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 REPLY BRIEF

Dated: February 26, 2025

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Introduction

The record in the case would allow a trier of fact to reasonably infer that in November 2018, Andersen provided the Department with notice of her disabilities. After receiving the subject notice, the Department commenced a pervasive and severe hostile work environment designed to exacerbate Andersen's medical condition to force her resignation. The Department succeeded. On August 30, 2019, Andersen was compelled to submit her constructive discharge. Based on the relevant record, triable issues of fact exist regarding whether Andersen's claim of constructive discharge is timely and actionable.

Plaintiff/Appellant Sharon Andersen ("Andersen") files this Reply Brief in response to Defendant/Appellee's Brief. The Reply Brief addresses the arguments made in Appellee's Brief. Each argument is addressed in turn.

II. Appellee's Arguments

A. Appellee's Brief makes clear the Superior Court's analysis of the continuing violation doctrine under the *Morgan* factors did not apply for Andersen's constructive discharge.

Appellee's Brief states the only two relevant actions occurred after August 18, 2019: 1) DHHS's continuing unwillingness to assign Andersen to a new supervisor, and 2) Andersen's resignation from her position on August 30, 2019. *Appellee's Brief p. 20.* Initially, Appellee's Brief spends much time recounting the Superior Court's analysis and conclusion that the first action – the reassignment-

was not a continuing violation under the *Morgan* factors. *Appellee's Brief 20-26.*[1] The Superior Court, however, did not analyze whether the second action- Andersen's resignation- was a continuing violation. Appellee's Brief, in fact, makes clear that the Superior Court did not analyze whether Andersen's resignation was a continuation violation under the *Morgan* factors. Specifically, Appellee's Brief states the Superior Court,

> Focus[ed] only of the DHHS unwillingness to reassign Andersen to a different supervisor or building as a reasonable accommodation, as this was the only *action* taken by the DHHS within the limitations period, and the *Morgan* factors require analysis of actions. Andersen's resignation – or alleged constructive discharge – was not an *action* taken by the DHHS. The reasons her resignation was not a constructive discharge, could not be a stand-alone claim even if it were, and cannot be used to anchor Andersen's hostile work environment claim all discussed *infra* at Section I. B. 2. *Appellee's Brief p. 23, ft. 2.*

Accordingly, we must go to the remaining portion of Appellee's Brief to address Appellee's argument that Andersen's claim of constructive discharge is not actionable.[2] Each of the Appellee's arguments are addressed in turn *infra.*

B. Andersen's claim of constructive discharge is not an independent claim. Andersen's constructive discharge is an adverse action as part, and culmination of, her hostile work environment claim.

Appellee's Brief points out that a constructive discharge cannot be an independent claim; it must be part of an underlying claim, such a hostile work

[1] Andersen does not contest that finding.
[2] Whether the constructive discharge is actionable is the salient issue in the appeal.

environment. Andersen agrees with Appellee. A constructive discharge cannot be an independent claim. A constructive discharge must be part of an underlying claim, such a hostile work environment. In the present case, Andersen's constructive discharge is not an independent claim; Andersen's constructive discharge on August 30, 2019, is the culmination of her underlying claim of a hostile work environment which commenced in November 2018.

C. A triable issue of fact exists as to whether Andersen was constructively discharged.

Appellee's Brief argues the constructive discharge is not supported by the record because "Andersen did not generate a genuine issue of fact that she experienced conditions to meet the steep burden to demonstrate she was forced to resign." *Appellee's Brief p. 32.* In support of its argument, the Department argues that Andersen was not compelled to resign on August 30, 2019, because she had been out on leave since January, not interacting with the Department in that time frame, and thus she could have simply continued to remain out on leave. The record, however, is not as sparse as the Department posits. On the contrary, after Andersen went on leave at the end of January, the record contains the following relevant facts:

- In February/March, the Department did not initiate an investigation into Andersen's prior complaints of harassment and retaliation.

