

STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. CUM-24-394

SHARON ANDERSEN,

Plaintiff/Appellant,

v.

DEPARTMENT OF DHHS

Defendant/Appellee

APPELLANT'S OPENING BRIEF

Dated: December 16, 2024

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I. Introduction

Plaintiff/Appellant Sharon Andersen (“Andersen”) filed an amended complaint of disability discrimination based on a hostile work environment. In sum, Andersen worked successfully for the Defendant/Appellee, Maine Department of Health and Human Services (“Department”), for thirteen years. In 2018, Andersen developed severe stress and anxiety, causing panic attacks and evolving into PTSD. Andersen’s medical conditions began to negatively impact her work performance. In response, the Department viewed Anderson as damaged goods, deciding to “squeeze” her out of the Department by targeting her with pervasive adverse actions designed to exacerbate her medical disabilities. The Department succeeded.¹ The Department did squeeze Andersen out of the Department and ultimately compelling her constructive discharge. The present lawsuit ensued.

The Department filed a summary judgment after discovery. The Department made three main arguments. Regarding the hostile work environment claim, the Department argued (1) that as a matter of the hostile work environment was not based on Andersen’s disability and (2) that as a matter of the hostile work the environment was not sufficiently severe or pervasive to alter Andersen’s work

¹ Andersen’s supervisor Cindy Sargent admitted to Andersen that she was instructed to target her in order to “squeeze her out” of the Department.

environment. Regarding the constructive discharge, the Department argued a matter of law that Andersen was not compelled to resign. Andersen argued that triable issues existed on the three elements. The Superior Court sided with the Department, granting the summary judgment. This appeal ensued.

II. Summary of Facts

A. Andersen successfully worked for the Department for 13 years.

In 2005, Andersen began her employment with DHHS as a Customer Representative Associate in the Office of Child and Family Services (“OCFS”). By the summer of 2018, Andersen was a Case Aide II which had many responsibilities. At that point, the DHHS admits that Andersen had been an OCFS employee for 13 years with no record of discipline. *Appendix at 219, Plaintiff’s Statement of Material Facts (“PSMF”) 1-3, Andersen Affd. ¶ 11.*

B. Andersen begins to experience high anxiety and stress. The Department receives notice of Andersen’s disabilities.²

In June of 2018, Andersen began to assist with legal work. The additional work caused Andersen to experience extreme stress and anxiety. Andersen gave her manager’s notice of the stress and anxiety. *Appendix at 255, PSMF 6,7, Sargent Dep. 25-26.* As evidence, on August 28th, Andersen sent a text to her supervisor,

² Andersen’s stress and anxiety progressed into panic attacks, PTSD and major depressive disorder are considered disabilities under the MHRA. Regardless, in its summary judgment, the Department did not argue that Andersen’s subject conditions are not disabilities.

Cindy Sargent, (“Sargent,”) writing “Cindy we need to have supervision. I need to talk to you; I am so stressed and upset about my job.” *Appendix at 255, PSMF 11, Sargent Dep. 26-27*. Further, on September 20th, the office held an outing at Two Lights State Park. Andersen, however, remained in the office to catch up on work. While in the office, Andersen experienced chest pain and felt very stressed. Andersen gave Sargent notice of the incident. *Appendix at 217, PSMF 15, Andersen Affd. ¶ 4*. Sargent admits to receipt of notice of Andersen’s stress and anxiety. *Appendix at 255, PSMF 6, Sargent Dep. 26*. In September, Andersen also informed Julie McShane (McShane”), the Department’s Director, being overwhelmed with work and the accompanying stress. *Appendix at 216, PSMF 13-14, Andersen Affd. ¶ 3*.

In early November, Andersen met with Sargent. At the meeting, Andersen again provided Sargent notice of her increasing stress, anxiety, and the need for medical appointments to address the conditions. *Appendix at 217, PSMF 29-30, Andersen Affd. ¶ 5*. In response, Sargent sent an email to her supervisor Denise Merrill (“Merrill”), the Department’s Assistant Manager, recounting the meeting, and Andersen giving notice of the stress and anxiety resulting in panic attacks. *Appendix at 289, PSMF 31-32, Sargent Dep. Ex. 5*. In turn, Merrill emailed Steve Smith (“Smith”), the Human Resources manager who oversaw the Department, McShane and Sargent, writing.

Steve – Can you get back to us about this – she [Andersen] has said in our meeting that her anxiety and stress were so high given this job that she had to see doctors and tests were run – thinking that she needs to fill these out, but it does not appear that she wants to – can you give us some direction. *Appendix at 289, PSMF 33, Smith Dep. Ex. 5.*

In response, Smith directed Sargent to fill out a Worker's Compensation First Report for Injury. On November 6th, Sargent prepared the Report. In the Report, Sargent wrote, "Sharon has issues with anxiety and low blood sugar which is exacerbated by stress and leads to mistakes. These symptoms for possible heart issue...OCFS management changed her job duties, re-assigned printer and scrutinized her job performance which in turn caused Sharon stress and anxiety." *Appendix at 277, PSMF 34-37.* Smith and McShane admit the Report gave them notice of Andersen experiencing anxiety and stress at a high level. *Appendix at 245, PSMF 38-39, McShane Dep. 25.*

C. After noticing Andersen's medical conditions, the Department begins to take adverse actions against Andersen to exacerbate her disabilities and "Squeeze" her out of the Department.

