

New Hampshire Commission for Human Rights



COMMISSIONERS

JOHN J. COUGHLIN, Esquire, Chair
MAUREEN RAICHE MANNING, Esquire
RICHARD HESSE, Esquire
ELIZABETH D. LOWN
PHILIP PALMER
ARTHUR L. HILSON, Ph.D.
NANCY C.R. ALLEN

2 CHENELL DRIVE
CONCORD, NEW HAMPSHIRE 03301-8501
TEL. (603) 271-2767
TDD Access: Relay NH 1-800-735-2964
FAX (603) 271-6339
E-MAIL: humanrights@nhsa.state.nh.us

EXECUTIVE DIRECTOR
KATHARINE A. DALY - 271-6838

ASSISTANT DIRECTOR
ROXANNE JULIANO - 271-2051

INVESTIGATORS
LORNA D. GREER - 271-2054
KATHY BURNHAM - 271-6840
JOHN GUDAVICH - 271-2055
LINDA CHADBOURNE - 271-6839
ADELAIDE SULLIVAN - 271-6621
WILLIAM T. McLAUGHLIN - 271-2050

EXECUTIVE SECRETARY
SHERYL COOMBS - 271-2768

Lisa Brown

v.

Ever Better Eating, Inc.

ES(H)(R) 0161-00
EEOC#: 16DA00132

Decision of the Commission

This charge of employment discrimination was filed with the Commission for Human Rights on May 25, 2000, and was dually filed with the US Equal Employment Opportunity Commission. Complainant alleged sexual harassment and retaliation.¹ A finding of probable cause was found in complainant's retaliation claim and, conciliation having failed, a hearing was held in this matter on June 11, 2002, before a panel of three commissioners.

The following witnesses presented testimony: Lisa Brown; Trisha Ann-Marie Gordon, employee of respondent and former co-worker of complainant; Susanna Witcher, Esquire (formerly Robinson), respondent's former counsel; Roland Verville, respondent's plant manager; Todd Brown, complainant's husband; Deb Blaisdell, former second shift supervisor for respondent; Steve Byers, private investigator; Bradford Sterl, Jr., president, Ever Better Eating.

The Commission notes that complainant's counsel served sub poenas on Jason Patterson, a former employee, and Cea Drew, and that neither appeared at the hearing.

¹ The investigating commissioner found no probable cause to credit complainant's sexual harassment charge and the Commission dismissed that portion of her claim. That finding is now on appeal to Superior Court pursuant to NH RSA 354-A:21,II(a).

Both parties were represented by counsel.

Based on the documentary evidence and the testimony presented, the Commission finds in favor of the respondent.

Background

Lisa Brown took a job with the respondent, Ever Better Eating, Inc., in Pittsfield, New Hampshire, in the fall of 1999. She worked on respondent's production line, assisting in the making of pizza dough and the assembly of pizza boxes.

On February 28, 2000, an incident occurred in the respondent's parking lot. Although she never reported the incident to anyone in management, Mrs. Brown later told a co-worker, Cea Drew, that her supervisor, Chris Jordan, had sexually assaulted her. Drew told another employee, Trish Gordon, who decided to inform management. Drew and Gordon told Roland Verville of the alleged assault on March 8, 2000.

Verville spoke with Jordan that day and then sent him home. According to Verville, Jordan admitted that he and the complainant had had a sexual encounter in the parking lot, but Jordan said that it was consensual. On March 9, Jordan was removed from second shift, and on March 10, he was suspended without pay. Verville set up an appointment to meet with complainant on March 9, however complainant did not come to the meeting as planned. Instead, her husband picked up complainant's paycheck that day. Complainant went to the police that day and reported the alleged sexual assault.

