mr. Mitchell joked at work. Herbert Dick did recall some sexual comment about the plaintiff's son. Henry Witmer heard Mr. Mitchell call the plaintiff ugly but emphasized Mr. Witmer has a "terrific" relationship with Mr. Mitchell. Amanda Irving recalled that the plaintiff's feelings were hurt when Mr. Mitchell said she was ugly.

The plaintiff's level of anxiety increased and toward the end of her employment, she was having panic attacks frequently. (Def.'s Ex. 24 at 1.) During one panic attack, the plaintiff asked one of the cooks if she could arrive at work early to relieve the plaintiff but the cook was unable to do so. At one point, the plaintiff thought she was having a heart attack. She called one of the SJM nurses, who talked the plaintiff through the episode. The plaintiff eventually was examined by a cardiologist to confirm she was not having heart problems. (Def.'s Ex. 6.)⁶

Mr. Barrows called the plaintiff to his office and said that she was acting quiet and nervous. She told him she could not deal with Mr. Mitchell's conduct and statements any longer. Although she had learned techniques to deal with anxiety, she could not control her anxiety at this time.

Donna Correll, the plaintiff's sister and a credible witness, recalled the plaintiff was very excited about the job at SJM. The plaintiff was doing well when she began the job and, notably, was able to seek full-time employment. Ms. Correll recalled the plaintiff calling several times about Mr. Mitchell's conduct, including the letters and the

⁶ Mr. Mitchell was not mentioned in the report of Dr. Hoag, the cardiologist who examined the plaintiff on July 9, 2007. (Def.'s Ex. 6.) The plaintiff also did not discuss with Dr. Hoag her grandson's illness and the problems with her tenants, which were other sources of stress in her

text messages. The plaintiff was upset and her panic attacks were becoming more difficult. The plaintiff did not, however, follow her sister's advice and call her supervisor after each incident.

Ms. Correll describes her sister as having suffered from anxiety all her adult life, although she tried to keep it hidden. She was also someone who has allowed herself to be treated poorly for her entire life.

Andrea Trynor-Kenney, a credible witness, is a good friend of the plaintiff. They are each other's safe person when one is having a panic attack and have learned to talk each other "off the edge." When the plaintiff began working at SJM, she was in the best place Ms. Trynor-Kenney had seen the plaintiff in years. As the job continued, the plaintiff called Ms. Trynor-Kenney regarding Mr. Mitchell's conduct. The plaintiff's emotional state was disintegrating. Mr. Asali, also a credible witness, described the plaintiff as a "basket case" at the end of her employment at SJM. (See Def.'s Ex. 18.)

The plaintiff decided to leave her employment at SJM. She wrote a letter dated July 28, 2007 to Mr. Barrows and Ms. Bookataub. (Pl.'s Ex. 11.) This was a difficult decision for the plaintiff because she considers her employment at SJM to have been the best job she ever had. She lost her benefits when she left. (Pl.'s Ex. 17.) Except for her treatment by Mr. Mitchell, she liked her job, her co-workers, and the residents, although she was unhappy about scheduling on occasion, as were most SJM employees. No one from SJM management contacted her after she submitted her letter.

Ms. Cote learned of the plaintiff's difficulties at SJM when she received a letter from the Maine Human Rights Commission. Ms. Cote testified the letter was vague and she did not understand it. During her testimony, she was unwilling to state whether

life. She saw Dr. Hoag because she was in the midst of a panic episode and thought she was dying. The report, dated July 9, 2007, documents her increased anxiety and panic.

the information from the MHRC provided a basis for a violation of SJM's sexual harassment policies. She testified that she needed more information to comment.

