



Maine Human Rights Commission
51 State House Station | Augusta ME 04333-0051

Physical location: 19 Union Street, Augusta ME 04330
Phone (207) 624-6290 ■ Fax (207) 624-8729 ■ TTY: 1-888-557-6690
www.maine.gov/mhrc

Amy M. Sneirson
Executive Director

John P. Gause
Commission Counsel

INVESTIGATOR'S REPORT

May 11, 2012

E10-0325

█
█
v.
█

I. Complainant's Charge:

Complainant (█ Complainant") alleges that Respondent (█ d/b/a █'s subjected her to a hostile work environment because of her disability (obsessive compulsive disorder) and subsequently terminated her in retaliation for reporting disability harassment to management.

II. Respondent's Answer:

Respondent denies any unlawful disability harassment and retaliation. Respondent terminated Complainant after she violated company policy for failing to charge a customer for a glass of milk.

III. Jurisdictional Data:

- 1) Date(s) of alleged discrimination: May 16, 2010.
- 2) Date of filing of complaint with the Maine Human Rights Commission: June 22, 2010.
- 3) Respondent is subject to Maine Human Rights Act and the Americans with Disabilities Act, as well as state and federal employment regulations.
- 4) █, Esq., represent Complainant. █ sq., represents Respondent.
- 5) This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of reasonable grounds or no reasonable grounds at this time.

IV. Development of Facts:

- 1) The parties and issues are as follows:
 - a) Complainant worked as a server at Respondent's restaurant ("Restaurant") in Augusta from December 21, 2006 until her termination on May 16, 2010.

INVESTIGATOR'S REPORT, E10-0325

- b) Respondent operates various restaurants in Maine, including the Restaurant in Augusta, Maine, where Complainant last worked.
- c) Relevant third parties: Assistant Manager JC ("Assistant Manager") directly supervised Complainant, and General Manager PC ("General Manager") made the decision to terminate Complainant.
- d) Complainant alleges that Respondent subjected her to a hostile work environment because of her medical condition, obsessive compulsive disorder ("OCD"), and terminated her in retaliation for complaining about harassment by her co-workers.
- e) Respondent denies any unlawful discrimination. Complainant was terminated for failing to charge a regular customer for a glass of milk, which constitutes theft of goods or services in violation of company policy.

2) Undisputed Facts:

- a) On May 16, 2010, Complainant was terminated after failing to charge a regular customer ("██████████") for a glass of milk. ██████████ had a habit of leaving a \$20.00 bill after eating without waiting to see the sales slip. The remaining portion of what was not charged would be the server's tip.
- b) Complainant had a long work history with Respondent. Prior to her termination, she never received any warnings for performance issues.

3) Complainant provides the following:

- a) Complainant was diagnosed with OCD and has been treated with medication. She "was open" about her condition with her co-workers at the Restaurant. She had explained to them the reasons why she needed her "work area to be left alone as [she] had arranged it."
- b) For approximately one year, several co-workers, including Co-worker CC and Co-worker MG, regularly harassed her and mocked her need for organization. They referred to her as "Miss Perfect" because of her OCD. Co-worker CC also "regularly messed with [her] work area". He repeatedly rearranged her supplies and demanded half of the work station for his own things. When she stated that his actions caused her to get new medication for her condition, he responded, "You just gave me a trophy to hang on my wall."
- c) Assistant Manager regularly worked the same shift as Complainant and witnessed the harassment by Co-worker CC and Co-worker MG. In the few months before her termination, Complainant complained to Assistant Manager about the harassment on approximately four separate occasions, most recently on May 1, 2010. He did nothing and treated it like "a big joke."
- d) On or about May 1, 2010, she reminded Assistant Manager of her condition and asked him to intervene and stop the harassment by Co-workers CC and MG. He ignored her request, and the harassment continued.