The Injury Report gave management and Human Resources clear notice of Andersen's medical conditions., In response, unfortunately, management and Human Resources now viewed Andersen as damaged goods, unable to keep up with the demands of her job, and thus a liability. As a result, management and Human Resources decided to "squeeze" Andersen out of the Department through

severe and pervasive adverse actions designed to exacerbate her anxiety and stress. For example, the Department management began to unfairly criticizing her job performance, violated the Collective Bargaining Agreement (“CBA”), reprimanded her for no reason, yelled at her, called her a “liar” and “stupid”, accused her of having “something wrong with her brain”, and treated her poorly, did not investigate her complaints of harassment and retaliation, and failed to properly handle her request for accommodation. *Appendix at 217, PSMF 41, Andersen Affd.* ¶ 6. Sadly, the plan worked, culminating with Andersen’s constructive discharge. The following summarizes the monthly chronology of pervasive actions.

November.

Human Resources representative Tristian Mahns (“Mahns”), who reported to Kate Wentworth (“Wentworth”), without investigating, summarily denied Andersen’s Worker’s Compensation claim.³ *Appendix at 248, 250, PSMF 42-45, Mahn’s Dep. 8-9, 17-18.* The Department also violated the union’s Collective Bargaining Agreement (“CBA”) by refusing Andersen use of company car and threatening her with termination. Ultimately, the union intervened and warned McShane and Smith their actions violated CBA. *Appendix at 217, PSMF 46-51, Andersen Affd.* ¶ 7. At a supervisor’s meeting, Sargent falsely accusing Andersen of “constantly lying and not working.” Sargent admits to making the statement.

³ Mahn’s testified he only had her First Report of Injury when he denied the claim.

Appendix at 243-244, 217, PMSF 52-54, 57, McShane Dep. 15-17, Andersen Affd.

¶ 8. In an Investigative Report, Sargent made several false statements regarding Andersen during her interview during the investigation. *Appendix at 218, PSMF 58-63, Andersen Affd.* ¶ 9. Sargent also moved Andersen's desk closer to her office. Sargent claimed she made the move because of Andersen's work performance. Sargent's statement is false. McShane made the decision to move Andersen's desk as part as a reshuffling of the seating of all staff, "help the floor function the best and ensure that new staff, case workers, clerks and aides, are all located near people who can help them with their questions and tasks." *Appendix at 218, 228-229, PSMF 64-65, Andersen Affd.* ¶ 9, *Ex. 2.*

December.

Sargent prepared a Written Warning for Andersen. In the Warning, Sargent falsely accused Andersen of failing to follow a directive, misrepresentation of facts, and working outside approved flex time. In response, Andersen responded to Sargent, emailing, "I do not have any idea about what you are talking about. I have never refused to do anything they have asked of me." Andersen refused to sign the Warning. *Appendix at 283-286, 270. PSMF 66-70, Sargent Dep. Ex. 14 and 15, Andersen Dep. 81-83.* At a meeting, Sargent accused Andersen of having "something wrong with her brain" and being a "sneaky liar." McShane admits that it was inappropriate for Sargent, a supervisor, to make such accusations. *Appendix*

at 218, 246, PSMF 71-73, *Andersen Affd.* ¶ 10, *McShane Dep.* 29-31. Andersen attempted to defend herself, but she barely got a word in as Sargent continued to yell at her. Sargent also falsely accused Andersen of getting lost while transporting a child and being “too stupid to use a GPS.” *Appendix at 218, PSMF 74-75, Andersen Affd.* ¶ 10. Union steward Godwin also attended the meeting and took notes. Goodwin’s notes confirm Sargent called Andersen a “sneaky liar and deceitful” and had “something is wrong with your [Andersen’s] brain.” *Appendix at 218-219, 230-233, PSMF 76-77, Andersen Affd.* ¶ 10, *Ex. 3*. After the meeting, Andersen went back to her desk, listening as Sargent stood in the hall outside of her office detailing to a co-worker the substance of the just completed meeting. *Appendix at 218, PSMF 79, Andersen Affd.* ¶ 10. At a Loudermill meeting, the Department issued a five-day suspension for Andersen for a work issue. The Commissioner reduced the suspension to 2 days. In the decision, the Commissioner wrote,

Ms. Andersen has been an OCFS employee for 13 years with no record of discipline until recently. It is noted that she attempted to speak to her supervisor and her workload and her inability to keep up with the amount of work she was responsible for, and I do believe that Ms. Andersen genuinely is remorseful for her action and inaction in response to this event.” *Appendix at 219, PSMF 80. Andersen Affd.* ¶ 11.

