Maine Human Rights Commission
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March 8, 2013

INVESTIGATOR'S REPORT
E11-0323

[redacted]

v.

[redacted]

I. Complaint:

Complainant [redacted] alleges that Respondent [redacted] Restaurant discriminated against her on the basis of sex by subjecting her to a hostile work environment. Complainant also alleges that Respondent retaliated against her in violation of the Maine Whistleblowers' Protection Act by terminating her employment after she complained of unsafe activity in the workplace.

II. Respondent's Answer:

Respondent denies discrimination and retaliation, and alleges that Complainant was terminated for disrespectful and inappropriate behavior in the presence of management and customers.

III. Jurisdictional Data:

1) Date of alleged discrimination: January 28, 2011.

2) Date complaint filed with the Maine Human Rights Commission: May 5, 2011.

3) Respondent employs 39 people and is subject to the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, as amended, the Maine Whistleblowers' Protection Act, and state and federal employment regulations.

4) Complainant is represented by [redacted]. Respondent is represented by [redacted].

5) Investigative methods used: A thorough review of the materials submitted by the parties, requests for further information and documents, a Fact Finding Conference. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

1) The relevant parties, issues and documents in this case are as follows:

   a) Complainant was employed by Respondent as a food server from March of 2009 until January 28, 2011 when she was terminated.

   b) Respondent operates a restaurant in Augusta.

   c) "General Manager" was the general manager in the restaurant where Complainant worked and had supervisory authority over Complainant.

   d) "Assistant Manager" was an assistant manager (or "person in charge") in the restaurant and had supervisory authority over Complainant.

   e) "Male Coworker" was a male coworker that worked with Complainant. Complainant alleges that Male Coworker sexually harassed her.

   f) "Area Manager" is a regional manager for Respondent and investigated Complainant's sexual harassment allegations after she filed a charge with the MHRC.

   g) Complainant's handwritten filled payroll form signed on January 28, 2011 states under termination that she was terminated for "attitude" and that she was rude and insubordinate to Assistant Manager and coworkers. Complainant's typed termination notice dated January 28, 2011 states, "You were disrespectful to your coworkers and management, yelling and using [expletives] in front of customers on January 26, 2011. You created a hostile environment for your coworkers and our customers." (See file.)

   h) Respondent submitted notes from the investigation Area Manager conducted in July of 2011 into Complainant's sexual harassment allegations, and after another employee made allegations of sexual harassment in June of 2011. The notes show that Area Manager interviewed numerous, non-management employees (mostly female) and that almost all of them reported that they had experienced or witnessed Male Coworker make lewd and inappropriate remarks or engaged in inappropriate touching. As a result, Area Manager recommended termination of Male Coworker for his behavior and Area Manager for his failure to appropriately deal with Male Coworker's behavior (see notes in exhibit A).

   i) Respondent provided termination notices showing that other employees have been terminated in the past two years for reasons similar to Complainant (insubordination, rudeness). (See file.)

2) Complainant provided the following:

   a) General Manager tolerated, participated in, and encouraged an atmosphere of sexual harassment in the restaurant throughout her employment.

i) General Manager would come out of the freezer and stick his hand down the back of her shirt. He would also come up to her often and attempt to tickle or poke her. She told him that she did not appreciate his behavior and asked him to stop.

ii) Male Coworker would make crude and disgusting sexual comments to her and would smack her on the bottom when he passed behind her. General Manager and others would laugh when they saw this. She reported to General Manager that she found this behavior unacceptable, but General Manager only responded that Male Coworker was a good server, and that he would talk to him about it. Male Coworker was never disciplined for his actions. She also told Male Coworker numerous times to keep his hands off of her but he kept bothering her.

iii) Female Coworker was a lesbian and touched her inappropriately nearly every shift they worked together, and often grabbed her groin area. Female Coworker would do this in front of management, and management would laugh about it instead of taking action. It made her very uncomfortable. (Note: this claim was made in Complainant's initial charge of investigation but was not corroborated further. Complainant also did not allege that she reported this incident.)