INVESTIGATOR'S REPORT, E10-0325

- e) On May 13, 2010, upon General Manager's return after a leave of absence, Complainant reminded him of her medical condition and asked that he "put an end to the harassment . . ." She explained that the harassment would cause her to cry at work, and she was treated with additional medication. She was tired of the taunts after her prior complaint to Assistant Manager had not produced results. She finally stated that she would file "an official complaint" with the company if General Manager did not address the situation. He responded with "a dirty look" and stated, "No. No. No. Don't even talk like that."
 - f) Complainant had worked for Respondent for approximately three and a half years. During her employment, she had never been disciplined for any performance issues or received any warnings.
 - g) On May 14, 2010, Complainant entered [REDACTED] order into the computer. She inadvertently left out the charge for a glass of milk. When General Manager showed her the sales slip the following day, she admitted that it did not indicate the charge. She apologized to him and offered to pay for the item. However, he refused the offer and terminated her on May 16, 2010.
- 4) Respondent provides the following:
- a) As part of Complainant's job as server, she was required to take food/drink orders and then enter them into the computer system. After a customer completed a meal, Complainant would be responsible for providing a bill for "goods and services" and obtain payment from the customer.
 - b) On May 13, 2010, after Complainant informed General Manager about "teasing" by her co-workers, he spoke to Co-worker CC and Co-worker MG about "the teasing and restaurant banter" that was going on between the three employees.
 - c) Complainant did not confront the co-workers about their actions. Further, she also participated in the "restaurant banter" even after her co-workers were reprimanded. However, the two co-workers insisted that they had "refrained from being baited into the banter, even if it was harmless." (*File*, Affidavits of Co-worker CC and Co-worker MG).
 - d) On May 16, 2010, Complainant waited on [REDACTED] who had ordered several items, including milk. Afterward, he left his customary bill (\$20.00) without seeing the tab. General Manager "saw milk at the table". He checked the sales slip and discovered that Complainant did not charge the glass of milk that he knew [REDACTED] would usually order; "By not charging the customer for the milk, the claimant earned more as a tip." General Manager had earlier suspicion about the Claimant's billing practices, but did not have any proof of any particular violation. On this occasion, GM felt "he had no alternative but to address a clear violation of company policy through termination. (*sic*)"
- 5) Complainant's Rebuttal:
- a) Complainant believed that another server, Employee LB, was terminated by a previous general manager SB only after repeated warnings for failing to charge customers for items. Respondent rehired her approximately eight months later.

INVESTIGATOR'S REPORT, E10-0325

- b) Complainant is aware of at least one other server, BP, who also failed to charge for items but was not terminated immediately after the alleged first offense.
- 6) Issues and Resolution Conference (2/16/2012):
- a) Respondent acknowledged that different managers have different policies and practices.
- 7) Relevant documents:
- a) A copy of Respondent's Employee Manual (Resp. Ex. 1; Comp. Ex. A.) - The Manual lists certain actions, including "theft", that are grounds for immediate termination. The section, "Disciplinary Action," provides for a four-step guideline regarding discipline.
 - b) List of Terminations (05/01/2008-05/31/2010) – The list includes terminations of 38 employees by different supervisors at six different restaurant locations throughout Maine. Two employees at the Restaurant, Complainant and Employee LB, were terminated for not including an item on a sales slip. Employee LB was terminated in November 2008, by a previous general manager, SB.
 - c) A copy of Employee LB's Employee Payroll Forms (Comp. Ex. B.) – In August 2009, Employee LB received a "Warning" because she "had a Mystery shop and she failed to add a coffee to the check. (*sic*)" General Manager stated that "[t]his is the first time" and listed under the section for "Expected Improvement," "Ring in all product. I will give you the benefit of the doubt this time you did ring in the dessert. (*sic*)"
 - d) Copies of Employee Performance Records (2008-2010) – The records show disciplinary actions taken against other similarly situated employees, including reprimands issued to servers at the Augusta location - One instance involves a "PIC-person in charge," who was authorized to give away food to customers. In some instances, Respondent did not immediately terminate other servers who engaged in similar conduct – giving away food or drink to a customer. Three employees, in addition to Employee LB, were disciplined for conduct similar to Complainant's. They were not immediately terminated for allegedly failing to charge for items and instead received warnings for initial offenses.
 - e) Copy of Employee 8's Employee Performance Record (12/29/2009) – General Manager terminated Employee 8 for "giving away food and drink," insubordination and unsatisfactory performance after she had been previously warned. Employee 8 "was observed giving desserts away without charging for them (3)," was observed not charging for beverages, and would leave "without doing sidework (*sic*)." She was terminated after having been spoken to previously on her deficiencies.
 - f) Copy of Employee July's Employee Performance Record (7/8/2010)¹ –Employee July received a "Warning" for "[g]iving away food or drink." General Manager stated that the employee