After her investigation, including discussions with Mr. Mitchell and other employees, SJM determined that interaction between Mr. Mitchell and the plaintiff was "mutual," although Ms. Cote was not aware of anyone, except Mr. Mitchell, who substantiated that the plaintiff engaged in sexual discussions. During the investigation, Mr. Barrows confirmed that the plaintiff complained about Mr. Mitchell's calling her ugly. Because Mr. Barrows "was not clear" on the Christmas card issue, Ms. Stilphen was consulted. Ms. Stilphen agreed the plaintiff had complained about the card and Ms. Stilphen spoke to Mr. Barrows about the need to follow up. Ms. Cote testified that she did not know that Mr. Barrows did not follow up on the card and that he said he had followed up. In fact, Mr. Barrows testified he did not recall a conversation about the plaintiff being upset about the card's sexual references and he did not see the card.

When asked whether Mr. Barrows violated the sexual harassment policy, assuming he was told that the plaintiff was upset about the sexual references in the card and did not follow up with the plaintiff or HR, Ms. Cote testified that she would not say he violated the policy but that he did not follow the policy. This is a distinction without a difference and illustrates the defendant's approach to the environment at SJM.

After leaving SJM, the plaintiff next worked at a restaurant, Bruno's as a cook in August 2007. (Stip. ¶ 1.) She could not do the work because of panic attacks. She left in September 2007, reapplied for disability, and was evaluated by Christopher Muncie, Psy.D.⁷ (Id. ¶¶ 3-4; Def.'s Ex. 24.) She was approved for disability in December 2007

⁷ The parties stipulated that Mr. Mitchell was not mentioned in the report of Dr. Muncie's evaluation of the plaintiff on 11/5/07. (Def.'s Ex. 24.) The report provides that the plaintiff "stated that she recently had to leave her former place of employment in the end of June 2007 due to the increasing symptoms of panic." (Def.'s Ex. 24 at 1.)

based on anxiety related disorders with panic attacks. (Stip. ¶¶ 5-6.) She was unemployed until she returned to work part-time at Bruno's Restaurant in November 2008. (Id. ¶¶ 4, 8.) She stopped working at Bruno's in June and July 2009 because of tendinitis. (Id. ¶ 10.) She returned to Bruno's in August 2009 and worked one day per week, six hours per day. (Id. ¶ 11.)

The plaintiff's adjusted gross income for calendar year ending 12/31/07 was \$17,294.00. (Id. ¶ 2; Def.'s Exs. 10-11.) Her adjusted gross income for calendar year ending 12/31/08 was \$1,034.67. (Stip. ¶ 9; Def.'s Ex. 10.)

Her current job at Bruno's Restaurant is hard work. The open kitchen is in plain view of the public. She cooks now for the public, which is more stressful to her than the SJM work. She eventually wants to work full-time, however; it is important that she work so she does not become agoraphobic again.

DISCUSSION ---

A. Sexual Harassment

"Beginning in 1986, the Supreme Court has recognized that a claim for unlawful employment discrimination under Title VII of the Civil Rights Act may be based on sexual harassment sufficiently severe or pervasive that it creates a hostile work environment." Watt v. Unifirst Corp., 2009 ME 47, ¶ 22, 969 A.2d 897, 902 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66-67, 73 (1986)). The Maine Human Rights Act (MHRA) "also authorizes employment-related claims of sexual harassment based on a hostile work environment." Watt, 2009 ME 47, ¶ 22, 969 A.2d at 902 (citing 5 M.R.S. § 4572(1)(A); 11 C.M.R. 94 348 003-6 § 3.06(I)(1)(c) (2007) (regulations issued by the Maine Human Rights Commission)); see also Nadeau v. Rainbow Rugs, Inc., 675 A.2d 973, 976-77 (Me. 1996); Forrest v. Brinker Int'l Payroll Co., 511 F.3d 225, 228 n.2 (1st Cir. 2007).