On March 14, the company met with its attorneys, and requested that Attorney Susanna Robinson (now Witcher) conduct an investigation into the report it had received and advise whether the company had taken appropriate action. Attorney Robinson spoke with a number of employees on March 16 and 17. On March 17, respondent terminated the employment of Jordan. Sterl wrote complainant letters on March 15 and 17, advising her that the company did not condone the behavior which had allegedly occurred, that Jordan had been removed from the workplace, and inviting complainant to return to work.

Complainant sought legal representation very shortly after she learned that Verville had been notified of the alleged incident in the parking lot. Complainant did not participate in respondent's investigation. On March 21, 2000, complainant's attorney wrote to Attorney Robinson, confirming that complainant would not be returning to work. His letter also states: "As you know, we are evaluating whether to bring a discrimination/harassment action against your client." Complainant's attorney then requested information from Robinson's investigation. Attorney Robinson responded by letter dated March 24, requesting the opportunity to speak with complainant, and advising that she would base her findings on information obtained from the other participants in the investigation, if she did not have the opportunity to hear from Mrs. Brown.

Although Robinson declined to provide copies of witness statements, she did send a summary of her investigation results to complainant's attorney in a letter dated April 3, 2000. In it, Robinson expresses her conclusion that her client has acted promptly and appropriately. She summarizes what she has learned about the alleged incident on February 28, as well as subsequent actions of complainant and respondent. She reports what witnesses have told her about complainant's behavior toward the alleged harasser. Finally, Robinson shares that a number of witnesses have told her that the complainant had been involved in "a voluntary relationship with another co-worker prior to the incident with Mr. Jordon." Robinson's letter states that these witnesses' statements led her to believe that the type of sexual activity engaged in by complainant with the previous co-worker was the same as that alleged to have occurred on February 28. Robinson's letter concludes with a statement that it would be helpful to discuss this with Ms. Brown.

While Attorney Robinson's investigation was essentially complete by the time she sent her April 3 letter to complainant's counsel, she had received inconsistent information regarding the rumor of a prior consensual relationship between complainant and a co-worker, and complainant, upon advice of counsel, had refused to speak with her. It was clear that the rumor existed prior to February 28 incident. Because the co-worker was no longer employed by respondent, Robinson had not interviewed him. Robinson contacted a private investigator, Steven Byers, to find and interview the former co-worker, Jason Patterson. Byers interviewed Patterson on April 26. According to Byers, Patterson was concerned because complainant was married and he expressed to Byers that he thought he might be in trouble because of that. On May 3 Byers sent a letter to Robinson outlining what he had learned. Byers' report states that Patterson confirmed having a sexual relationship with complainant sometime during the end of December 1999 or in early January 2000.

When complainant learned of witnesses' statements, she was distraught and embarrassed. Maintaining that the rumor was false and having learned that Patterson had been contacted by a private investigator, complainant contacted Patterson herself. Patterson provided complainant with an undated note in which he states: "Lisa Brown and I were just friends she gave me and a friend a ride home from work we never had sexual relations in any way." Complainant sent the note to her attorney on May 3rd.

On May 9, Robinson sent complainant's attorney a copy of Byers' report. Robinson also informed complainant's attorney that she knew that complainant had visited Patterson and tried to get him to change his story after the contact from Byers. Robinson states that she has contacted Patterson herself since then and Patterson has confirmed what he told Byers.

On May 17, complainant's attorney responded to Attorney Robinson. He indicated that he had talked to Patterson, who denied sexual intimacy with complainant or telling a private investigator that there was such sexual contact. He also pointed out that information regarding any alleged affair with Patterson was irrelevant and prejudicial and would be barred from introduction at trial by Evidence rule 412.

On May 25, complainant filed a charge of sexual harassment and retaliation with the Commission. Her retaliation charge states that:

"34. Ever Better Eating has hired an attorney and a private investigator. Both have accused me of having sexual relationships with a former employee of Ever Better Eating. Those accusations are false and malicious. I have spoken with the former employee who tells me he never told the private investigator that we had sexual relations.

35. I believe these accusations are being made against me by Ever Better Eating in an effort to intimidate me and frighten me away from pursuing this claim."

