



# 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: Maine Relay 711

[www.maine.gov/mlrc](http://www.maine.gov/mlrc)

Amy M. Sneirson  
EXECUTIVE DIRECTOR

John P. Gause  
COMMISSION COUNSEL

## INVESTIGATOR'S REPORT

E12-0168

October 4, 2013

██████████  
██████████  
v.  
██████████

### **I. The complaint:**

Complainant ██████████ alleged that Respondent ██████████ subjected her to sexual harassment due to a hostile work environment and retaliated against her by terminating her employment when she told a co-worker that she objected to the sexual harassment.

### **II. Respondent's answer:**

Respondent ██████████ (██████████) asserted that Complainant ██████████ was terminated due to performance deficiencies and denied all allegations of sexual harassment and retaliation.

### **III. Jurisdictional Data:**

- 1) Date of alleged discrimination: September 4, 2011.
- 2) Date complaint filed with the Maine Human Rights Commission: April 2, 2012.
- 3) Respondent employs 4-7 employees and is subject to the Maine Human Rights Act and state and federal regulations.
- 4) Complainant is represented by ██████████ Respondent represents itself.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution Conference ("IRC"). This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds".

### **IV. Development of Facts:**

- 1) The parties and issues in this case are as follows:
  - a) Complainant ██████████ was employed by ██████████ as a cook between June 2011 and September 4, 2011.
  - b) ██████████ is a variety store in Lyman, Maine.

- c) Third parties: Owner, PP; Manager, DG; Co-worker 1, KB; Co-worker 2, SL; Co-worker 3, AR; Customer 1, TC; Customer 2, GT; Manager, Former Employer, RT.

2) Ms. [REDACTED] offers the following:

- a) I was employed by [REDACTED] as a cook from June of 2011 until September 4, 2011 when I was terminated. I believe that I performed my job duties satisfactorily.
- b) On June 27, 2011 Owner walked through behind me and said, "I know that you're still new so I won't do it today, but around here, we have a company bun check." I responded, "Well, I'll be sure to keep my buns hidden." Later, a co-worker told me that it was Owner's excuse for grabbing someone's buttocks. I confided in her that I feel very uncomfortable being touched by anyone.
- c) About July 4, 2011, I picked out an extra-large men's crew style shirt for my uniform, as I worked around grills and fryolators. A few days later, on July 8 or July 13, I went in to retrieve my paycheck and Owner was standing at the front cash register. After chatting a bit, he got onto the subject of new uniforms. He asked me why it was that I wanted a larger men's style shirt and I explained that I am much more comfortable in loose clothing as opposed to skin-tight clothes. At this point, Owner asked, "Why? Don't you want to accentuate your assets?" Manager was standing next to me during this discussion, but simply giggled at Owner's comments. I said that I do not like my assets and it makes me very uncomfortable. By this time, I was blushing and feeling very uncomfortable about the whole situation. He just looked at me and gave a laugh.
- d) August 24, 2011 or August 31, 2011, I was working with Co-worker 1. I had previously mentioned to other co-workers that I felt that some of her attire may have been inappropriate for our working environment. On this day, she wore a particularly revealing outfit. Owner had been hanging around the store for a while. I heard him make a comment to Co-worker 1. She later confirmed that the comment I heard was, "If no one has told you today, your breasts are amazing." I said, "He can't make comments like that. He's creating a sexually uncomfortable work environment." Her response was "So, it doesn't bother me." I said, "Well, it bothers me." Her reply was "Oh." She walked away.
- e) On either August 24 or August 31, 2011, in talking with a co-worker at [REDACTED] I learned that Co-worker 1 had told Owner and Manager that I was going to file a sexual harassment lawsuit against Owner because of his comments. Since I had never made any such comment, I just brushed it off as nothing more than gossip and people trying to start trouble. I continued to do my job to the best of my ability. Later, I learned that Co-worker 1 had also been telling everyone else that I was going to file a sexual harassment lawsuit against Owner because of his comments.
- f) On September 4, 2011, I was scheduled to work a double shift. I worked the entire shift and at closing time, Manager came in when Owner was away in Vermont on vacation, and informed me that things just weren't working out and that she had to let me go. When I asked why, I was told that complaints had been made against me, but only Owner knew the actual details.
- g) Throughout the course of my employment, I asked several times if there was anything that I needed to improve upon or do differently to perform to their expectations. The only issue which was ever brought up was that I was to be aware that people needed to be made aware if I needed to sit due to medical problems with my knees. Owner and Manager were both aware of my limitations and requirements when I was hired. I always made sure that everyone knew where I was and if I saw customers coming in, I always returned to the kitchen. I maintained positive relationships with many of [REDACTED] regular customers. I believe that the reason given by [REDACTED] for my termination is a

pretext. I believe that the real reason for my termination is retaliation after Owner suspected that I might seek legal assistance due to the unlawful sexual harassment that I was subjected to at work.