On December 19th, Andersen sent an email to Sargent giving notice that she would not be in to work due to recurring chest pains. Sargent did not return or

acknowledge Andersen's message. Instead, the same day, Merrill sent an email to Andersen falsely accusing her of poor performance. *Appendix at 219, 234, 253-254, 256-257, 287-288, PSMF 81-84, Andersen Affd. ¶ 12, Ex. 5, Sargent Dep 13-21, 60-61, Sargent Dep. Ex. 19.* In response to Merrill's email, Andersen sent an email to Sargent, McShane and Merrill asking, "I am not even sure why I am getting this email again. I feel I do follow all the below and **I feel as though I am being targeted.**" *Appendix at 256-257, 287-288, PSMF 85-86. Sargent Dep. 60-61, Sargent Dep. Ex. 19.* Despite notice of Andersen's complaint of being targeted, McShane and Smith admit the Department did not undertake an investigation or inquiry into Andersen's report. *Appendix at 256-257, 258, PSMF 87-91, Smith Dep. 25, Sargent Dep. 61.* Finally, Sargent held a Christmas party for the Department at her home. Sargent did not invite Andersen to the party. *Appendix at 219, PSMF 92-93, Andersen Affd. ¶ 14.*

January.

McShane and Merrill falsely accused Andersen of improperly requesting medical records. In response, Andersen explained she managed the requests as she had been trained. *Appendix at 273, PSMF 94-95, Andersen Dep. 117.* In an email, Andersen wrote, "**I feel this is just another form of attack on me.**" *Appendix at 219, 235, PSMF 96, Andersen Affd. ¶ 15, Ex. 6.* McShane confirmed to Andersen

receipt of her email. Merrill, however, said she would not respond in writing.

Appendix at 235, PSMF 97, Andersen Affd. ¶ 15.

On January 15th, Sargent sent an email to Andersen requesting a meeting regarding discipline. *Appendix at 220, PSMF 98, Andersen Affd. ¶ 16.* Union steward Godwin received notice of the impending discipline. In response, Godwin sent an email to her Union Supervisor, Jim McGurty, writing, “**At this point, I think it is fair to say this is becoming harassment, and/or a form of retaliation.** Could you please advise regarding next steps?” *Appendix at 220, 236, PSMF 99, Andersen Affd. ¶ 16, Ex. 7.*

On January 17th, Sargent issued Andersen a “Written Reprimand.” *Appendix at 220, 271-272, PSMF 100, Andersen Dep. 96:13-97:16, Andersen Affd. ¶ 17.* In the Reprimand, management accused Andersen of failing to comply with the emails dated 11/2/18 and 12/19/18. The Reprimand, however, did not provide any specific incidents of Andersen violating the directives, and Andersen is not aware of violating any of the directives. *Appendix at 220, PSMF 101-103, Andersen Affd. ¶ 17.* At the meeting, Sargent yelled at Andersen, again accusing her of having something wrong with her brain, getting lost and being too stupid to use a GPS. *Appendix at 272, PSMF 105, Andersen Dep. 97:17-22.* Sargent yelled so loud that co-workers could hear her and caused Andersen to leave the room to try to catch her breath. *Appendix at 272, 220, PSMF 106, Andersen Dep. 100:2-4, Andersen*

Affd. ¶ 18. Andersen then experienced an anxiety attack. Sargent and the union representative wanted to call rescue, but Andersen managed to calm down.

Appendix at 220, 108-109. Andersen Affd. ¶ 18. After Andersen had calmed down, Sargent asked if Andersen was okay and all right to drive home. *Appendix at 220, PSMF 109, Andersen Dep. 123:17-124:15. Andersen Affd.* ¶ 18. Sargent also said, **“You know I did not want to do this to you, I was told to squeeze you.”** *Appendix at 220, PSMF 110, Andersen Affd.* ¶ 18.

On January 18th, Andersen worked in the back room, so she would not see anyone. Andersen worked on files the entire day. She broke down crying several times and not once did anyone check on her. *Appendix at 220, PSMF 113, Andersen Affd.* ¶ 19 The next day, Andersen’s physician, Peter Emery, put her out on medical leave due to depression and post-traumatic stress disease (“PTSD”) caused by the hostile and retaliatory work environment. *Appendix at 220, PSMF 156, Andersen Affd.* ¶ 19. On January 30th, Andersen commenced counseling with Elizabeth Millett, NCC, LCPC. Millett diagnosed Andersen with PTSD. *Appendix at 221, PSMF 157, Andersen Affd.* ¶ 20.

February/March.

Andersen remained out on medical leave. While Andersen remained on leave, the record does not contain any evidence of the Department or Human Resources investigating Andersen's complaints of harassment and retaliation.

April.