Legal Standard

NH RSA 354-A:19 provides: "It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to discharge, expel, or otherwise retaliate or discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under this chapter."

NH RSA 354-A:11 provides: "It shall be an unlawful discriminatory act to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this chapter."

The question presented by this case is whether respondent's pursuit of information regarding alleged sexual activity by complainant with a former co-worker (not the alleged harasser) during its investigation was retaliation or intimidation in violation of the State's law against discrimination.

In order to establish a case of retaliation or intimidation through circumstantial evidence, a charging party ordinarily must establish the following prima facie case: (1) that she participated in "protected activity" by either opposing a discriminatory practice or assisting someone else to do so; (2) that respondent was aware of her protected activities; (3) that respondent took adverse employment action or otherwise retaliated against, interfered with, or attempted to interfere with complainant; (4) that respondent's adverse action followed complainant's protected activities within such period of time that retaliatory motivation can be inferred, or that other evidence exists which tends to show illegal motivation.

If complainant can establish a prima facie showing, then respondent must articulate a legitimate non-retaliatory reason for its actions. If respondent does this, then the burden of production shifts back to complainant to show that respondent's explanation is a pretext for retaliation or intimidation.

Analysis

Complainant did not report alleged sexual harassment directly to her employer at any time after February 28; the employer was notified by complainant's co-workers. However, stating an intent to oppose a discriminatory practice by filing a charge has been recognized as "protected activity." See: O'Neal v. Ferguson Constr. Co. 237 F.3d 1248, 84 FEP 1491 (10th Cir. 2001). It also could be argued that contacting the police for the purpose of filing a criminal complaint is opposition activity. See: EEOC v. Dinuba Med. Clinic, 222 F.3d 580, 83 FEP 1655 (9th Cir. 2000).

Respondent had knowledge of complainant's protected activity, because Sterl was contacted by the Pittsfield Police shortly after complainant reported the assault. [Respondent's Exhibit 11, page 15, paragraph 34.] Respondent learned of complainant's intent to file a discrimination charge through her attorney's letter of March 21, 2000. Therefore, respondent had knowledge of complainant's protected activity, at least from the March 21 letter, if not sooner.

While respondent took action to pursue information regarding rumors of sexual activity by complainant with a former co-worker, first by noting the rumors in the investigative report, then by hiring an investigator to interview Jason Patterson, and finally by reporting those rumors to complainant's attorney, the preponderance of the evidence does not establish that these actions were retaliatory or intimidation.

Robinson testified that she was hired to do an investigation and to advise her client whether they had taken appropriate remedial action. She also testified that her firm would represent the respondent if legal action were later taken against it. Acting as investigator, Robinson gathered information. The rumors regarding complainant and Jason Patterson existed prior to complainant's protected activity, and Robinson wrote down what witnesses offered. There is no evidence that Robinson sought negative information about complainant, or that she or Byers "accused" complainant of having a sexual relationship with a former employee. At the request of complainant's counsel, Robinson shared what she learned during her investigation, including reports of similar sexual activity by complainant with another employee.

The Commission finds it would be unreasonable under these circumstances to infer retaliatory motive solely from the short period of time between complainant's protected activity and respondent's investigation, because respondent was under a legal obligation to act promptly. And, although complainant's counsel was correct when he pointed out that rumors of sexual activity with another co-worker would probably be considered irrelevant and would be excluded if the matter went to trial, that fact is not enough to infer retaliatory motive either, under these circumstances.

In any sexual harassment case, the question what actually happened and whether the alleged behavior was "unwelcome" to the charging party is an issue. At the stage when an

employer is doing an investigation, therefore, it may be impossible to draw a bright line between those matters which may turn out to be important and/or probative, and thus may be inquired into, and those which may not. And when an investigator receives conflicting stories from witnesses about any matter, even those which may turn out to be irrelevant, the credibility of witnesses providing information becomes a legitimate issue for inquiry.

