

## MEMORANDUM

The Minnesota Department of Human Rights (MDHR) has finished its investigation into this charge of discrimination and the Commissioner determines:

There is **PROBABLE CAUSE** to find that the respondent discriminated against the charging party when it subjected her to racial harassment.

There is **PROBABLE CAUSE** to find that the respondent discriminated against the charging party when it subjected her to differential treatment when it wrongfully terminated her employment on the basis of her race.

### Background

1. On November 18, 2018, the charging party filed this charge of discrimination (charge) and alleged the respondent discriminated against her in the area of employment, on the basis of the charging party's race.<sup>1</sup> Specifically, the charging party alleged the respondent subjected her to race-based harassment when it failed to respond to her complaints of a resident's racial harassment and wrongfully terminated her employment on the basis of her race,<sup>2</sup> in violation of the Minnesota Human Rights Act (MHRA).
2. The MDHR cross-filed this charge with the Equal Employment Opportunity Commission (EEOC). The respondent has more than 15 employees. The charging party did not file this charge with any other agency.
3. The respondent received a copy of the charge, provided the MDHR with an answer to the charge, denied it discriminated against the charging party, and provided documents and witness interviews to support its position. The respondent asserted the charging party did not report complaints about harassment and was not aware of any conduct towards her on the basis of her race. The respondent further alleged it terminated the charging party's employment after she failed to report for her shifts and then refused to work her remaining shifts.
4. The charging party received a copy of the respondent's answer to the charge, submitted additional documents, and participated in an investigatory interview.
5. The MDHR considered all of these materials and interviewed relevant witnesses. The MDHR limited its investigation to whether the respondent violated the MHRA.

### Facts

6. The charging party is an African American woman.
7. The respondent is a senior living facility located in Sartell, Minnesota.

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<sup>1</sup> Minn. Stat. § 363A.08, subd. 2(2,3)

<sup>2</sup> In her charge, the charging party also alleged the respondent subjected her to differential treatment compared to white coworkers in terms of discipline and incentives. This investigation was unable to corroborate these allegations.

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8. On November 11, 2017, the respondent hired the charging party as a full-time Personal Care Assistant (PCA). Witness testimony supported that the charging party was a valuable worker and genuine individual.
9. Throughout the charging party's employment, the respondent regularly assigned her to work with a resident who would make negative and derogatory comments to the charging party about her race, skin, and hair.
10. Witness testimony corroborated that the charging party experienced significant issues with the resident and the resident's family. This investigation found that the racial harassment became so difficult for the charging party to endure that she began asking other PCAs to accompany her when entering the resident's room and that she would cry as a result of the resident's racial harassment.
11. Witness testimony evidenced a resident stated "don't let that nigger in here" when speaking about the charging party. The witness reported this to a supervisor but the supervisor did not take action.
12. Additional witness testimony evidenced the resident would attempt to rip the charging party's headscarf off and that the resident's family would similarly harass her. When brought to the respondent's attention, the supervisor stated the resident was "not used to being around colored people," that they were "just old, it's how they were raised," and "She pays to live here. There isn't anything we can do."
13. According to the charging party, she approached her supervisor on three to four separate occasions to report the resident's harassment and request to be moved to a different resident. The supervisor denied this request.
14. During one of the charging party's attempts to speak to her supervisor, the supervisor responded to the effect of "Why don't you prove to them that there is nothing wrong with them working with a black staff?" Following this interaction, the charging party stated she no longer felt comfortable going to her supervisor about the harassment.
15. Witness testimony evidenced a white employee was regularly allowed to switch residents.
16. The respondent denies that the charging party submitted complaints about the resident's racial harassment. However, contrary to the respondent's position, witness testimony corroborated that the charging party made complaints about the resident's racial harassment to her supervisor and the supervisor's response to the reports.
17. The respondent's Workplace Harassment policy defines harassment as "verbal or physical conduct that denigrates or shows hostility or aversion towards an individual because of his/her race..." and that employees who believe they have been harassed should promptly report the facts and names of the individuals involved to their supervisor.
18. The respondent's Workplace Harassment policy further states it will promptly investigate all such complaints and take appropriate corrective action.