“To succeed on such a claim, the First Circuit has required that, pursuant to the MHRA, concurrent with Title VII, a plaintiff must demonstrate:

(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, 2009 ME 47, ¶ 22, 969 A.2d at 902-03 (quoting Forrest, 511 F.3d at 228). “It is appropriate to look to analogous federal case law for guidance in the interpretation of the MHRA. Watt, 2009 ME 47, ¶ 22 n. 4, 969 A.2d at 903 (citing Bowen v. Dep't of Human Servs., 606 A.2d 1051, 1053 (Me. 1992)).

B. Hostile Work Environment

“A hostile work environment claim requires an examination of ‘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.’” Watt, 2009 ME 47, ¶ 23, 969 A.2d 897, 903 (quoting Doyle v. Dep't of Human Servs., 2003 ME 61, ¶ 23, 824 A.2d 48, 56 (citation omitted)). To establish hostile work environment, a plaintiff must show harassing behavior “sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment and creates an abusive working environment.” Meritor Savings Bank, 477 U.S. at 67 (citation and quotation omitted). The United States Supreme Court has stated:

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the

very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993).

C. Constructive Discharge

With regard to constructive discharge as unlawful employment discrimination, the MRHA is interpreted according to Title VII. See 5 M.R.S.A. § 4572(1)(A) (2009); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2010). Under the comparable federal act, "discharge" includes situations "where, although not formally discharged by the employer, the employee has no reasonable alternative to resignation because of intolerable working conditions." King v. Bangor Federal Credit Union, 611 A.2d 80, 82 (1992). "The test is whether a reasonable person facing such unpleasant conditions would feel compelled to resign." Id. This is the test used by the First Circuit. See Greenberg v. Union Camp Corp., 48 F.3d 22, 27 (1st Cir. 1995) ("evidence must support a finding that . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign"). To establish constructive discharge, the plaintiff

must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus.

Pa. State Police v. Suders, 542 U.S. 129, 133-34 (2004).

CONCLUSIONS

The defendant's position appears to be that only the plaintiff was required to conduct herself in a reasonable and mature fashion while employed at SJM. It is undisputed on this record that Mr. Mitchell engaged in regrettable, demeaning,

sexually harassing conduct that he believed was funny. Yet the defendant argues that the plaintiff is at fault for not dealing with this conduct appropriately while the defendant's management did not deal with this conduct at all.

The defendant makes much of the fact that the plaintiff made an effort to maintain a working relationship with Mr. Mitchell and did not confront him when he appeared at her party. This is a woman who was abused for significant periods of her life and who acquiesced. She does not confront; she appeases. As her sister observed, the plaintiff has allowed people to treat her badly for her entire life. Mr. Mitchell was just one of many.

A. Sexual Harassment Hostile Work Environment

a. Unwelcome Sexual Harassment Based on Sex

It is undisputed on this record that Mr. Mitchell made gestures and comments, and sent notes and texts, to the plaintiff. He also made sexually degrading comments to other female employees. The use of "sexually degrading, gender-specific epithets" constitutes harassment based on sex.⁸ Forrest, 511 F.3d at 229. The plaintiff did not welcome Mr. Mitchell's conduct and found it offensive.

b. Harassment Sufficiently Pervasive

Mr. Mitchell's conduct was sufficiently pervasive to create an abusive work environment. This was not "simple teasing, offhand comments, and isolated incidents." Crowley v. L.L. Bean, Inc., 2001 U.S. Dist. LEXIS 11039, at * 52 (D. Me. May 8, 2001). This involved vulgar, frequent statements, written and verbal, and gestures directed toward the plaintiff or other women in her presence.