¹ Respondent did not assign any identifying number to this employee after redacting confidential personal data. For purposes of identification, the employee is designated as "Employee July" to correspond with the date of the performance record.

“allowed customers behind counter to make their own shakes. (*sic*)” Employee July was disciplined although she engaged in alleged violations similar to Complainant’s.

- g) Copy of Employee 1’s Employee Performance Record (2/15/2011)² – Employee 1 was terminated after multiple previous warnings for giving away food or drink and other performance issues. Assistant Manager stated that Employee 1 was terminated for “Giving away food or drink” in addition to insubordination and unsatisfactory work performance. Employee 1 had previously received “[p]revious warnings for allowing customers behind the counter to get their own drinks, also for insubordination to a PIC (12/25/2010).”
- h) Affidavit of Co-worker CC (2/17/2012) – He was a server who had worked with Complainant for over 2 years. He would often joke with Complainant, who “would engage in self-deprecating behavior or jokes about herself and her desire to have everything a certain way. She would sometimes refer to it as her “OCD”. In May 2010, General Manager met with him, and this was “the first and only time anyone had ever said anything” about his interactions with Complainant. He then stopped “any behavior that could be construed as teasing” toward Complainant.
- i) Affidavit of Co-worker MG (undated) – She was a server who had worked with Complainant for two years. She would often joke with Complainant, who “would engage in self-deprecating behavior or jokes about herself and her desire to have everything a certain way. She would sometimes refer to it as her ‘OCD’.” In May 2010, General Manager met with her and asked that she stopped “teasing” Complainant. Afterwards, she “stopped any behavior that was offensive to” Complainant. “Approximately a week” before Complainant’s termination, management posted a notice warning all servers that they were not allowed to give away free food or drinks in violation of company policy. She was aware that General Manager fired Complainant for not charging ██████████ for a glass of milk. When she was a general manager and assistant manager for Respondent, she “would routinely write up servers who failed to charge a customer correctly. To [her] knowledge some of those people that were written up were also fired.”
- j) Affidavit of Assistant Manager (2/17/2012) – On at least two occasions, Assistant Manager suspected that money was taken by Complainant. However, he could not prove it definitely. Before her termination, Complainant was under suspicion for giving away free food or drink or using coupons to increase her tips. On one occasion, Complainant was reprimanded for using the company’s coupons to reduce the customers’ charge. She had cut out many of these coupons to use them to discount a customer’s bill. “This was discussed with [Complainant] and she was warned that this behavior was a violation of company policy. She was not terminated at this time, but it certainly would have been a behavior that warranted termination.” “While [he] cannot prove it definitely, it was something that made [General Manager] and I (*sic*) suspicious.”
- k) Copy of Complainant’s Employee Payroll Form (5/18/2010) (Resp. Ex. 5.) – Complainant was terminated for “failure to charge for Product. (*sic*)” General Manager commented, “Regular

² Management signed and dated the form on February 15, 2011. Employee 1 signed and dated the acknowledgement on February 15, 2010. The employee’s date is assumed to be a typographical error given the content of the form.

customer. Always leaves money & doesn't want to see check. Always orders milk. Wasn't on check. I saw milk at the Table. (sic)"

V. Analysis:

- 1) The Maine Human Rights Act ("MHRA") requires the Commission to "conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) Here, Complainant alleges that Respondent subjected her to a hostile work environment because of her disability and terminated her in retaliation for complaining about harassment by her co-workers.
- 3) Respondent denies any unlawful disability harassment and retaliation. Pursuant to established policies and procedures regarding employee theft, Respondent terminated Complainant after she was observed not charging a regular customer for a glass of milk.