iv) Investigator's Note: When asked at the Fact Finding Conference why she did not complain to someone other than General Manager about the alleged harassment, she stated that she did not feel comfortable reporting to anyone else.

b) Complainant provided the following regarding retaliation:

i) Approximately 5 to 6 months prior to her termination, a dishwasher came to work with scabies. She reported to General Manager that the employee should not be working, but General Manager told her that the dishwasher was having an allergic reaction to soap. She was later diagnosed by her doctor with scabies and reported this to management. She was told to work anyway against her doctor's orders because there was no one available to cover her shift.

ii) Another time, management allowed a cook to work with cellulitis. He had large open lesions on his face. She reported to General Manager that he should not be working. General Manager just stated that he did not know what to do about it.

iii) On or around January 24, 2011 she was called into management's office and was written up for paying another server to do side work for her. This is common practice among servers and has never been an issue. Management has always been aware of this happening. She protested the written warning and gave management other instances when this has occurred with other servers. General Manager stated that he did not care about the other instances. This was retaliation.

iv) On January 26, 2011 she got into an argument with a new server who was not pulling her weight and fulfilling her required job duties. She told the new server to "suck it up" and get the job done. She did this in the back area of the restaurant and did not do it in front of customers. She was sent home and told by Assistant Manager that she would have to come back in to discuss the incident with management. She did not yell at the new server or

swear at her. She does not believe she was yelling at Assistant Manager, and she did not swear at him. This too was retaliation.

c) On January 28, 2011 General Manager terminated her employment and stated that the reason was that she could not get along with others. She believes the real reason she was terminated was in retaliation for her complaints about the unsafe work conditions caused by employees with contagious conditions. She was a good employee and always received positive reviews from management. She always maintained good relationships with her coworkers and with customers.

3) Respondent provided the following:

a) Complainant never reported sexual harassment to management or Respondent during her employment.

i) The first Respondent became aware of allegations of harassment was when it received the charge from the MHRC and when another employee made a report of harassment in June of 2011.

ii) Once the MHRC charge was received, Area Manager investigated her claims concluded after numerous interviews that Male Coworker had engaged in sexually inappropriate conduct toward female employees, and that General Manager failed to control Male Coworker's behavior and take appropriate action (Exhibit C). Both General Manager and Male Coworker were terminated.

iii) There are no records of Complainant ever having complained of sexual harassment. There is, however a record from NR who complained of harassment by Male Coworker in June of 2011 (see file). Respondent immediately investigated the claim and took prompt and appropriate corrective action.

b) Complainant never filed any reports regarding unsafe work conditions or participated in activity protected under the WPA.

i) Respondent acknowledges that there was a dishwasher that had an allergic reaction to chemicals which caused a temporary rash, and that there was a cook who received medical treatment for a spot on his face. Respondent was never provided with any medical documentation or information suggesting that either of the incidents posed a reportable work condition or required restrictions from working. Respondent has no knowledge whether these conditions were scabies and or cellulitis.

ii) On January 22, 2011 Complainant left her shift without completing her work and paid another server to complete her work, which is a violation of company policy. She was provided a written warning for this behavior on January 24, 2011 and it was not retaliation.

iii) On January 26, 2011 Complainant had a verbal altercation with a coworker in the front portion of the restaurant in view of customers. Assistant Manager was on duty and brought her to the back of the restaurant to counsel her regarding the inappropriateness of her actions. When he tried to counsel her, she continued to yell profanities in a voice loud

enough for guests to hear. Assistant Manager sent her home for the day and informed her that she would have to speak with General Manager before returning to work. This was not retaliation.

c) Assistant Manager discussed the incident with General Manager, and it was determined that Complainant should be terminated for her grossly unacceptable behavior. Any other employee who behaved such as Complainant did would have been similarly terminated. Other employees have been terminated in the past for rude behavior toward customers and employees as well as confrontations with coworkers (see file).

d) The company's employee handbook states that grounds for immediate termination without progressive discipline include "insubordination."

e) Another employee (other than Assistant Manager) witnessed the altercation between Complainant and the new server, and corroborated Respondent's claim regarding her inappropriate behavior (see hand-written note in file).

f) Complainant acknowledged at the Fact Finding Conference that she was aware to whom she could make any kind of complaint to if she felt that General Manager was not appropriately handling her complaints, yet she made no effort to report to anyone else.