Smith contacted Andersen to inquire about returning to work. In response to Smith, Andersen gave notice that her doctor and therapist said she is not ready to return to work. In response, Smith said Andersen would need to request accommodation for additional medical leave. *Appendix at 221, PSMF 159, Andersen Affd.* ¶ 22. Accordingly, Mahns send Andersen the paperwork for the additional medical leave. Andersen completed the paperwork. In the paperwork, Andersen again recounted that “stress brings on chest pain, shortness of breath, and she is being treated for “Major Depressive Disorder”, PTSD and anxiety. *Appendix at 278, PSMF 170-74, Mahns Dep. Ex. 3.* Andersen also stated as “**OCFS is a very hostile work environment to work in.**” *Appendix at 278, PSMF 175, Mahns Dep. Ex. 3.*⁴

⁴ Smith testified that “if somebody claimed a hostile work environment, the department would look to see what the claim was. Why as there a claim of a hostile work environment.” Smith testified the department would initially speak to the complaining employee. Depending on what the employee said, an investigation may result. Wentworth, the ADA/EEO coordinator, and Wendy Malinowski, the Human Resources Director DHHS Human Resources Director, Resources Service Director, would decide whether to investigate. *Appendix at 220, 259, PSMF 113-117, Andersen Affd.* ¶ 19, *Smith Dep.* 35.

May.

Upon notice of Andersen's complaint of a hostile work environment, Department policy required it to investigate the complaint. *Appendix at 259, PSMF 114-117, Smith Dep. 35:11-20.* Mahns testified pursuant to the subject policy, he was responsible to interview Andersen and report back to his supervisor Kate Wentworth. *Appendix at 249, 251, PSMF 118-121, Mahn's Dep. 14, 15, 32.* Mahns did speak Andersen. Andersen recounted the hostile work environment. Mahn's notes documented the interview. In the notes, Mahn recorded that Sargent told Andersen she was instructed to "put the squeeze on me?" Andersen also told Mahn she wanted to file a complaint against Sargent. *Appendix at 280-281, PSMF 121-124, Mahn's Dep. Ex. 9.* After speaking to Andersen, Mahns testified she would have spoken to Wentworth, but he did nothing further. After Mahn's spoke to Wentworth, there is no evidence of Wentworth or the Department doing anything further to investigate the hostile environment. *Appendix at 252, 260, PSMF 125-126, Mahn's Dep. 33, Smith Dep. 38.*

Mahns also communicated with Andersen's primary physician Dr. Emery regarding her request for accommodation. Specifically, Mahn's sent Dr. Emery a letter asking, "In order to accommodate Ms. Andersen, I need the following clarification and update" regarding Andersen's return to work date and what accommodations Andersen will need upon her return to work. In response, Dr.

Emery's estimated Andersen could return to work in six weeks, but "when Ms. Andersen returns to work, she will be unable to return to work in the same department she was working in. No other accommodation required at this time. *Appendix at 251, 279, PSMF 183-184, Mahns Dep. 31:15:32:2, Mahns Ex. 8.* In his notes, Mahns also wrote that Andersen did not want to go back to the same office, but she would go to Biddeford or to a different division within the DHHS in Portland. *Appendix at 281, PSMF 185, Mahns' Depo. Ex. 10.*

The Department maintains a detailed procedure to respond to requests for accommodations titled "Policy and Procedure for Processing Requests for Reasonable Accommodations from Employees and Applicants" ("ADA Policy"), *Appendix at 201-204, PSMF 157, 160-168, Affidavit of Guy D. Loranger ("Loranger Affd."), ¶ 2, Ex. 1.* The policy initially requires, "The agency EEO Officer will work with the supervisor/manager determine whether the request is reasonable within the framework of existing laws and regulations." *Id.* The ADA policy continues.

If at any time during the process it is determined that the employee is unable to perform the essential functions of his/her position even with reasonable accommodation, she may be eligible for reassignment. *Id.*

The policy the requires that,

If reasonable accommodation cannot be made within the employee's current position, state and federal law require the employer explore

reassignment to a vacant position. Agencies must first explore equivalent positions and then demotion options for disabled employees who can no longer perform their current jobs with or without reasonable accommodation. *Id.*

The policy defines “Reasonable Accommodation may take such forms as ...Reassignment to a vacant position.” *Id.* The subject policy sets out “Procedures” for handling requests for reassignment. The Procedure specifically requires that,

Full documentation must be provided concerning efforts to make reasonable accommodation in accordance with this policy, including reasons for bypassing reassignment to an equivalent position. *Id.*

Mahns did not come comply with Department’s accommodation policy. Initially, Mahn’s testified he does not recall responding to Dr. Emery’s request for accommodation. *Appendix at 251, PSMF 186, Mahns Dep. 32:2-11.* Further, the Department maintains a “Log of Requests for Accommodations.” The Log documents the Department’s activity responding to Request for Accommodations. *Appendix at 290, PSMF 187, Smith Dep. Ex. 18,* The Log for Andersen’s request accommodation does documents that on May 8, 2019, Andersen made a request for an accommodation for leave time and reassignment.” *Id.* The Log, however, does not identify any activity whatsoever on Andersen’s request for accommodation after May 8, 2019. *Id.* The Log, therefore, provides compelling evidence that the Department and Human Resources did not comply with its procedure for responding to Andersen’s request for accommodation.

June.