3) Owner offered the following on behalf of [REDACTED]

- a) Ms. [REDACTED] was fired because she was dirty, very unsanitary in the kitchen. I had received multiple customer complaints about her cooking. "Regulars" were avoiding my place when they saw her car out front – when they knew that she was doing the cooking. She threw an egg across the kitchen, covering several pieces of equipment. She was seen by a customer smoking something other than a cigarette behind the store. She smoked on the front steps even though she knew that she was not supposed to do it. She has a personality that clashed with a lot of our customers. She was not personable and friendly in a cashier-to-customer situation. This doesn't work well when you depend on repeat customers who are turned off by what they perceive as rude behavior. She couldn't make eye contact and smile. She told me that she didn't like kids. In general, she just was not a good fit.
- b) Ms. [REDACTED] never complained about sexual harassment. The comment about the "company bun check" happened no more than 3 – 4 times. I was only referring to hot dog buns, hamburger buns, the buns which were used to make the Italian sandwiches. I needed to make sure that the buns were not stale, that they were fresh. It was just a long-standing joke. I never touched anyone's buttocks. As far as the comment which Ms. [REDACTED] recounted about "accentuate your assets," I wouldn't even use that language, those words. She didn't dress provocatively. I would have ordered v-neck shirts if I had wanted a shirt that was revealing. That's not what I did – I offered crew-neck shirts. I may have asked Ms. [REDACTED] why she wanted to wear a shirt that was so baggy, so big. She did work around fryolators and other kitchen equipment like the grill. As far as my having told Co-worker 1 that her breasts "looked amazing" – it didn't happen. She was pregnant and her husband was making her feel unattractive. This co-worker was always looking for compliments. I did tell Co-worker 1 that she looked amazing, just to make her feel good about herself. I never said the word breast. I was in my pickup truck, Co-worker 1 was by my truck and Ms. [REDACTED] was in the store. I don't know how Ms. [REDACTED] could have heard me make any comment whatsoever.

4) Ms. [REDACTED] stated that she talked with Co-worker 1 about Owner's sexualized comments:

I told Co-worker 1 that Owner could not make these comments because he was creating a sexually uncomfortable work environment. Co-worker 1 said, "It's okay – I don't mind." From what I heard from Co-worker 2, Co-worker 1 told Owner that I was going to file a charge of sexual harassment. Within 1 week, I was fired. I had no idea that there was any problem with my performance.

5) Further investigation from the IRC reveals:

- a) Neither Owner nor Manager had ever expressed concern about Ms. [REDACTED] relationship to customers nor her ability to cook in a satisfactory manner. Shortly after she started work for [REDACTED] as she was about to prepare food for one of the store's most difficult customers, she was told that if she got his order right, she would have no problems. That customer complimented her cooking.
- b) Ms. [REDACTED] credibly asserted that she was never verbally warned or spoken to about performance issues of any sort: "I am stunned by these comments today because Manager never complained about my work and I was never spoken to about smoking or anything else."

