Maine Human Rights Commission
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Investigator's Report
E12-0025

[redacted]

v.

[redacted]

I. The Complaint:

The Complainant alleges that she was discriminated against in employment due to her race, ancestry and national origin [Chinese] and retaliated against for engaging in protected activity in violation of the Whistleblowers' Protection Act.

II. Respondent's Answer:

Respondent [redacted] asserted that decisions to reprimand and/or discipline Complainant and to cut back her hours of employment were entirely unrelated to her race, ancestry and national origin, or alleged protected activity.

III. Jurisdictional Data:

1) Dates of alleged discrimination: September 19, 2011 through June 5, 2012. Complainant also alleged a continuing violation.

2) Dates complaints filed with the Maine Human Rights Commission ("Commission"): January 18, 2012; March 15, 2012 and June 7, 2012.

3) Respondent [redacted] employs 6 employees and is required to abide by the nondiscrimination provisions of the Maine Human Rights Act and state employment regulations.

4) Complainant is represented by Peter Bickerman, Esq. Respondent is represented by Elek Miller, Esq.

5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution 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 parties in this case are as follows:

a) Ms. [redacted] is Chinese and English is not her first language. Ms. [redacted] was employed by Alternative Organizational Structure ("[redacted] Western Kennebec County Schools in their Central Office in Winthrop as a Payroll/Human Resources Clerk from 1994 until June 30, 2012.

b) The Western Kennebec County Schools was formed by the towns of Fayette and Winthrop under the 2007 State of Maine School Administrative Reorganization law. The [redacted] combines administrative, special education, transportation, and various other operational functions as required by law. Additional services may be combined where cost savings may be found. Along with a combined [redacted] budget and board, each member school unit retains a local budget and school board.

c) Important third parties: Auditor, JN; Food Services Director, CM; Superintendent 1, PG; Finance Director, JT; Accounts Payable Clerk, EM; Superintendent 2, SC; Superintendent 3, GR; Superintendents' Secretary, SF; Affirmative Action Officer, KM.

2) The parties alleged facts dating back many years, ostensibly related to their claims and defenses. Some of the facts are recounted here for background but are not timely for the purposes of assessing Ms. [redacted] claims. The Maine Human Rights Act provides that a complaint must be filed within 300 days of the date of discrimination for the Commission to have jurisdiction to hear the claim.

a) For Ms. [redacted] original complaint, filed January 18, 2012, alleged discriminatory acts that occurred between March 24, 2011 and January 18, 2012 are timely.

b) For Ms. [redacted] first amended complaint, filed March 15, 2012, alleged discriminatory acts that occurred between May 20, 2011 and March 15, 2012 are timely.

c) For Ms. [redacted] second amended complaint, filed June 7, 2012, alleged discriminatory acts that occurred between August 12, 2011 and June 7, 2012 are timely.

3) Ms. [redacted] provides the following summary in support of her original complaint and two amendments:

a) She was employed by [redacted] as a Payroll/Human Resources Clerk between 1994 and June 30, 2012.

b) On or about September 8, 2011, Superintendent 3 started with the school district.

c) By September 15, 2011, within one week of his arrival, Superintendent 3 had placed Ms. [redacted] on probationary employment status, based for the most part on two e-mails which she had written and sent to staff regarding benefits. The content of the emails was correct; he simply objected to her grammar, spelling and presentation. He was well aware of the fact that English was Ms. [redacted] second language and that the challenges inherent in her written communications flowed from her national origin. Superintendent 3 stressed that a memo which she had written was so poorly done that he would "not allow this to continue" and stated that she should go back to college to take a business writing course. Ms. [redacted] explained yet again to Superintendent 3 that English was not her first language.

d) On December 5, 2011, Superintendent 3 again wrote Ms. [redacted] up and extended her probation. In the letter, Superintendent 3:

i. Reprimanded Ms. [redacted] for attempting to work out a new, streamlined warrant, chiding her: "Let's make this simple, efficient, transparent and bring the process in to (sic) line with what other school departments are doing with regard to payroll procedures – something that should not take eleven years to figure out."

ii. Again referred to Ms. [redacted] supposed need for a writing course.