19. The respondent's policy does not address harassment by or from a resident.
20. On March 10, 2018, the charging party texted her supervisor regarding double shifts on March 17 and March 18 she had agreed to work for a coworker.
  - a. Charging party: "So I don't know if I'm gonna be able to make it to any of my shifts that I picked up because my car is literally sitting in the parking lot and will not start and I don't have any money to fix it until next paycheck."
  - b. Supervisor: "Ok, so do you want me to take you off all of them?"
  - c. Charging party: "Yes because if I can't come up with money by Monday I won't be able to make it to those days"
  - d. Supervisor: "Ok"
21. The supervisor confirmed the charging party could have contacted her regarding her removal from the schedule but alleged she could not accurately recall.
22. Witness testimony evidenced the charging party's car remained at the respondent parking lot for approximately one week and employees were aware the charging party was dropping her two double shifts.
23. On March 17, 2019, a coworker texted the charging party, asking her where she was.
  - a. Employee 1: "Hey I was wondering where you are?...You were suppose [sic] to work at 2:30"
  - b. Charging party: "No [supervisor] took me off the schedule?????...my car is messed up I just got it towed out of the [respondent] parking lot yesterday [supervisor] knew that so she was supposed to take me off all the days I was scheduled...I don't know why [supervisor] would do something like this because I was supposed to work doubles today and tomorrow which means there will be nobody for 2 shifts."
  - c. Employee 1: "[Employee 2] came in I would call her"
24. The respondent alleged Employee 2 was the one to contact the charging party. The respondent also claimed the charging party alleged she had never agreed to work that weekend, and refused to work her other scheduled shifts. The respondent was unable to provide evidence to support their claim.
25. During investigation, Employee 2 alleged she attempted to call the charging party, the charging party stated she was having car troubles, and that she could not come in for her shifts. Employee 2 further alleged she asked the charging party if she realized that her employment could be terminated to which the charging party responded "okay."
26. The charging party provided evidence that she called Employee 2 on March 17, 2018 at 3:19pm. The charging party alleged she explained the situation, stated that she could send the texts between her and her supervisor if needed, and clarified that she would not be able to report to her double shifts on March 18.
27. The charging party further provided evidence that she called the respondent at 4:52pm. This evidence did not demonstrate any indication that the respondent attempted to call the charging party.

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28. On March 18, 2019, the respondent never removed the charging party from the schedule. The charging party was unable to report for her shift. The charging party provided evidence that the respondent did not attempt to call her at any point.
29. The respondent's Excused Absences policy states excused absences include "transportation problems while driving into work if it can be proven and does not become a pattern of behavior."
30. The respondent's Job Abandonment/No Call- No Show policy further states "If an employee does not report for their shift and does not call in, it will be considered job abandonment and may result in termination of employment."
31. Witness testimony further evidenced a supervisor is an appropriate person to contact if an employee needs to be taken off the respondent schedule.
32. On March 21, 2018, the respondent terminated the charging party's employment stating "You were scheduled for shifts on Saturday, March 17, and Sunday, March 18, 2018; however, you did not show up for it nor did you follow appropriate call in protocols which were finding your own replacement and you did not have your absence previously approved. You have not responded to several attempts to contact you." The charging party's supervisor was the only signature on the letter of termination.
33. On March 26, 2018, the charging party received her letter of termination and texted her supervisor.
  - a. Charging party: "So you guys sent me a letter saying I'm terminated for two no call no shows?"
  - b. Supervisor: "They made me, I'm sorry...I have resigned because I have been unjustly treated as well."
34. During investigation, the supervisor confirmed this exchange "could" have happened.
35. During investigation, the supervisor also denied signing the charging party's termination letter.
36. Witness testimony provided that the respondent did not terminate a white employee who had significant attendance problems.
37. On June 6, 2018, the charging party submitted a complaint to the respondent.
38. On June 7, 2018, the respondent responded to the charging party's complaint stating it forwarded her complaint to the respondent Executive Director. The charging party did not hear back from the respondent.