Analytical Framework

Claim of Disability Harassment - Hostile Work Environment

- 4) The Maine Human Rights Act ("MHRA") provides, in part, as follows:
- 5) It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of . . . physical or mental disability . . . discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S.A. § 4572(1)(A).
- 6) The MHRA, 5 M.R.S.A. § 4553-A, defines "physical or mental disability," in relevant part, as follows:

1. Physical or Mental Disability, defined. Physical or mental disability" means:

A. A physical or mental impairment that:

- (1) Substantially limits one or more of a person's major life activities;
- (2) Significantly impairs physical or mental health; or
- (3) Requires special education, vocational rehabilitation or related services;

B. Without regard to severity unless otherwise indicated: absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn's disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson's disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury;

- C. With respect to an individual, having a record of any of the conditions in paragraph A or B;
or
- D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A or B.

2. Additional terms. For purposes of this section:

- A. The existence of a physical or mental disability is determined without regard to the ameliorative effects of mitigating measures such as medication, auxiliary aids or prosthetic devices; and
- B. "Significantly impairs physical or mental health" means having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population.

- 7) With respect to the claim of hostile work environment, the Maine Human Rights Commission Regulations provide, in part, as follows:

Harassment on the basis of physical or mental disability is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct related to physical or mental disability constitute harassment on the basis of physical or mental disability when...

- c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Me. Hum. Rights Comm'n Reg. § 3.08(I) (1) (July 17, 1999).

- 8) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile work environment claim exists, it is necessary to view "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the workplace to become hostile or abusive. *Id.*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996). "The standard requires an objectively hostile or abusive environment--one that a reasonable person would find hostile or abusive--as well as the victim's subjective perception that the environment is abusive." *Nadeau*, 675 A.2d at 976.
- 9) Accordingly, to succeed on such a claim, Complainant must demonstrate the following:

(1) that she (or he) is a member of a protected class; (2) that she was subject to unwelcome [disability] harassment; (3) that the harassment was based upon [disability]; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that [the] objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

Watt v. UniFirst Corp., 2009 ME 47, ¶ 22, 969 A.2d 897, 902-903.

10) The fact that the conduct complained of is unwelcome must be communicated directly or indirectly to the perpetrator of the conduct. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988). In some instances, Complainant may have the responsibility for telling the alleged harasser directly that his or her comments or conduct is unwelcome. In other instances, however, Complainant's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the conduct is unwelcome. *Id.* Where Complainant never verbally rejects a supervisor's sexual advances, yet there is no contention or evidence that Complainant ever invited them, evidence that Complainant consistently demonstrated unalterable resistance to all sexual advances is enough to establish their unwelcomeness. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1990). Complainant may also be relieved of the responsibility for directly communicating unwelcomeness when she reasonably perceives that doing so may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the business. *Id.*

11) The MHRC Regulations provide the following standard for determining employer liability for disability harassment committed by a non-supervisor:

[A]n employer is responsible for acts of disability harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

Me. Hum. Rights Comm'n Reg. § 3.08(I) (3) (July 17, 1999). *See Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 27, 969 A.2d 897, 904.

12) The Law Court has held as follows: "The immediate and appropriate corrective action standard does not lend itself to any fixed requirements regarding the quantity or quality of the corrective responses required of an employer in any given case. Accordingly, the rule of reason must prevail and an employer's responses should be evaluated as a whole, from a macro perspective." *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 28, 969 A.2d 897, 905.

Claim of Retaliation

13) The MHRA makes it unlawful for "an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of [the MHRA] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S.A. § 4572(1)(E).