⁸ The fact that Mr. Mitchell embarrassed the plaintiff about her emotional problems, a gender-neutral act, does not negate his other conduct based on sex.

c. Conduct Subjectively Offensive

The plaintiff was disgusted, offended, and humiliated by Mr. Mitchell's conduct. She found her environment to be hostile and abusive. Crowley, 2001 U.S. Dist. LEXIS 11039, at * 54.

d. Basis for Employer Liability

Finally, a basis for employer liability has been established. Mr. Mitchell's regrettable conduct was well known to the SJM employees and members of management, including Mr. Barrows and Ms. Bookataub. No action was taken except to tell Mr. Mitchell to "knock it off" or "stop." Although Mr. Barrows was informed of the Christmas card and that the plaintiff was offended by the sexual references, he did not follow through as required. Mr. Barrows witnessed Mr. Mitchell telling the plaintiff to get her breasts out of his face at a meeting in front of other employees. Mr. Mitchell commented on the breasts of others, including Ms. Bookataub. Management took no action. Mr. Mitchell discussed having sex with Ms. Bookataub in front of her and the plaintiff. Ms. Bookataub did nothing except joke. SJM knew about the sexual harassment and "failed to implement prompt and appropriate corrective action." Id. at *57.

B. Constructive Discharge

The "constructive discharge standard is more onerous than the hostile work environment standard." Bodman v. Me., Dep't of HHS, 720 F. Supp. 2d 115, 123 (D. Me. 2010). The plaintiff must suffer from "working conditions so intolerable that a reasonable person would have felt compelled to resign." Id. (quoting Pa. State Police, 542 U.S. at 147). This is an objective standard as opposed to a subjective standard. Based on her particular circumstances, the plaintiff perhaps felt compelled to resign.

Mr. Mitchell's conduct would not, however, have mandated the resignation of a reasonable person. "[U]nless conditions are beyond 'ordinary' discrimination, a complaining employee is expected to remain on the job while seeking redress." Pa. State Police, 542 U.S. at 147 (quoting Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1015 (7th Cir. 1997)).

C. Damages

a. Compensatory Damages

The MHRA provides for compensatory damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 5 M.R.S. § 4613(2)(B)(8)(e); Kopenga v. Davric Maine Corp., 1999 ME 65, ¶ 18, 727 A.2d 906, 910. Through learned techniques and medicine, the plaintiff's anxiety disorder and panic attacks were under control at the time she applied for a full-time job and began work at SJM. Her anxiety levels increased significantly during her employment at SJM; she was having panic attacks frequently toward the end of her employment. At one point, the plaintiff thought she was having a heart attack and a SJM nurse talked the plaintiff through the episode. She sought an evaluation from a cardiologist because of concerns of heart problems. Certainly the plaintiff's psychological difficulties did not begin at SJM but the environment there caused a serious exacerbation of her panic attacks.

b. Back Pay

Where there is no actual discharge, a plaintiff must prove that she was constructively discharged to receive "damages flowing from the loss of her job (most notably back pay and front pay)." Bodman, 720 F. Supp. 2d at 123; Ginn v. Kelley Pontiac-Mazda, Inc., 2004 ME 1, ¶¶ 2-3, 841 A.2d 785, 786.

c. Punitive Damages

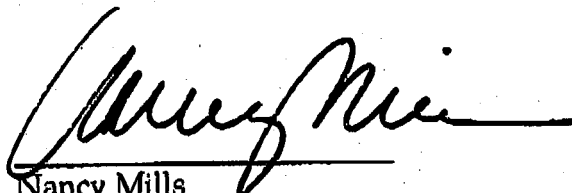
The plaintiff is not entitled to punitive damages. She has not proved by clear and convincing evidence that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the rights of an aggrieved individual." Batchelder v. Realty Res. Hospitality, LLC, 2007 ME 17, ¶¶ 13-14, 914 A.2d 1116, 1121-22.

The entry is

Judgment is entered in favor of the Plaintiff Trudy Little and against the Defendant Saint Joseph's Manor on Counts I and II of the Plaintiff's Complaint in the amount of \$20,000.00 plus prejudgment interest at the rate of 3.40% and post-judgment interest at the rate of 6.30% plus costs.

Judgment is entered in favor of the Defendant Saint Joseph's Manor and against the Plaintiff Trudy Little on Counts III and IV of the Plaintiff's Complaint.

Date: April 22, 2011


Nancy Mills
Justice, Superior Court