Discussion

*Harassment*

39. It is an unlawful discriminatory practice for an employer to discriminate against a person because of race.<sup>3</sup>
40. The charging party alleged the respondent subjected her to race-based harassment when it failed to respond to her complaints of a resident's harassment because of her race.<sup>4</sup>
41. To prevail on a claim of harassment, the charging party must prove: (1) she is a member of a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on membership in a protected class; (4) the harassment affected a term, condition, or privilege of her employment, and (5) the employer knew or should have known about the harassment and failed to take appropriate remedial action.<sup>5</sup>
42. To show that the alleged harassment affected a term, condition or privilege of the charging party's employment, the charging party must show that the conduct was objectively "severe or pervasive" and that she subjectively perceived that her employment environment was altered or affected.<sup>6</sup>
43. Harassing conduct is "severe or pervasive" based on a holistic review<sup>7</sup> of the nature, frequency, intensity, location, context, duration, and target of the conduct,<sup>8</sup> whether the conduct is physically threatening or humiliating, and whether the conduct unreasonably interferes with an employee's work performance.<sup>9</sup>
44. Further, an employer may be responsible for the acts of non-employees over whom it has control with respect to harassment of employees in the workplace.<sup>10</sup>
45. Here, there is credible, testimonial evidence that the respondent subjected the charging party to a hostile work environment based on her race, in violation of the MHRA.
46. The respondent does not dispute the charging party's race, and the charging party credibly testified of her race. Therefore, the charging party has satisfied the first element.

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<sup>3</sup> Minn. Stat. § 363A.08, subd. 2.

<sup>4</sup> *Id.* at subd. 2(3).

<sup>5</sup> *Goins v. W. Grp.*, 635 N.W.2d 717, 725 (Minn. 2001).

<sup>6</sup> *Rasmussen v. Two Harbors Fish Co*, 832 N.W.2d 790, 797 (Minn. 2013).

<sup>7</sup> *LaMont*, 814 N.W.2d at 22; *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 176 (Minn. Ct. App. 2007).

<sup>8</sup> *Id.*

<sup>9</sup> *Goins*, 635 N.W.2d at 722.

<sup>10</sup> *Costilla v. State*, 571 N.W.2d 587, 591-92 (Minn. Ct. App. 1997), *review denied* (Minn. Jan. 28, 1998); *see* 29 CFR § 1604.11(d).

47. Witness testimony corroborated the charging party's harassment allegations that a resident made race-based slurs, negative, and derogatory comments to the charging party about her race, skin, and hair throughout her employment. Therefore, the charging party has satisfied the second and third elements.
48. The weight of the evidence supports that the resident's conduct subjectively impacted the charging party's employment environment. This was evidenced by her multiple attempts to speak with her supervisor, requests to change residents, crying while at work, and requests that other employees accompany her into the resident's room. The regular occurrences of the behavior satisfies the pervasive standard. Therefore, the charging party has satisfied the fourth element.
49. The charging party credibly testified she brought her concerns to the attention of her supervisor approximately 3-4 times and witness testimony corroborated the complaints. On these facts, the MDHR finds respondent more likely than not knew or should have known about the harassing behavior. Further, witness testimony confirmed that the respondent took no steps to investigate or remediate the charging party's complaints. Therefore, the charging party has satisfied the fifth element.
50. Additionally, witness testimony evidenced a white employee, under the same supervision as the charging party, was allowed to change residents. The supervisor denied this opportunity to the charging party, leaving her to continue to work with the resident who racially harassed her.
51. In sum, the MDHR concludes that the respondent subjected the charging party to a hostile work environment based on her race.

#### *Wrongful Termination*

52. The charging party alleged the respondent wrongfully terminated her employment on the basis of race. This termination is the "adverse employment action" that the charging party claims is unlawful.
53. A charging party can prove a respondent discriminated against them by presenting direct and/or indirect evidence.<sup>11</sup>
54. When there is no direct evidence of discrimination, a fact finder can rely on indirect evidence or all of the evidence put together, to infer that the respondent's alleged discriminatory intent motivated the adverse employment action. If a case involves indirect evidence, like this one, the burden of proof shifts back and forth between the charging party and the respondent.<sup>12</sup>
55. First, to prove the respondent wrongfully terminated charging party's employment because of race the charging party must establish: (1) she is a member of a protected class; (2) she was meeting legitimate job expectations; (3) she suffered an adverse employment action; and (4) a fact finder can infer discrimination based on the totality of the circumstances or similarly situated employees who are not members of the charging party's protected class were treated differently.<sup>13</sup>

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<sup>11</sup> See *Aase v. Wapiti Meadows Cmty. Techs. & Servs., Inc.*, 832 N.W.2d 852, 856 (Minn. Ct. App. 2013) (explaining that a complainant may prove discriminatory intent by presenting sufficient direct evidence to prove her claim or by relying on indirect evidence and employing the *McDonnell Douglas* burden-shifting analysis).

