



Maine Human Rights Commission  
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Amy M. Sneirson  
*Executive Director*

John P. Gause  
*Commission Counsel*

# Memo

Date: December 3, 2012  
To: Amy M. Sneirson, Executive Director  
From: John P. Gause, Commission Counsel   
Re: PA11-0416, Renee Mayer v. John Matt Dorn, M.D.

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Respondent has requested administrative dismissal of the above-referenced complaint on the ground that it is subject to the Maine Health Security Act (“MHSA”), 24 M.R.S. §§ 2501-2987 (2012). A complaint of discrimination may be administratively dismissed by the Executive Director for lack of jurisdiction. 94-348 C.M.R. ch. 2, §2.02(H)(1) (2012). For the following reasons, I recommend that the complaint should not be administratively dismissed.

The complaint alleges that Respondent violated the public accommodations provisions of the Maine Human Rights Act (“MHRA”) by subjecting Complainant to a hostile environment on the basis of sex. Complainant alleges that Respondent, a psychiatrist, sexually harassed her during marital and individual counseling sessions. In particular, the allegations include that Respondent hugged her at the end of each of her individual counseling sessions, sometimes for as long as a minute; asked her during an individual counseling session, “When are you going to go to bed with me?”; grabbed her behind at the end of an individual counseling session; rubbed her leg during an individual counseling session, telling her that she was beautiful and “everything could be better if

you came home with me”; told her during an individual counseling session how “great” he was in bed and said he could please her in any way she wanted; and said to Complainant’s husband during their last marital counseling session with Respondent, “Don’t worry, I’ve tried several times to seduce your wife, and she wouldn’t have anything to do with me.”

Respondent asserts that the complaint should be dismissed because the allegations fall within the MHSA and the Law Court has held that the MHSA “occup[ies] the field” with regard to actions against health care providers. Respondent’s September 28, 2011, submission at 11-12. Respondent also asserts that Complainant must exhaust the MHSA medical malpractice screening panel process before pursuing her complaint before the Commission. Respondent’s December 20, 2011, submission at 8.

The MHSA is a procedural Act that governs how medical malpractice actions are brought; it does not create a substantive cause of action. *See Hinkley v. Penobscot Valley Hosp.*, 2002 ME 70, ¶ 12. The MHSA procedures apply “to *all* ‘actions for professional negligence,’ which are defined as ‘*any actions* for damages for injury or death against any health care provider, its agents or employees, or health care practitioner, his agents or employees, whether based upon tort or breach of contract *or otherwise, arising out of the provision or failure to provide health care services.*” *Saunders v. Tisher*, 2006 ME 94, ¶ 12 (quoting 24 M.R.S. § 2502(6) (2005)) (emphasis in opinion). *See also* 24 M.R.S. § 2502(6) (2012). The Law Court has interpreted the scope this language to cover many different causes of action—statutory and common law—not just negligence claims. *See, e.g., infra*. “The Act requires that all claims against medical providers be preceded by a notice of claim and screening by a prelitigation panel.” *Dutil v. Burns*, 1997 ME 1, ¶ 2 (citing 24 M.R.S.A. §§ 2851-2859, 2903).

When the MHSA applies, compliance with its notice of claim and screening-panel process is required, and its three-year statute of limitations applies, even if the state law that creates the substantive cause of action has no administrative exhaustion requirement or has a longer statute of limitations. *See, e.g., Saunders*, 2006 ME 94, ¶ 16 (MHSA statute of limitations applied to claim that doctor vindictively falsified an application for involuntary commitment, not longer statute of limitations in Maine Civil Rights Act, 5 M.R.S. §§ 4681-4685 (2005), or applicable to claims for intentional and negligent infliction of emotional distress); *Butler v. Killoran*, 1998 ME 147, ¶ 12 (MHSA statute of limitations applied to a complaint relating to failure to detect a treatable brain aneurysm, not Wrongful Death Act statute of limitations); *Brand v. Seider*, 1997 ME 176, ¶ 5 (dismissing court complaint for disclosure of confidential medical information because plaintiff failed to file notice of claim under MHSA); *Dutil v. Burns*, 1997 ME 1, ¶ 2 (noting earlier dismissal of product liability complaint for defective joint because plaintiff had not served MHSA notice of claim or participated in screening-panel process).

Here, it is unnecessary to resolve whether the allegations in the complaint are subject to the MHSA because, assuming that they are, the MHSA does not displace the Commission investigation or require Complainant to comply with the MHSA procedural requirements before filing with the Commission. Although the Law Court has on multiple occasions recognized “a legislative intent that the MHSA occupy the field with regard to actions against health care providers,” *Saunders v. Tisher*, 2006 ME 94, ¶ 13 (citations and quotations omitted), the Court has never held that the procedural requirements of the MHSA relieve a plaintiff of the obligation of complying with the procedural requirements of another statutory scheme. On the contrary, in *Hinkley v. Penobscot Valley Hosp.*, 2002 ME 70, ¶ 15, the Court held that a claim that a governmental hospital employee

improperly prescribed penicillin was subject to the procedural requirements of *both* the Maine Tort Claims Act (“MTCA”), 14 M.R.S. §§ 8101-8118, and the MHSA. In *Hinkley*, the Court affirmed summary judgment for defendant because plaintiff did not comply with the MTCA’s 180-day notice provision or two-year statute of limitations. *Id.*

Complainant may file with the Commission before meeting the MHSA prerequisites to suit. The MHSA states that “[n]o action for professional negligence may be commenced until the plaintiff has” served and filed the notice of claim and complied with the screening-panel requirements. 24 M.R.S. § 2903 (emphasis added). The Law Court has referenced this as applying “before pursuing the claim in the court system.” *Choroszy v. Tso*, 647 A.2d 803, 805 n. 1 (Me. 1994) (emphasis added). Moreover, although “action” is undefined in the statute, the “[t]erm in its usual legal sense means a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law.” Black’s Law Dictionary, Sixth Edition (1990). The Commission’s administrative investigation is not a claim in the court system. Unlike a complaint filed in court, the Commission’s investigations do not adjudicate parties’ rights, and the Commission does not have the authority to award damages. *Cf. Tomer v. Maine Human Rights Com'n*, 2008 ME 190, ¶ 14, 962 A.2d 335, 340 (finding an administrative dismissal did not affect the legal rights, duties, or privileges of a party to a Commission action).

Because the MHSA does not displace the Commission’s investigation, and because Complainant is not required to meet the MHSA prerequisites to suit before filing with the Commission, the request for administrative dismissal should be denied.