- In April, Andersen filled paperwork giving notice to the Department and Mahns 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.*

- In May, Mahns did interview Andersen about her complaint about the hostile environment. Mahn's notes of the interview documented 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.* There is no evidence of the Department doing anything further to investigate the hostile environment. *Appendix at 252,260, PSMF 125-126, Mahn's Dep. 33, Smith Dep. 38.*

- In June, Tammy Desjardin of the Department sent an email to Mahns, Wentworth, and Malinoski, relating that she attended Andersen's worker compensation mediation and learned Andersen reported that Sargent was retaliating against her and calling her names. 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, and there is no evidence the Department commenced an investigation into Andersen's complaint. *Appendix at 2, PSMF 132, Mahn's Dep. 35.*

- Further in June, Wentworth received paperwork from Andersen again recounting her 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.* 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.* 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.*

- In July, Andersen emailed Wentworth seeking an update. *Appendix at 264, 293-294, PSMF 141, Wentworth Dep. 23, Wentworth Dep. Ex. 6.* Andersen also wrote*, "*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 do not understand why this is taken so lightly. It has been five months since we first talked." *Id.*

- In August, Andersen did not hear back from Wentworth, so she sent Wentworth an email requesting an update. Wentworth informed Andersen, "You did not qualify for reassignment because you can do your job,[3] 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…" *Appendix at 221, PSMF 149, Andersen Affd*. ¶23, *Ex. 9*. In response to Wentworth's intention, Andersen's LCPC, Elizabeth Millett, sent a letter to the 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.

- On August 13th, Andersen learned from a co-worker that her office had been cleaned out. *Appendix at 222, PSMF 212,* Andersen Affd. ¶ 26. Accordingly, 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 on 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.*

The Department's recital of the relevant evidence is obviously not complete. Further, analogous case law has held in similar circumstances a constructive discharge is actionable. For example, denying a request for accommodation forcing a plaintiff to continue to work in an environment which could negatively impact the plaintiff's health and well-being is presents an actionable constructive discharge. *Smith v Hendersen* 376 F.3d 529 (6th Cir. 2004). Moreover, "A 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. The employer nor Human Resources investigated the complaints. 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. Andersen's medical providers even warned her not to return to the same work environment. Given the evidence, Andersen (and her health care providers) could only anticipate more intolerable harassment. If she wanted to avoid further harm, she would have to leave work entirely. Based on that evidence, a trier of could have found that a reasonable person in Andersen's shoes would have felt compelled to resign. A triable issue of fact, therefore, is present on this material issue.

D. Andersen did not waive any argument regarding the statute of limitations or the continuing violations issue.

Appellee's Brief argues Andersen waived arguments regarding the statute of limitations and the continuing violation issues because "at no place in Andersen's Brief will the Court find any discussion of the statute of limitations, the continuing

violation theory, or the *Morgan* factors…" *Appellee's Brief p. 34.* Appellee's argument is misplaced.

At the outset of Andersen's Brief regarding the constructive discharge, Andersen's frames the statute of limitations argument. Specifically, Andersen posits,

> The Department admits if Andersen's constructive action claim is actionable, her hostile environment [claim] 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. *Appellant's Opening Brief p. 31.*[4]

The above passage and subsequent arguments make clear that Andersen's Brief, and the parties, did address the statute of limitations issue. Regarding the continuing violation theory, as the Department pointed out *supra*, the Superior Court did not address the issue relative to the constructive discharge claim. Accordingly, the Department's arguments are not sustainable.

E. A triable issue exists as to whether the harassment was based on Andersen's disability.

Andersen's disability is based on stress, anxiety, panic attacks, depression, and PTSD. In Appellee's Brief, the Department did not dispute Andersen's experienced the subject disabilities. Instead, the Department argues the record is

undisputed that it did not have notice of Andersen's disabilities. *Appellee's Brief 37.* The Department's position is not sustainable.

First, in support of its subject position, Appellee's Brief points to DSMF's 55-60, 65-67. *App. 87-88.* Andersen, however, disputed each subject fact. *App. 107-110, 112-113.* Accordingly, the record submitted by the Department is not undisputed, and, therefore, the Department's argument is not sustainable.