<sup>12</sup> *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986).

<sup>13</sup> *Hansen v. Robert Half International Inc.*, 813 N.W.2d 906, 918 (Minn. 2012).

56. If the charging party can establish these four elements, then the respondent has the opportunity to provide a legitimate, non-discriminatory reason for its actions.<sup>14</sup>
57. If the respondent produces a legitimate, non-discriminatory reason for its actions, the charging party then has to show that the respondent's reasons are false or an excuse for discrimination.<sup>15</sup>
58. Here, there is only indirect evidence of discrimination regarding the respondent's decision to terminate the charging party's employment. Therefore, a burden-shifting analysis applies.
59. Looking to the first part of the analysis, the charging party is an African American woman, had the required experience and skills necessary for the position, and despite appropriately contacting her supervisor to be removed from the schedule, the respondent terminated her employment on March 21, 2019. The MDHR received credible witness testimony that the respondent did not terminate a white employee who had significant attendance problems. While the MDHR specifically requested documentary evidence regarding this white employee, the respondent produced no documentation to refute the testimony. Therefore, the MDHR finds there is an inference of discrimination.
60. Second, if the charging party can establish these four elements, then the next part of the test allows the respondent to provide a legitimate, non-discriminatory reason for its actions.<sup>16</sup>
61. The respondent alleged the charging party's termination was based on misconduct, unrelated to her race. Specifically, the respondent claimed that they called the charging party after she missed her first shift, she claimed she never agreed to work that weekend, and she refused to report for the remaining shifts. This is a legitimate, nondiscriminatory reason for termination.
62. Third, if the respondent produces a legitimate, non-discriminatory reason for its actions, the next part of the test requires the charging party to show that the respondent's reasons are false or an excuse for discrimination.<sup>17</sup>
63. The evidence did not support the respondent's stated reason, the MDHR determined the respondent's stated reason for termination to be false and merely an excuse for race-based discrimination.
64. Evidence demonstrated the charging party contacted her supervisor one week prior to her scheduled shifts, stated she was experiencing car issues, and stated she could not report for the shifts. The supervisor asked the charging party if she would like to be removed from the shifts. The charging party responded affirmatively. The supervisor confirmed receiving the charging party's response.
65. Despite this conversation, the charging party's supervisor wrote and signed the charging party's letter of termination.

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<sup>14</sup> *McDonnell Douglas*, 411 U.S. at 802.

<sup>15</sup> *McDonnell Douglas*, 411 U.S. at 802.

<sup>16</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>17</sup> *McDonnell Douglas Corp.*, 411 U.S. at 802.

66. When the charging party confronted her supervisor about this, the supervisor responded "They made me, I'm sorry...."
67. Despite the respondent's allegation that it made "several attempts" to contact the charging party, it was unable to provide evidence to support its claim.
68. The supervisor admitted the charging party may have contacted her regarding her removal from the schedule.
69. Witness testimony evidenced the charging party's car was at the respondent parking lot and that employees were aware the charging party would not be reporting for the shifts.
70. A review of the respondent's policy confirms the charging party followed the correct protocol for reporting her absences.
71. In sum, the MDHR concludes that the respondent wrongfully terminated the charging party based on her race.

Conclusion

72. THEREFORE, the Minnesota Department of Human Rights finds that there is **PROBABLE CAUSE** to find that the respondent discriminated against the charging party when it subjected her to racial harassment, in violation of the MHRA.<sup>18</sup>
73. THEREFORE, the Minnesota Department of Human Rights finds that there is **PROBABLE CAUSE** to find that the respondent discriminated against the charging party when it subjected her to differential treatment when it wrongfully terminated her employment on the basis of her race, in violation of the MHRA.<sup>19</sup>

**Minnesota Department of Human Rights**

**FOR THE DEPARTMENT BY:**



Rebecca Lucero, Commissioner

Dated: December 31, 2019

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<sup>18</sup> Minn. Stat. § 363A.08, subd. 2(3).

<sup>19</sup> Minn. Stat. § 363A.08, subd. 2(2).