iii. Indicated that Ms. [redacted] had misconstrued the support staff employment contract and that "school year" employees are not allowed to accrue and carry over vacation leave. The actual union contract provisions on vacation accrual did not distinguish between year-round and school-year employees, and "[a]ll employees" were entitled to accrue and carry over 25 hours. This was not a proper reason for disciplining Ms. [redacted]

iv. Reprimanded Ms. [redacted] about recording/reporting leave balances. However, the problem was not Ms. [redacted] performance. The [redacted] had changed accounting systems in January 2011, and the new software was not designed to correspond with the leave practices in Winthrop. The prior system allowed the accounting for leave on an hourly basis; the new system only recognized ¼, ½ and full-day increments. In March 2011, Superintendent 3's predecessor informed the employees that the school system would account for the leave on a manual basis until computer changes could be made. Over the summer, Ms. [redacted] entered the information and her work was reviewed and approved by two co-workers. On October 5, 2011, Superintendent 3 informed employees of a change in how leave would be accrued, mandating ½-day increments. Apparently, the union identified the decision as one subject to bargaining and on November 1, 2011, Superintendent 3 relented and allowed hourly employees to take leave in hourly increments, even though the software continued to be unable to recognize such increments. Superintendent 3 did not direct that the leave be manually recorded. This problem was not one of Ms. [redacted] creation.

v. Scolded Ms. [redacted] for overpaying a Food Service worker for one hour's time during a holiday week. The employee was scheduled to work from 6:30 a.m. until 2:00 p.m. on November 22, 2011, and worked from 6:30 p.m. until 1:00 p.m. and recorded her work time as well as another hour from 1:00 p.m. to 2:00 p.m. The entire time was recorded as 6.5 hours, which is inconsistent with both the hours recorded and Superintendent 3's policy of automatically deducting a 30-minute meal break. When Ms. [redacted] reviewed the time sheet, she caught the error and called the employee. The employee indicated that she had worked 6.5 hours and that it was her intent to claim an hour of vacation time from 1:00 p.m. to 2:00 p.m., vacation time to which the employee was entitled. The employee's supervisor only comes in periodically and was not scheduled to be in until after the employee was due to be paid. She was paid for the claimed 7.5 hours. Ms. [redacted] believed that she, as payroll clerk, was required to pay for the leave taken in compliance with state wage and hour laws. Even if she had chosen to follow Superintendent 3's policy and deducted the unutilized 30-minute break time, it would have been a difference of 30 minutes.

vi. Rebuked Ms. [redacted] for including information on association dues deductions on the employee payrolls every two weeks. The association fee was a frequent $0.01 cent change per pay period in the union dues deduction; because of this variability, it could not be pre-programmed and had to be entered manually.

vii. Complained about the reports the accounting system provided. Superintendent 3 preferred a short and simple report but the system chosen by the district had pre-packaged reports. Ms. [redacted] offered to use the system's Payroll Check Register, a simple listing of who is getting paid what amounts, but Superintendent 3 refused that option. In order to provide the information Superintendent 3 required, Ms. [redacted] then turned to using a "Payroll Warrant Register"; because of the various deductions, this was a long, complex document.

e) Superintendent 3 wrote yet again to complain about Ms. [redacted] writing in emails on January 17, 2012, noting that her email to a principal was "poorly written, left room for misunderstanding, and was perceived by the Principal as being argumentative". Superintendent 3 reiterated that Ms. [redacted] was still sending "unacceptable" emails without his prior authorization, and notwithstanding his offers of a Business Writing course for her.

f) Both before and after her suspension, Ms. [redacted] had reported illegal activity in the workplace to the employer.

   i. Her first instance of protected whistleblower activity occurred in May 2011, when Ms. [redacted] reported information about the manner in which Food Services Director was being paid. It appeared that Superintendent 3 and Food Services Director were misusing [redacted] salary funds to pay Food Services Director, when the money should have been charged to the Food Service Fund. On August 24, 2011, Ms. [redacted] discovered the altering of wages in the software system by Food Services Director. This was not the first time that she had informed her employer of an employee tampering with the software.