In early June, Tammy Desjardin of the Department, sent an email to Mahns, Wentworth, and Malinoski, the Director of Human Resources of the DHHS. In the email, Desjardin related that she attended Andersen's worker compensation mediation and learned Andersen reported that Sargent was retaliating against her and calling her names such as stupid. In the email, Desjardin asked "is HR currently doing an investigation into her claims?" *Appendix at 251, 282, PSMF 127-128, Mahn's Dep. 35, Mahn's Dep. Ex. 11.* Mahns and Wentworth did not respond to the Desjardin. *Appendix at 2, PSMF 132, Mahn's Dep. 35.* Moreover, Sargent testified that she also learned of Desjardin's email. Sargent further testified that Julie [McShane] or Denise [Merrill] told her of Andersen's allegations of Sargent creating a hostile work environment and retaliating against Andersen. Sargent, however, testified that no one interviewed her regarding Andersen's repeated complaints of a hostile work environment and retaliating. *Appendix at 257, PSMF 130-131, Sargent Dep. 63.* Again, despite repeated notice of complaints, the Department and Human Resources continually violated policy by investigating the complaints. In other words, the Departments and Human Resources negligence is further evidence of attempting to "squeezing" Andersen out of the Department.

Wentworth also testified that in early June she took over Andersen's request for accommodation from Mahn's. Wentworth initially sent Andersen the same ADA Questionnaire that Mahns had sent. Accordingly, Andersen again by recounting the diagnosis of major depression, PTSD, and anxiety and the existence of the hostile work environment, and recounting, "I cannot work in the OCFS again because I fear the bullying will continue and they will retaliate against me." *Appendix 291-292, PSMF 191-193, Wentworth Dep. Ex 4.* In response to her requested accommodation, Andersen again requested a "change in department/building." *Id.* Andersen also reported, "There has been nothing done concerning my complaint on the bullying and retaliation that was done to me. I cannot work there knowing it will happen again." *Id.* In response to how her impairment affect the ability to perform the functions of her job, Andersen responded "anxiety attacks that have been brought on by the work/bullying." *Id.* Despite Andersen's clear notice of a hostile work environment, Wentworth took no action whatever to respond to the subject notice. *Appendix at 261-262, PSMF 134-141, Wentworth Dep. 13, 14.*

Regarding Andersen's request for accommodation for reassignment to a different location, Wentworth testified, "Reassignment was a reasonable accommodation within the department." *Appendix at 263, PSMF 197, Wentworth Dep. 20:18-21.* Despite reasonable request by Andersen, and the Departments

detailed policy to respond to requests for accommodations, as noted, the Activity Log, does not indicate Wentworth took further action whatsoever on Andersen's request for accommodation. *Appendix at 290, PSMF 187-188, Smith Dep. Ex. 18.* In other words, like Mahn's, after receiving Andersen's request for accommodation, Wentworth did not process the request.

July.

By late July, the Activity Log indicates Wentworth had not taken any action on Andersen's request for accommodation and had no communication with Andersen. *Appendix at 290a), PSMF 187, Smith Dep. Ex. 18.* Andersen, therefore, contacted Wentworth seeking an update for her request for a reassignment.

Appendix at 264, 293-294, PSMF 141, Wentworth Dep. 23, Wentworth Dep. Ex. 6. In response to Andersen's email, Wentworth replied by email stating, "I don't usually start with a reassignment." *Id.* In response, Andersen wrote,

When talking to you a few months ago, you informed me that you would help me get another position and now it sounds like you are saying that you cannot help... You also told me you were looking into the complaint I made on my supervisor Cindy Sargent. When I asked you if you were really going to investigate the complaint, you said to me that we were going to look into this right away. I don't understand why this is taken so lightly. It has been five months since we first talked. *Id.*

August

Again, through the balance of July and into August, Andersen did not hear back from Wentworth. Accordingly, on August 7th, Andersen sent an email to Wentworth requesting an update. The two then spoke on the phone. In the phone call, Wentworth informed Andersen,

You did not qualify for reassignment because you can do your job,⁵ it's that you and your supervisor are not getting along...Uhm,, you know, my next step is to send you a letter that says to get back to work or we are going to have to proceed with, um, you know figuring out our next step..." *Appendix at 221, PSMF 149, Andersen Affd.* ¶23, *Ex. 9.*

Initially, the Activity Log does not contain any document any activity whatever since May 8th. *Appendix at 290, PSMF 187-188, Smith Dep. Ex 18.* The lack of documentation violated Department policy, and it puts into question the credibility of Wentworth's response to the request for accommodation.

In response to Wentworth's statement to Andersen that her next step is to send her a letter directing her to return to work, in a letter August 8th, Andersen's LCPC, Elizabeth Millett, sent a letter to Department. In the letter, Millette wrote,

I do not feel Sharon should return to work in the same building or environment. She has made some progress, but she is still triggered by contact from the department or even the building she worked. She was taking her son to an appointment in the building and had a PTSD attack...I have diagnosed her with PTSD. *Appendix at 221, PSMF 210, Andersen Affd.* ¶ 24.

After Millett's letter, Andersen again spoke to Wentworth. In the call, Wentworth told Andersen,

Okay, so here is the issue. I cannot reassign you to get away from your supervisor...Um, you know, I talked to. I talked to your management about what your, you know what your supervisor said to you, and I was told that did not happen... *Appendix at 222, PSMF 211, Andersen Affd.* ¶ 25.