14) The MHRA further defines unlawful discrimination to include "punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act. . . ." 5 M.R.S.A. § 4553(10)(D).

15) The Maine Human Rights Commission regulations provide as follows:

No employer, employment agency or labor organization shall discharge or otherwise discriminate against any employee or applicant because of any action taken by such employee or applicant to exercise their rights under the Maine Human Rights Act or

because they assisted in the enforcement of the Act. Such action or assistance includes, but is not limited to: filing a complaint, stating an intent to contact the Commission or to file a complaint, supporting employees who are involved in the complaint process, cooperating with representatives of the Commission during the investigative process, and educating others concerning the coverage of the Maine Human Rights Act.

Me. Hum. Rights Comm'n Reg. 3.12 (July 17, 1999).

- 16) In order to establish a *prima facie* case of retaliation, Complainant must show that she engaged in statutorily protected activity, she was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56; *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006). The term "materially adverse action" covers only those employer actions "that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 126 S. Ct. 2405. One method of proving the causal link is if the adverse action happens in "close proximity" to the protected conduct. *See Id.*
- 17) The *prima facie* case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See, Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry her overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.*

Complainant's Prima Facie Case

- 18) Here, Complainant has alleged sufficiently a *prima facie* claim of a hostile work environment. For purposes of the investigation, Respondent has not disputed that Complainant has OCD and falls within a protected class due to her medical condition. Co-workers CC and MG allegedly harassed her because of her OCD for an extended period (approximately one year). She allegedly reported their harassment to management, who failed to act promptly to correct her working condition over several months. The co-workers' taunts and actions, which appear to be both objectively and subjectively offensive, allegedly caused Complainant to cry at times. A reasonable person would find certain statements and actions as alleged to be abusive. There also appears to be a basis for employer liability.
- 19) Complainant also has alleged sufficiently a *prima facie* claim retaliation. Complainant allegedly reported the harassment to Assistant Manager and General Manager (undisputed). She was terminated soon after she allegedly renewed her request for corrective actions to General Manager. There are sufficient factual allegations of a causal link between the complaints and her summary termination.

Respondent's Legitimate, Non-Discriminatory Reason

- 20) Respondent asserted management took immediate corrective actions, and Co-worker CC and Co-worker MG were properly disciplined. Complainant was terminated subsequently simply because

she failed to bill a customer for a glass of milk in violation of company policy prohibiting employee theft.

Final Stage Analysis of Evidence

21) Complainant has carried her overall burden of proving that Respondent is responsible for disability harassment committed by a non-supervisor, based on the following reasoning:

- a) Respondent asserted that Complainant did not suffer repeated or intense harassment sufficiently severe or pervasive so as to disrupt her work given her long work history. According to Respondent, mere offensive utterances by co-workers are not sufficiently severe or pervasive.
- b) Regardless, Respondent asserted that management immediately intervened, and the harassment stopped. General Manager allegedly took "immediate and effective corrective measures," and "[t]he alleged perpetrators of the harassment also refrained from reengaging in the same offensive behavior. Respondent acted as required by the law." Yet, except for the Co-workers' statements, there is no other record of any warnings relating to any investigation or resolution of the harassment complaints. There are no notes of any disciplinary actions in any of their personnel files, including any extemporaneous notes taken at the time of the alleged discussions between General Manager and the co-workers.
- c) Further, Respondent argued that Complainant did not confront the alleged harassers. She "actively participated in the banter, . . ." Her alleged participation in the "taunting and teasing" after General Manager's actions made her behavior equally inexcusable. However, this argument contradicts Complainant's factual allegations in her notarized charge of discrimination and does not address her previous complaint to Assistant Manager. There is no record to indicate that Assistant Manager took any actions with respect to the harassment even though he allegedly observed the harassment and was aware of Complainant's previous complaint of harassment.
- d) Complainant did describe some of the alleged harassment, including some statements and actions by Co-worker CC. It is undisputed that she discussed "teasing by her co-workers" with General Manager. It is also undisputed that she previously spoke with Assistant Manager about her working conditions. The law provides that harassment may be actionable even if it only occurred once.
- e) The evidence in the record supports Complainant's claim that Respondent failed to take prompt, corrective actions with respect to her complaints of harassment because of her disability.