   ii. A second incident of whistleblowing during the 2011-12 school year was when she was reprimanded over an incident involving another employee's time sheet for Thanksgiving week 2011. She paid the employee for hours worked and for an hour of vacation time. Superintendent 3 reprimanded her for paying the employee for an extra hour of service. This is so despite the fact that Ms. [redacted] had received wage and hour training at conferences for school business managers and despite the fact that she printed out information on the wage and hour laws and showed this to Superintendent 3 to explain why she had taken the action she did. Since the employee had both worked the paid hours and accrued the paid vacation time, it is difficult to understand what she had done wrong. Apparently, all she did was refuse to violate wage and hour laws by not paying the employee for time actually worked. For this, she was reprimanded and her probation was extended.

   iii. Ms. [redacted] was asked by a school board member to provide information about her allegation that the Food Services director had been overpaid via misuse of funds, which she believed to be illegal since it involved federal funding. Ms. [redacted] was placed in the position of having to lie to protect her supervisors or being honest with the board as to what she knew. Ms. [redacted] provided truthful information on or about May 10, 2012 and as a result, Food Services Director had to amend the accounting entries she had made. Food Services Director and Superintendent 3 were angry with Ms. [redacted] because of this situation. A mere three (3) weeks later, on June 1, 2012, Superintendent 3 informed her that she would not be offered a contract for the 2012-2013 school year.[1]

g) Superintendent 3 was critical of everything she did and seemed to make an effort to find something to discipline her for. He was often rude and disrespectful to her and also audited her work, which was different from the manner in which he dealt with other employees' work product.

h) On or about February 16, 2012, Superintendent 3 informed Ms. [redacted] that he was going to cut her hours back beginning in July 2012.

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[1] Superintendent 3 made this announcement to Ms. [redacted] in the course of discussing her evaluation, in which he again criticized her English.

i) Even after that, Ms. [redacted] alleged that she received unfair and retaliatory discipline, including on March 15, 2012 when she was placed on paid administrative leave for allegedly yelling during a conversation with two employees of the Finance Office and damaging the microwave oven in the staff kitchen. Ms. [redacted] admits that the microwave oven was damaged but explained that it was an accident. She also admitted that she was upset and crying when she spoke with Finance Director but denied yelling at anyone.

j) Ms. [redacted] alleged that Superintendent 3 further discriminated and retaliated against her by administering an unfair, negative performance appraisal on June 1, 2012, telling her that she should resign. She did not resign.

k) On June 5, 2012, Superintendent 3 notified Ms. [redacted] that she would not be offered a new employment contract for the 2012-2013 fiscal year, beginning on July 1, 2012. No reason was offered for the non-renewal of her contract.

l) Although she was employed by the school district for 17 years, it was only in her final year of employment that she was singled out and treated poorly because of her race, ancestry and national origin. Superintendent 3 immediately seized upon her accent, grammar and spelling and took the position that she wasn't worthy of any supervisory responsibility because of her poor English. None of her prior supervisors had expressed any concern about her English. Superintendent 3's behavior and attitude toward her amounted to discrimination based upon race and national origin, and it created an atmosphere of disdain and bullied her in a manner which invited co-workers to adopt the same attitude.

5) [redacted] offered the following:

a) By her own allegations, Ms. [redacted] has revealed that reports of illegal activity in the workplace [to the extent that they occurred] were made prior to Superintendent 3's tenure as superintendent. Thus, his decision could not legally have been based on alleged complaints he knew nothing about and that occurred before he began work with the School.

b) Contrary to Ms. [redacted] allegations, she had significant problems in the workplace, including a written reprimand which she received from Superintendent 3 in September of 2011 continuing her probationary employment status when she distributed two memoranda to all staff which contained numerous grammatical, spelling and presentation errors. Ms. [redacted] had not corrected or asked a co-worker to proofread the memos before they were circulated. One of the memos addressed a collective bargaining agreement issue without approval by or consultation with Superintendent 3. The letter from Superintendent 3 also reprimanded Ms. [redacted] for other performance-related issues such as accuracy, validity and distribution of leave balances.

c) Superintendent 3 reprimanded Ms. [redacted] in writing again in December of 2011 and continued her probationary employment status as a result of unfriendly and negative communication skills, issues with service delivery and continued inappropriate interpretation of the CBA.