On August 13th, Andersen learned from a co-worker that her office had been cleaned out. *Appendix at 222, PSMF 212, Andersen Affd.* ¶ 26. After her discussions with Wentworth, and learning her office had been cleaned out, Andersen spoke to her physician and husband about returning to work at the Department. After the discussion, Andersen concluded she could not return to the hostile environment which had negatively impacted her health and caused her to go out on medical leave for several months. Accordingly, on August 30th, Andersen notified Wentworth that she was forced to submit notice of her constructive discharge. *Appendix at 222, PSMF 213, Andersen Affd.* ¶ 27.

III. Issues on Appeal.

- Did the Department establish as a matter of law the harassment was based on Andersen's disability.
- Did the Department establish as a matter of law the harassment was sufficiently severe or pervasive to alter Andersen's work environment.
- Did the Department establish as a matter of law the harassment that Andersen was not compelled to resign.

IV. Legal Analysis.

Andersen's lawsuit alleges sole count of disability based on a hostile work environment. The Department filed a summary judgment, arguing Andersen's did not establish two elements of the prima facie case, and the claim was not timely. The Superior Court granted the summary judgment on both grounds. Accordingly, each argument is addressed in turn.

A. The Prima Facie Elements.

The prima facie elements of a disability discrimination based on a hostile work environment claim are (1) Andersen belonged to a protected class (in this context, that she was a qualified individual with a disability); (2) she was subjected to unwelcome harassment; (3) harassment was based on her disability; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive work environment; (5) the harassment was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and Stratton in fact perceived it to be so; and (6) some basis for employer liability has been established. See *O'Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir.) 2001; *Stratton v. Bentley Univ.*, 113 F.4th 25, 50-51, 2024 U.S. App. LEXIS 20706.

The Department argues that there are not triable issues of fact as to the third and fifth elements. Each argument is addressed in turn.

1. Harassment based on Andersen's disability.

The third element requires evidence that the harassment was based on Andersen's disability. Initially, Andersen's disability is based on extreme stress, anxiety which caused panic attacks, a depressive order, and PTSD. The Department did not dispute that Andersen had a disability. Instead, the Department argued that "The record establishes no one with the DHHS knew that Andersen had a disability prior to her departure on medical leave on January 18, 2019. Neither Sargent nor McShane knew anything about her disability at any time while working for them." *Dept. MSJ p. 16.*⁶ The record, however, is disputed on this issue.

The record contains evidence that in summer of 2018, Andersen began to experience extreme stress and anxiety due to her workload. As the summer progressed, Andersen's anxiety increased. As evidence, on August 28th, Andersen sent a text to Sargent, writing "I need to talk to you; I am so stressed and upset about my job." Sargent admits, by this time, she had noticed Andersen's stress and anxiety.

⁶ The Department's points to it SMF 55-59, 65-67 in support of its argument. Andersen disputed each fact.

Andersen's symptoms increased in the fall, and she continued to give the Department notice of the condition. For example, on September 20th, the office held an outing at Two Lights State Park. Andersen, however, remained in the office to catch up on work. While in the office, Andersen experienced chest pain and felt very stressed. Andersen gave Sargent of the incident. In September, Andersen also informed McShane of being "overwhelmed" with work and accompanying stress. In early November, Andersen met with Sargent. At the meeting, Andersen told Sargent of her increasing stress, anxiety, and the need for medical appointments to address the medical conditions. In response, Sargent sent an email to her supervisor Denise Merrill ("Merrill") recounting the meeting, and Andersen giving notice of the stress and anxiety resulting in panic attacks. In turn, Merrill emailed Steve Smith ("Smith") at Human Resources. McShane and Sargent, writing.

Steve – Can you get back to us about this – she [Andersen] has said in our meeting that her anxiety and stress were so high given this job that she had to see doctors and tests were run.

In response, Smith directed Sargent to fill out a Worker's Compensation Claim for Andersen. Sargent prepared the Claim for Andersen. In the Claim, Sargent wrote,

Sharon has issues with anxiety and low blood sugar which is exacerbated by stress and lead to mistakes. These symptoms for possible heart issue...OCFS management changed her job duties, re-

assigned printer and scrutinized her job performance which in turn caused Sharon stress and anxiety.

Andersen's medical conditions worsened into 2019, and she continued to provide notice to the Department of her medical condition. On January 15, 2019, Sargent sent an email to Andersen requesting a meeting regarding discipline. Upon notice of the discipline, Godwin, the union rep, sent an email to her regional union McGurty regarding upcoming discipline for Andersen. In the email, Godwin wrote, "At this point, at this point I think it is fair to say this is becoming harassment, and/or a form of retaliation." Sargent then met with Andersen to issue the reprimand. At the meeting, Sargent yelled at Andersen, accusing her of having "something wrong with her brain." Sargent yelled so loud that co-workers could hear her. Sargent's outburst caused Andersen to leave the room to try to catch her breath. Andersen then experienced an anxiety attack. Sargent wanted to call rescue, but Andersen managed to calm down. After Andersen had calmed down, Sargent went to Andersen to ask if she was okay. Sargent also told Andersen "You know I did not want to do this to you, I was told to squeeze you."