Second, Appellant's Brief submitted substantial evidence establishing that the Department received notice of Andersen's disabilities. *Appellant Brief p. 5-7, 24-27.* Appellee's Brief, however, did not address Andersen's relevant evidence. *Appellee's Brief 36-38.* The Department, therefore, waived any opposition to the Andersen's evidence. Accordingly, Andersen's evidence creates a triable issue of fact as to this material issue.

F. A triable issue exists as to whether the harassment was severe or pervasive.

Appellee's Brief argues that the record is undisputed that harassment was neither severe and/or pervasive. Appellee's Brief, however, characterizes the harassment as simply Andersen's supervisor's poorly treating Andersen.

Appellee's Brief p. 40. On the contrary, Andersen's Brief and the records submits much more harassment than cited by the Department.[5]

In Appellant's Brief, Andersen points to evidence establishing that she enjoyed 13 years of relatively peaceful work history and did not receive any discipline. Yet, after the Department received notice of Andersen's extreme anxiety, stress and related disabilities, there was a marked change in the Department's treatment of Andersen. For example, the Department became overly critical of Andersen and made false allegations against her. Sargent began to frequently yell and scream at her, referred to Andersen as "stupid" and said there "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 abusive treatment, 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 admits repeated notice of complaints from Anderson and her health care providers about harassment, retaliation, and hostile work environment. The Department also

[5] Regarding the record the Department does address, the Department admits that the record is supported by "Anderson's own testimony" or "Sargent denies these allegations." *Appellee's Brief p. 40*. In other words, the Department admits that the record is not undisputed regarding whether the harassment was severe or pervasive.

admits to the repeated notice, yet it concedes it violated its policy by not responding to the repeated notice. Moreover, the record contains evidence that Andersen and her health care providers repeatedly advised the Department she could not return to the Department. Finally, the record is replete with evidence of the hostile environment causing Andersen extreme stress, anxiety, panic attacks, and PSTD. The record, therefore, is much more extensive than Andersen's supervisor treating her poorly.

Further, the legal authority cited by the Department is not pervasive. The authority cited by the Department concerns the "ordinary slings and arrows that the suffice the workplace every day." *Appellee's Brief p. 40.* In the contrast, the present case is analogous to *DePaolo v. GHM Portland Mar, LLC,* 2018 U.S. Dist. LEXIS 135286, *37-39, 2018 WL 3822455 where 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[.]"[6]

[6] *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."

The complete record and the relevant authority would allow a trier of fact to find the harassment was severe or pervasive. A triable issue of fact, therefore, exists as to this material fact.

G. A triable issue exists as to whether the harassment would be objectively offensive to a reasonable person.

Appellee's Brief argues that the record is undisputed that the harassment would not be offensive to a reasonable person. Again, the Department views the record narrowly. Specifically, the Department characterizes the record of harassment as only how the Department enforced its policies, and the discipline issued to Andersen. *Appellee's Brief p. 41-42.* As discussed *supra*, the record is much more extensive. For example, the Department ignores the evidence of its offensive conduct towards Andersen commencing after receiving notice of medical condition, that 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, and the Department admittedly violated policy by not investigating. Finally, the totality of the harassment caused Andersen extreme emotional distress, anxiety, panic attacks and PTSD.

The complete record and the relevant authority would allow a trier of fact to find the harassment would be objectionable to a reasonable person. A triable issue of fact, therefore, exists as to this material fact.

III. Conclusion

The record in the case would allow a trier of fact to reasonably infer that in November 2018, Andersen provided the Department with notice of her disabilities. After receiving the subject notice, the Department commenced a pervasive and severe hostile work environment designed to exacerbate Andersen's medical condition to force her resignation. The Department succeeded. On August 30, 2019, Andersen was compelled to submit her constructive discharge. Based on the relevant record, triable issues of fact exist regarding whether Andersen's claim of constructive discharge is timely and actionable. Accordingly, Andersen requests the Law Court vacate the Superior Court's order granting the Department's motion for summary judgment.

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