6) Superintendent 3 presented Ms. [redacted] with a letter on December 5, 2011, chastising her for:

a) Developing processes and protocols which violated the "spirit and letter of the intent of the CBA";

b) Concerns throughout the District with regard to accuracy, validity and distribution of leave balances;

c) Changes which she made to an employee's time sheet without consulting the Department head;

d) The manner in which she dealt with Association Dues when preparing bi-weekly payrolls;

e) The manner in which she dealt with the Payroll Warrant Register;

f) Failing to act upon his suggestion that she take course(s) at Central Maine Community College;

g) Failure to seek out additional ADS (payroll software) training;

h) Not meeting the professional standards required of members of the education profession;

i) Lack of progress in improving efficiency and operations;

j) Overburdening herself [and others] with paper in an effort to provide justification for her full-time position;

k) Increasing confusion and dysfunction with regard to communications and service delivery.

7) Further investigation reveals:

a) [Issues and Resolution conference] Ms. [redacted] explained that the idea of taking continuing education classes in English was not workable because she was a single mom with family responsibilities at the end of the work day. She lived in East Winthrop and taking evening classes at Central Maine Community College in Auburn, even if paid for by the District, did not seem to be possible for her.

b) Upon information and belief, the individual hired to replace Ms. [redacted] is a female Caucasian who formerly worked for another school district as a food service director. She was hired without payroll experience.

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. § 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.

Discrimination - race, ancestry and national origin

2. Ms. [redacted] alleges that she was discriminated against on the basis of her Chinese race/color/national origin and her difficulty with English, given her national origin. She claims that Superintendent 3's discriminatory animus toward her led to her probation (September and December 2011), his issuing her an unfair, negative performance appraisal (June 2012), and the [redacted] ultimate decision not to renew her contract (June 2012).

3. The Maine Human Rights Act provides, in part, that it is unlawful for an employer to "fail or refuse to hire or otherwise discriminate . . . [or] discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." because of race, or color, or national origin. 5 M.R.S. § 4572(1)(A).

4. The phrase "terms, conditions or privileges of employment" is broad and not limited to discrimination that has an economic or tangible impact. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (interpreting Title VII of the Civil Rights Act of 1964); *King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "An employee has suffered an adverse employment action when the employee has been deprived either of 'something of consequence' as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld 'an accouterment of the employment relationship, say, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.'" *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20 (citations omitted). An abusive reprimand may also be actionable. *See King,* 611 A.2d at 82 (telling an employee who had requested a smoke-free environment as a reasonable accommodation that "she should look for another job if she couldn't stand the smoke").

5. Here, Complainant [redacted] has alleged that there was direct evidence of discriminatory animus based upon Superintendent 3's immediate negative response to her as a Chinese woman. Just a few days after he began work for [redacted] he attacked her grammar and punctuation errors in business emails (in English) and placed her on probationary status as an employee. In this case, Superintendent 3's comments about Ms. [redacted] difficulties with language were not openly tied to her national origin. Because of that, the "direct evidence" analysis will not be applied.[2]

6. Because here there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).

7. First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) she belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261.

8. Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. *See id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered

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[2] If the Commission had viewed this as direct evidence of discriminatory animus, a mixed-motive analysis would apply. *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination. . . ." *Id.* Where this evidence exists, Complainant "need prove only that the discriminatory action was a motivating factor in an adverse employment decision." *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Doyle*, 2003 ME 61, ¶ 14, n.6, 824 A.2d at 54, n.6. Upon such a showing, in order to avoid liability, Respondent must prove "that it would have taken the same action in the absence of the impermissible motivating factor." *Id.*; *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 276-77, 109 S. Ct. 1775, 1804 (1989) (O'Connor, J., concurring).

reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68.

9. Thus, Complainant can meet her overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16. In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.

10. Employers sometimes have legitimate business reasons for basing employment decisions on linguistic characteristics. However, linguistic characteristics are closely associated with national origin. Therefore, employers must ensure that the business reason for reliance on a linguistic characteristic justifies any burdens placed on individuals because of their national origin. *See EEOC Compliance Manual,* Section 13.V ("National Origin Discrimination").