Witnesses repeated a rumor about complainant, which complainant denied. Robinson had a "loose end" which she felt she should try to tie up. She hired an investigator to interview Patterson. Complainant and her attorney then contacted Patterson, who gave them a different story than he gave Byers. Robinson, learning of this, decided she should contact Patterson herself. The Commission can not find, under those circumstances, that Robinson's intent was retaliatory or intimidating. While it is understandable that circulation of sexual rumors would be embarrassing and humiliating, there is no evidence that Robinson and Byers started the rumors. Robinson passed the information on to complainant's attorney at his explicit request.

No other evidence of retaliatory or intimidating motive has been submitted. The Commission finds, therefore, based on the preponderance of the evidence, that complainant, even if credited with establishing a prima facie case, has not met her burden of showing that respondent's explanation of its conduct is a pretext for retaliation.

Finally, it should be noted that respondent took no adverse employment action against complainant after it learned of her complaint of sexual harassment. Complainant made up her mind to quit her job at the same time she learned that co-workers were reporting the alleged harassment to her employer. Prior to that time, that is, between February 29 and March 8, complainant had come to work as usual and had even requested and received a raise. No evidence has been submitted to show that respondent took any action during that time which caused complainant to quit.

Complainant's testimony that she quit work because of the rumors about her is not credible, because she did not learn of the rumors until after Robinson's April 3 letter, almost a month after she quit.

Having found in favor of the respondent, the complainant's charge is hereby DISMISSED.

So Ordered.



Elizabeth D. Lown, Commissioner
On behalf of the hearing panel.

Philip P. Palmer, Commissioner

Arthur L. Hilson, Commissioner

COMPLAINANT'S REQUEST FOR FINDINGS AND RULINGS

FINDINGS OF FACT

1. Granted
2. Granted
3. Granted
4. Granted
5. Denied
6. Denied
7. Denied
8. Granted
9. Granted
10. Granted
11. Denied. No evidence submitted that Attorney Robinson asked for said information.
12. Granted
13. Granted
14. Denied
15. Granted
16. Granted
17. Granted
18. Granted
19. Granted
20. Granted. No such telephone call took place, therefore there was no need for Attorney Robinson to advise anyone of it.
21. Granted, as follows: "Attorney Robinson hired a private investigator (Steven Byers) to interview Jason Patterson."
22. Granted
23. Neither granted nor denied: Not relevant.
24. Denied
25. Granted
26. Granted
27. Granted
28. Granted
29. Granted
30. Granted
31. Granted
32. Granted
33. Denied
34. Granted
35. Granted
36. Denied
37. Granted; as follows: "Lisa Brown was earning \$7.50 per hour at the time she quit her employment with Ever Better Eating."

38. Denied
39. Denied

RULINGS OF LAW

40. Granted
41. Granted
42. Granted
43. Granted
44. Granted
45. Denied as written. Granted as follows: The intent of federal and state "rape shield" laws is to protect victims from being subject to unnecessary embarrassment, prejudices and courtroom procedures that only serve to exacerbate the trauma of rape. State v. Howard, (1981) 121 NH 53.
46. Denied
47. Denied
48. Denied

RESPONDENT'S PROPOSED FINDINGS OF FACT AND RULINGS OF LAW

1. Granted
2. Granted
3. Granted
4. Granted
5. Granted
6. Granted
7. Granted
8. Granted
9. Granted
10. Granted
11. Granted
12. Granted
13. Granted
14. Granted
15. Granted
16. Granted
17. Granted
18. Granted
19. Granted
20. Granted
21. Granted
22. Granted
23. Granted

24. Granted
25. Granted. But Commission notes that other actions besides adverse employment actions may be retaliatory under RSA 354-A
26. Granted
27. Granted
28. Denied
29. Granted
30. Granted
31. Granted
32. Granted
33. Granted
34. Granted
35. Granted
36. Granted
37. Granted