22) Complainant also has carried her overall burden of proving that Respondent's reasons for her termination are pretextual and that a causal connection exists between her protected activity and subsequent termination, based on the following reasoning:

- a) Respondent asserted that Complainant's termination had nothing to do with her disability or her complaining about harassment. "She failed to properly account for product ordered by a customer (sic)." Further, her claim that she forgot to charge for the glass of milk would run

counter to her alleged mental disability given that "pronounced OCD manifests an overwhelming attention to detail."

- b) First, the sequence of events between Complainant's complaints of harassment and termination supports an inference of retaliatory motive. The close proximity (a three-day span) between her discussion with General Manager (May 13, 2010) and her termination (May 16, 2010) indicates a causal connection that undermines Respondent's proffered reason for its actions.
- c) Respondent asserted that Complainant's conduct constituted "theft" and presented sufficient grounds for immediate termination. Complainant insisted that her failure to charge for the glass of milk was inadvertent. Respondent did not provide any objectively verifiable evidence with respect to [REDACTED] to suggest that her action was intentional or was anything other than a one-time offense. It is unclear how long [REDACTED] has frequented the restaurant. However, it is disingenuous for Respondent not to act on its suspicion of any company violation until after Complainant discussed the harassment with management.
- d) The stated reason for Complainant's termination suggests a deviation from the company's standard procedure regarding progressive discipline and is undermined by other employees' disciplinary records. Respondent's assertion regarding Complainant's prior violations of company policy or management's suspicion of wrongdoing before her termination is not persuasive. If Complainant's actions were serious enough to warrant summary termination at the time of the alleged violations, then management's failure to document adequately in her personnel file is suspect given her positive work history.
- e) Respondent contended that the number for terminations for theft is high and that Complainant was treated the same as other servers. Respondent submitted evidence of one other termination at the Augusta location for failing to charge for an item: the termination of Employee LB under a previous general manager. However, General Manager subsequently rehired her, who then failed to charge a customer for a drink later. General Manager issued only a warning. Based on Employee LB's performance record, it appears that she had engaged in the same conduct as Complainant's but was not terminated.
- f) However, General Manager's actions with respect to other similarly situated employees were remarkably different compared to Complainant for apparently the same alleged violation. The record indicates that General Manager did not terminate some other employees who had engaged in similar misconduct at the Restaurant.
- g) Co-worker MG's statement that she had written up servers for not charging customers properly further supports Complainant's claim that she was quickly dismissed despite Respondent's standard practice of issuing warnings to servers for not charging customers properly.
- h) Records of other employees disciplined or terminated for various reasons, including failing to charge for items, are instructive on the question of whether other similarly situated employees were merely warned for failing to charge for items or were terminated immediately. Unlike other similarly situated employees, Complainant was never issued any warnings for an allegedly first offense. Respondent acknowledged that different managers follow different policies and practices. If true, the different managerial approaches would not support Respondent's argument that Complainant knew or should have known its policy and practice

INVESTIGATOR'S REPORT, E10-0325

on employee theft. Respondent's position is not persuasive in light of the evidence presented; its purported reason for terminating her appears to be a pretext for an unlawful discriminatory motive

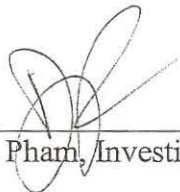
VI. RECOMMENDATION:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that Respondent [REDACTED], LLC d/b/a [REDACTED]'s subjected Complainant [REDACTED] to a hostile work environment and terminated her employment in retaliation for complaining about harassment; and
- 2) This case should be conciliated in accordance with 5 M.R.S.A. § 4612(3).



Amy M. Sneirson, Executive Director



Domini Pham, Investigator