11. Here, Ms. [redacted] set forth a prima-facie case of discrimination based on her race/color/national origin: (1) she belonged to a protected class (Chinese origin); (2) she performed her job satisfactorily, albeit not perfectly; (3) her employer took an adverse employment decision against her by putting her on probation, extending probation, and ultimately not renewing her contract; and (4) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed.

12. Respondent stated a legitimate, non-discriminatory reason for the probations and non-renewal of contract, namely Ms. [redacted] performance and temperament/behavior issues.

13. In the final analysis, Ms. [redacted] supported her burden to show must show that she would not have subjected to two probations, and ultimately had had her contract not renewed, but for her Chinese origin/race/color, although protected-class status was not be the only reason for the decision. Reasoning is as follows:

    a. Superintendent 3's demeaning attitude toward Ms. [redacted] and her English skills began immediately when he started working with her and continued through the end of her employment there. The instantaneous timing and nature of the criticism is striking.

    b. Superintendent 3's decision to place Ms. [redacted] on probation in September 2011 was unwarranted and appears to have been caused, at least in part, by Ms. [redacted] race/color/national origin.

        i. Superintendant 3 objected to two emails Ms. [redacted] sent on September 8 as containing "numerous spelling, grammatical, and presentation errors" which he found unacceptable because he felt that the [redacted] was "expected to set a standard for [] community and model appropriate behavior for all of our stakeholders, especially those we come into contact with on a regular basis." In reality, the email messages to which Superintendent 3 objected in his September 2011 probation letter are not perfectly written but are professional, readable, appropriate as to content, and understandable.
        ii. Superintendent 3 stated in the letter that he wanted to review every email or other communication by Ms. [redacted] prior to her sending it; this micro-managing approach by a Superintendent who presumably had many other things to do was unusual, at best, and, at worst, seems designed to find faults. Ms. [redacted] prior supervisors had not disciplined her for English

language grammar errors, or demanded to read each email before she sent it. Superintendent 3's behavior toward Ms. [redacted] was notably different in nature than that of his predecessors.

c. After discriminatory animus led Superintendent 3 to place Ms. [redacted] on probation in September 2011, he continued to monitor her every move more closely than he did with other colleagues who were not Chinese. His continuation of her probation in a December 5, 2011 letter likely would not have occurred otherwise.

   i. As noted above, all of the criticisms Superintendent 3 made regarding performance were open to interpretation. They may have been warranted, or may not have been warranted, but the manner in which Superintendent 3 delivered the message was inappropriately harsh.[3]
   ii. Superintendent 3's consistent insistence that Ms. [redacted] affirmatively "improve [] work-place skills" with a "Business Writing course" indicates that his difficulty with her race/color/national origin and English Language skills played a significant role in his decision to continue her probation.

d. It seems more likely than not – the Commission's "reasonable grounds" standard – that Superintendent 3's disproportionately close review of all Ms. [redacted] work, and his criticisms of her English language skills in her work, led at least in part to the Respondent's decision not to renew Ms. [redacted] contract. This is buttressed by Ms. [redacted] notes from her meeting with Superintendent 3 on June 1, 2012, when Superintendent 3 reviewed Ms. [redacted] annual review. The discussion covered a number of topics, including specific discussion of Ms. [redacted] English writing skills.

8) As Ms. [redacted] explained in the Issues and Resolution Conference, she had worked for the [redacted] (and its predecessor district) for 17 years and had never been criticized or disciplined about her English language skills before. Ms. [redacted] had developed a system by which co-workers proofread her communications prior to her sending them out and all had gone along adequately from her point of view, for eleven 11 years until Superintendent 3 was hired.

9) Even though Ms. [redacted] did have other performance issues that may have played a role in Respondent's decisions to put her on probation in December 2011 and to not renew her contract in June 2012, it is more likely than not that Superintendent 3's actions were motivated – at least in part- by Ms. [redacted] national origin.