The record would allow a trier of fact to reasonably conclude that the Department did know of Andersen's disability prior to her medical leave.⁷ A triable issue of material fact, therefore, exists as to this material issue.

2. The Harassment was severe or pervasive to alter Andersen's working environment and culminating in Andersen's constructive discharge.

Case law holds that "determining whether harassment is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment depends on all the relevant circumstances." *Richardson v. Mabus*, 203 F. Supp.3d 86, 160 (D. Me. 2016). Case law has held that an "inadequate response by defendant to plaintiff's internal complaints of harassment may be considered as evidence of a hostile work environment." *Cook v. Entergy Nuclear Operations, Inc.*, 948 F. Supp. 2d 40, 46, 2013 U.S. Dist. LEXIS 71721, *14-16, 28 Am. Disabilities Cas. (BNA) 67, 2013 WL 2251264. "The law is without a mathematically precise test to determine whether a plaintiff presents sufficient evidence of a severely and pervasively hostile work environment, but the thrust of this inquiry is to distinguish between the ordinary, if occasionally unpleasant, vicissitudes of the workplace and

⁷ Further, the record contains ample evidence that after Andersen went on medical leave the Department continued to receive notice of Andersen's disabilities.

actual harassment." *DePaolo v. GHM Portland Mar, LLC*, 2018 U.S. Dist. LEXIS 135286, *37-39, 2018 WL 3822455. *DePaolo* is analogous to the present case.

In *DePaola*, the plaintiff was diagnosed with cancer. After the employer received notice of DePaolo's medical condition, there was a marked change in management's treatment of DePaolo. Management "became highly critical of him and hostile toward him", his manager "began frequently yelling and screaming at him, and referred to him on multiple occasions as a chemo brain". DePaolo testified that he felt "threatened, degraded, frustrated, red in the face, hurt, disappointed, scared [and] protective." *Id.*

While Palmer (the supervisor) did not refer to DePaolo's disability during that incident, a reasonable jury could infer, on the totality of the evidence, that his hostility emanated from DePaolo's disability. Further, DePaolo adduces evidence that Palmer's treatment of him caused heart palpitations, nausea, vomiting, nightmares, violent thoughts, and a desire to hide or run away from the property, and that Palmer testified that Winston told him that DePaolo's FMLA leave in January 2015 was due to workplace stress." *Id.*

Based on the relevant evidence, the Court held, "At bottom, the evidence viewed in the light most favorable to DePaolo paints a picture of a work setting more closely matching the description of "an abusive working environment" than one filled with "the ordinary, if occasionally unpleasant, vicissitudes of the workplace[.]" *DePaolo v. GHM Portland Mar, LLC*, 2018 U.S. Dist. LEXIS

135286, *37-39, 2018 WL 3822455.⁸

Similarly, the record in the present case contains evidence the following evidence: Andersen enjoyed 13 years of relatively peaceful work history and did not receive any discipline. Yet, after receiving notice of Andersen's notice extreme anxiety and stress, there was a marked change in the Department's treatment of Andersen. The Department became highly critical of Andersen and made false allegations against her. Sargent began to frequently yell and scream at her, and referred to Andersen as "stupid" and "something wrong with her brain." Sargent ultimately admitted to Andersen that she was instructed to "squeeze" her out. Anderson's union representative, who witnessed the Department's abusive treatment of Andersen, advised her superior that "At this point, at this point I think it is fair to say this is becoming harassment, and/or a form of retaliation. Could you please advise regarding next steps?" Further, the Department repeated notice of complaints directly by Anderson and her health care providers of the harassment, retaliation, and hostile work environment. The Department admits to the repeated notice, yet it also admits it violated its policy by not responding to the repeated

⁸ *Stevens v. S. Me. Oral and Maxillofacial Surgery, P.A.*, 2022 U.S. Dist. LEXIS 39654, *26-29, 2022 WL 671213 is another analogous case in which the plaintiff worked for nearly seven years "without significant incident, [before] the tone and temperature of her workplace altered sufficiently to create a hostile work environment commencing shortly before her medical leave of absence and continuing through the date she was fired, and that the timing was no coincidence."

notice. Moreover, the record contains evidence that Andersen and her health care providers repeatedly advised the Department she could not return to the Department and, therefore, requested a simple accommodation to transfer to a different location, such as Biddeford. The Department's policy states a transfer is a reasonable accommodation. Wentworth even testified a transfer is a reason accommodation. Yet, neither Mahn's or Wentworth followed Department policy in processing Andersen's request for accommodation. Finally, the record is replete with evidence of the hostile environment causing Andersen extreme stress, anxiety, panic attacks, and PTSD.

Like the *DePaolo* case, the evidence viewed in the light most favorable to Andersen paints a picture of a work setting more closely matching the description of an abusive working environment rather than one filled with "the ordinary, if occasionally unpleasant, vicissitudes of the workplace."