V. Analysis:

1) The Maine Human Rights Act requires the Commission 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.

Hostile Work Environment

2) The Maine Human Rights Act provides, in part, as follows:

It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of . . . sex . . . 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).

3) Harassment on the basis of sex is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment 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. § 3.06(I) (1) (July 17, 1999).

4) "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.

5) Accordingly, to succeed on such a claim, Complainant must demonstrate the following:

> (1) that she is a member of a protected class; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based upon sex; (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 sexually 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.

6) 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.*

7) The MHRC Regulations provide the following standard for determining employer liability for sexual harassment committed by a supervisor:

> An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment. When the supervisor's harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or

> even forbidden by the employer. When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:
>
> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
>
> (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Me. Hum. Rights Comm'n Reg. § 3.06(I) (2) (July 17, 1999).

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

> [A]n employer is responsible for acts of sexual 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. § 3.06(I) (3) (July 17, 1999). *See Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 27, 969 A.2d 897, 904.

> 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.

9) Complainant has satisfied her prima-facie case, with reasoning as follows:

a) Complainant is a female who was harassed by Male Coworker on the basis of her sex. She told Male Coworker that she was offended and to cease his advances but he did not do so.

b) Respondent's No Harassment policy states "If you believe you are being, or have been, sexually harassed, you should notify your immediate supervisor, or, if you cannot notify your immediate supervisor notify the person in your company designated to handle personnel or human resources problems." An acknowledgement form further states that Complainant experienced harassment she "can utilize the Open Door policy and report such incident(s) to [her] supervisor, General Manager, District Manager, or call the corporate offices…" " (see policy in file). It is not in dispute that Complainant received this policy and understood it.

c) Complainant has shown that she likely was subjected to unwelcome sexual harassment from Male Coworker, but it is unclear whether that harassment was severe or pervasive.

i) The behavior described by Complainant, which was consistent with that observed by witnesses investigated by Respondent after the fact, appears to be severe and pervasive.

ii) The fact that Complainant alleged that she only reported Male Coworker's behavior to General Manager somewhat detracts from her claim that she was subjected to harassment that was "sufficiently severe or pervasive so as to alter the conditions of [her] employment and create an abusive work environment." If Male Coworker had been subjecting Complainant to inappropriate physical or verbal harassment throughout her employment sufficient to create an abusive work environment, it seems likely that she would have made a report to a higher member of management or human resources as consistent with Respondent's No Harassment Policy, or to anyone other than General Manager.

iii) When asked specifically why she never reported Male Coworker's behavior to other management personnel, Complainant did not say that she withheld the report out of fear she would lose her job; rather, she stated that she "did not feel comfortable" reporting to anyone other than General Manager. However, if General Manager had subjected her to sexual harassment himself as she claims or laughed when he observed Male Coworker act inappropriately (an indication to a reasonable person that a complaint would not be taken seriously), it does not make sense that Complainant would choose to report harassment to General Manager when she had other avenues to choose from. It also does not make sense that she would feel comfortable reporting harassment to him.

iv) Nevertheless, given the Commission's "reasonable grounds" standard (discussed above), it is found that Complainant subjectively perceived the environment to be abusive.

d) According to MHRC regulations, an employer is liable for sexual harassment by a non-supervisor if the employer or its supervisory employees knew or should have known about the conduct (see above). It is clear from the investigation conducted by Area Manager in July of 2011 that Male Coworker participated in frequent inappropriate sexual conduct toward several employees; given the frequency of Male Coworker's offensive behavior, General Manager either knew or should have known about it.

e) Since General Manager either knew or should have known of Male Coworker's sexual harassment of Complainant, Complainant has established a prima-facie case for employer liability.

f) There was insufficient evidence to show that General Manager himself subjected Complainant to sexual harassment. A neutral, non-management employee alleged that Complainant would sometimes give General Manager back rubs. (This employee also claimed that she witnessed sexual harassment by Male Coworker, so she is being credited as an independent witness in that she has no obvious or apparent biased toward either Complainant or Respondent.)