10) Superintendent 3's business reasons for employment decisions related – at least in part – to linguistic characteristics associated with Ms. [redacted] national origin. Superintendent 3's disciplining Ms. [redacted] for linguistic characteristics associated with her national origin did not justify the burden placed on Ms. [redacted] because of her national origin.

11) Evidence reveals that Ms. [redacted] was discriminated against due to her race, ancestry and national origin.

Retaliation

12) The Maine Human Rights Act prohibits terminating an employee's employment because of previous actions that are protected under the Whistleblowers' Protection Act ("WPA"). 5 M.R.S. § 4572(1)(A).

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[3] On or about February 16, 2012, Superintendent 3 informed Ms. [redacted] that he was going to cut her hours back beginning in July 2012.

13) 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.

14) 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.*

15) 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 University of Texas Southwestern Medical Center v. Nassar*, 2013 WL 3155234, *16 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).

16) Ms. [redacted] set forth a prima-facie case of the WPA by alleging that on June 5, 2012 Respondent [redacted] advised that it would not offer her a contract for the 2012-2013 school year, a mere three weeks after she provided truthful information to a school board member regarding the misuse of funds. In this case, this time sequence provides an inference of retaliation. With the prima-facie case met, there is a rebuttable presumption that [redacted] terminated Ms. [redacted] employment in retaliation for engaging in protected whistleblower activity when she reported accounting and payroll irregularities.

17) [redacted] offered probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action, namely that Ms. [redacted] had many performance deficiencies, including disruptive conduct by Ms. [redacted] on the job, numerous errors and failures to follow policy and instructions, and a lack of professionalism.

18) In the final analysis, Ms. [redacted] showed that [redacted] would not have determined not to renew her contract but for her protected activity, even if the protected activity was not the only reason for the decision. Reasoning is as follows:

a) In May 2011, Ms. [redacted] first reported what she believed in good faith was misuse of [redacted] salary funds to pay Food Services Director, when that money should have been charged to the Food Service Fund. The report related directly to Superintendent 3's conduct. Ms. [redacted] found that the misuse was ongoing in August 2011, when she discovered the altering of wages in the software system by Food Services Director. Ms. [redacted] was asked by a school board member to provide information about her allegation that the Food Services director had been overpaid via misuse of funds, which she believed to be illegal since it involved federal funding. Ms. [redacted] was placed in the position of having to lie to protect her supervisors or being honest with the board as to what she knew. Ms. [redacted] provided truthful information on or about May 10, 2012.

b) As a result of her report to the school board, Food Services Director had to amend the accounting entries she had made. Food Services Director and Superintendent 3 were angry with Ms. [redacted] because of this situation. Three weeks later Ms. [redacted] was out of a job.

c) It is interesting to note that Respondent's June 5, 2012 letter advising Ms. [redacted] that it would not renew her contract did not cite any reason for the decision.

d) After the fact, Respondent argues that the decision not to renew the contract was solely because of Ms. [redacted] performance issues. [redacted] states that Ms. [redacted] had a documented history of becoming temperamental and irritable acting inappropriately with peers; she also had been put on paid leave after an incident with a colleague in which Ms. [redacted] damaged the microwave. [redacted] notes that this problem was a continuing one that dated back to 2004, 2005 and 2009 incidents. Coupled with technical mistakes, her continued employment apparently was no longer of value to [redacted] but it did not bother to make explanations to Ms. [redacted]

e) It is possible that Superintendent 3 felt that Ms. [redacted] performance issues were unredeemable, but the timing of the decision is notable. The fact that his decision not to renew the contract of a 17-year employee came only three weeks after her report to the school board is unavoidable.

19) It is more likely than not – the Commission's "reasonable grounds" standard - that Complainant can show in court that [redacted] would not have terminated her employment but for her protected conduct.

20) Retaliation for engaging in protected whistleblower activity is found.

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] discriminated against Complainant [redacted] in employment due to her race, ancestry and national origin;

2. There are Reasonable Grounds to believe that Respondent [redacted] retaliated against Complainant [redacted] for engaging in protected activity in violation of the Whistleblowers' Protection Act, and;

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

Amy M. Sneirson, Executive Director

Michèle Dion, Investigator