In its motion for summary judgement, the Department downplayed the work environment as simply consisting of how policies were enforced, discipline issued, degrading Andersen by calling her names. and the like. The Department, however, ignores the fact its offensive conduct towards Andersen began after receiving notice of medical condition, Sargent admitted to be instructed to squeeze Andersen out, the union representative termed the Department's actions as harassment and

retaliation, the Department repeatedly receiving complaints of Andersen's being exposed to a hostile work environment, the Department admittedly violated policy by not investigating, and the Department violated Department policy by failing to properly handle Andersen's request to accommodation. Finally, the totality of the harassment caused Andersen extreme emotional distress, anxiety, panic attacks and PTSD. The evidence viewed in the light most favorable to Andersen could be reasonably viewed an abusive working environment. Accordingly, a material fact exist to the element.

B. Constructive Discharge.

The Department admits that if Andersen's constructive discharge is actionable, her hostile environment is timely. The Department, however, makes two arguments which it contends leaves the constructive discharge not actionable, and, therefore, the hostile work environment is not timely. Each argument is not sustainable.

First, the Department argues that constructive discharge is not a separate cause of action. A constructive discharge must be part of an underlying claim, such as a claim of discrimination based a hostile work environment. *Marrero v Goya of P.R. Inc.* 304 F. 3d 7, 28 (1st Cir. 2002). Andersen's agrees with the Department. However, Andersen's constructive discharge is not an independent cause of action. To the contrary, the constructive discharge is part of her underlying claim of

discrimination based a hostile work environment. The Department's initial argument, therefore, is misplaced.

Second, the Department argues "Andersen did not experience conditions to meet the steep burden to demonstrate she was forced to resign." *D's motion for summary p. 13*. The Department's argument, however, is not supported by the record and the relevant authority.

Case law holds the standard for a constructive discharge is flexible, depending on the circumstances of the case. For example, the Law Cour has held that a change to an employee's work schedule to one she cannot work due to childcare issues compelled the employee to resign thus created a triable issue of fact as to whether the employee was constructively discharged. *Fuhrmann v. Staples the Office Superstore East, Inc.*, 2012 ME 135, P16, 58 A.3d 1083, 1090-1091, 2012 Further, denying a request for accommodation which would force the plaintiff to continue to work in an environment which could negatively impact the plaintiff's health and well-being is presents a constructive discharge. *Smith v Hendersen* 376 F.3d 529 (6th Cir. 2004). Moreover, "The jury reasonably can take into account how the employer responded to the plaintiff's complaints, if any." *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 28-29, 2002 U.S. App. LEXIS 17789, *47-49. *Marrero* is an analogous case.

In Marrero, the plaintiff/employee repeatedly complained about the harassment to her supervisors and the Human Resources Department. Nothing was done. The employer also refused Marrero's request that she be moved to another building. Marrero ultimately went out on medical leave for stress. She remained out on leave for six months before submitting her resignation. The 1st Circuit found that Marrero established a triable issue of fact regarding whether she was constructively discharged. The Court held,

Based on that evidence, the jury reasonably could have found that "a reasonable person in [Marrero's] shoes would have felt compelled to resign." *Alicea-Rosado*, 562 F.2d at 119. Given the inadequacy of the transfer after a long history of hostility and frequent complaints, Marrero reasonably believed that her working conditions at Goya would not change and that she could only anticipate more of the same intolerable harassment. If she wanted to avoid further harm, she would have to leave work entirely. *See Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 200-01 (5th Cir. 1992) (affirming finding of constructive discharge where employer refused to take adequate corrective measures to protect employee from future harassment). *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 28-29, 2002 U.S. App. LEXIS 17789, *47-49.

In the present case, Andersen experienced a pervasive history of hostility and frequent complaints. Despite the subject history, the Department violated its policies by not investigating her complaints and not processing Andersen's request for accommodation. Instead, Wentworth told Andersen that she would receive a letter instructing her to return to the same hostile environment which caused her disabilities and forced her out on medical leave. Andersen's medical providers

even warned her to not return to the same work environment which “squeezed” her out. Given the evidence, Andersen (and her health care providers) could only anticipate more of the same intolerable harassment. If she wanted to avoid further harm, she would have to leave work entirely. Based on that evidence, the jury reasonably could have found that a reasonable person in Andersen’s shoes would have felt compelled to resign.

The Department argues that Andersen was not compelled to resign on August 30, 2019. The Department argues that in the alternative, Andersen could continue to stay out on leave and communicate with Wentworth. The record, however, as noted, provides a fuller picture. The Department ignores that Wentworth told Andersen that she would not approve her request for accommodation and would send her letter instructing return to work. The Department also ignores the long history of hostility and frequent complaints, and, despite the subject history, the Department violated its policies by not investigating Andersen’s complaints. Instead, the Department expected Andersen to return to the same hostile environment which caused her disabilities and forced her out on medical leave. Obviously, when the full record is examined, a triable issue exists on this issue.

V. Conclusion.

For the above reasons, Andersen requests that summary judgement order be

vacated.

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