10) Respondent did not rebut the prima-facie case by showing that it took immediate, appropriate corrective action to address Male Coworker's sexual harassment.

a) General Manager did nothing to address Male Coworker's offensive conduct until after Complainant had been terminated. He was Complainant's supervisor and had the responsibility for ensuring that the workplace he supervised was free of unlawful harassment.

b) Respondent argues that Complainant was at fault for not making a formal complaint about the harassment, and that because of that Respondent had no opportunity to investigate. However, although Complainant's claim that she reported harassment to General Manager remains in dispute, the fact remains that General Manager knew or should have known about the harassment. General Manager's failure to follow up immediately and appropriately cannot be blamed on Complainant.

11) Based on the Commission's "reasonable grounds" standard, it appears that Complainant has at least an even chance of prevailing in court in proving that there is employer liability for subjecting her to a hostile work environment based on sex.

Whistleblower Retaliation

12) The Maine Human Rights Act prohibits termination because of previous actions that are protected under the Whistleblower Protection Act ("WPA"). *See* 5 M.R.S.A. § 4572(1)(A).

13) The WPA provides, in part, that it is unlawful, based on protected activity, to "discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment. . . ." 26 M.R.S.A. § 833(1).

14) Protected activity includes:

> A. The employee, acting in good faith, or a person acting on behalf of the employee, reports orally or in writing to the employer or a public body what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States;
>
> B. The employee, acting in good faith, or a person acting on behalf of the employee, reports to the employer or a public body, orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual.

26 M.R.S. § 833(1)(A, B).

15) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *See DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.

16) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA-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 employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry her overall burden of

proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*

17) In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant's protected activity, although protected activity need not be the only reason for the decision. *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).

18) Here, Complainant alleges that she reported what she reasonably believed to be unlawful sexual harassment to the General Manager. This, if true, would be protected activity under the WPA. Complainant did not show that she participated in protected activity by reporting to Respondent what she had "reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual." Respondent denies Complainant filed any report of safety concerns, and there was no objective evidence of such reports or medical documentation submitted to Respondent at the time regarding safety concerns.

19) However, assuming Complainant established a prima-facie case of retaliation, Respondent provided probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action. It is undisputed that Complainant was involved in a dispute with a coworker two days prior to her termination. While Complainant denies the severity of her behavior that day, it is undisputed that she was sent home early by Assistant Manager (not an employee alleged to be involved in her sexual harassment claim and with no apparent reason to retaliate against her) because of her disruptive behavior. Another employee corroborates her yelling and swearing as well (see file). This was sufficient reason to terminate her employment.

20) Complainant did not provide any evidence to prove that Respondent would not have terminated her but for her reports about her coworkers' physical conditions. Respondent provided evidence showing that other employees have been terminated for the same reasons as Complainant. There was no evidence to show that Complainant was terminated for reasons other than her behavior on January 26, 2011.

21) Retaliation in violation of the WPA is not found.

VI. Recommendation:

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

1) There are **Reasonable Grounds** to believe that [redacted] Augusta, LLC d/b/a [redacted] Restaurant subjected [redacted] to a hostile work environment based on sex.

2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).

3) There are **No Reasonable Grounds** to believe that [redacted] Augusta, LLC d/b/a [redacted] Restaurant retaliated against [redacted] in violation of the Maine Human Rights Act and the Whistleblowers' Protection Act by terminating her employment.

4) This portion of the Complaint should be dismissed in accordance with 5 M.R.S.A. § 4612(2).

Amy M. Snetrson, Executive Director

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