- c) Ms. [REDACTED] felt she was working in a sexualized environment and, rather than act, Manager just laughed. Ms. [REDACTED] let Co-worker 1 know that she was going to file a sexual harassment complaint and one week later, she was fired without warning.
  - d) On August 13, 2011, on a Saturday night, there was a company party for which the diner was closed so that everyone could attend. Ms. [REDACTED] did not attend for two reasons: the function was being held at Owner's home and, due to his previous statements, she alleges that she felt very uncomfortable attending any gathering. Also, she stated that she had learned that there would be heavy drinking going on at this party and that she honestly is not a drinker and chose not to place herself in situations where she knew there would be drinking. Although nothing was said directly to her, she stated that she sensed that she was an outcast because she didn't attend to drink.
  - e) Owner insisted, during the Issues and Resolution Conference, that Ms. [REDACTED] was fired for a whole litany of reasons, including that she was "unsanitary in the kitchen", yet has been unable to show proof that any one of the issues was ever discussed with Ms. [REDACTED]. She was credible during the conference when she said that she had no idea that her job was in jeopardy and that Owner and Manager never said a word to her about performance. As to her professional behavior in the kitchen, in her current position for a university, she passed the "Safe Serve" test on the first try. She has had several inspections of her work area, production, temperature recording and product rotations. These inspections, conducted by both the Maine Health Inspector and Internal Corporate Inspectors have been successful for Ms. [REDACTED].
  - f) With regard to having "thrown an egg across the kitchen" Complainant [REDACTED] was credible when she explained that she was very busy in the kitchen and had to help in the dining room. She overcooked an egg for a customer, attempted to throw it into the trash and simply missed it.
  - g) As to Owner's comment to Co-worker 1, "has anyone told you today that your breasts look amazing," Owner denied that Ms. [REDACTED] could have heard this comment. She explained that she was standing at the register, which was next to an open ice cream window when she heard the comment.
  - h) Ms. [REDACTED] has questioned why, if Owner believed her co-worker was smoking marijuana while on the clock, her employment was not terminated.
  - i) Owner has no written warnings, no record of verbal warnings or anything else that would support his assertion that she simply was not a good employee and had to be fired.
  - j) Owner was not a credible witness.
- 6) Manager, Former Employer commented in a written statement to the MHRC, "Throughout her employment here, I had several compliments about her work ethic and the way she handles customers. Our customers were very impressed with her fast and efficient work in the deli. Some customers specifically requested her. She is familiar with all of Maine's Health and Safety codes and effectively used them throughout her deli duties. She always greeted customers with a hello and a smile. We still have customers who refer to her as "Smiley." Ms. [REDACTED] left her former employer when it became clear to her that she had reached the maximum wage rate of \$8.90 and there was no prospect of having that increased. She had anticipated having better earnings prospects over time with [REDACTED]."

**Analysis:**

- 1) The Maine Human Rights Act ("MHRA") 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.
- 2) Complainant [REDACTED] alleged discrimination based upon her sex. She alleged that she was sexually harassed and that the employer terminated her employment when she objected to the harassment.
- 3) Respondent [REDACTED] asserted that Complainant [REDACTED] was discharged as a result of performance deficiencies. Respondent denied that Complainant was subjected to inappropriate conduct, but in fact was terminated for poor job performance.

*Sex Discrimination – Hostile Work Environment*

- 4) It is unlawful employment discrimination, in violation of the Act "... for any employer to ... because of . . . sex . . . discriminate with respect to . . . terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S. § 4572(1)(A).
- 5) 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. § 4572(1)(A).

- 6) The Maine Human Rights Commission Regulations provide, in part, as follows:

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).

- 7) "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.

8) 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 (1<sup>st</sup> 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. *Id.* 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. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1990).

9) 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.

10) 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 physical or mental disability 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).

11) Complainant has articulated a prima facie case of sex discrimination.

- a) Ms. [REDACTED] has clearly and very credibly described a sexualized and offensive environment in which she was ill at ease and anxious about potentially being touched and leered at inappropriately. Her conversation with Owner about the shirt which she would wear was offensive, both objectively and subjectively. Her description of the "shirt" conversation with Owner during the IRC left little doubt that she felt disgusted, vulnerable to his unsavory and egregious comments about her body and embarrassed. She described having felt sexually harassed by the "bun check" comment, as well.

- b) The harassment was based on sex, and was in this case sufficiently severe or pervasive so as to alter the conditions of Ms. [REDACTED] employment and create an abusive work environment.
  - c) The harassment was in this case objectively and subjectively offensive, and Ms. [REDACTED] did perceive it to be so. Her discomfort in the face of Owner's behavior and comments must certainly have been adequate communication on her part to convey the unwelcomeness of Owner's behavior.
  - d) Ms. [REDACTED] has established a basis for employer liability. Owner was the primary harasser. Also, Manager knew of the sexualized environment and Ms. [REDACTED] objections to it, and did nothing to redress the situation.
- 12) Respondent knew of the harassment, and failed to exercise reasonable care to correct (promptly or otherwise) this sexually harassing behavior.
- 13) It is found that [REDACTED] is liable for subjecting Ms. [REDACTED] to sexual harassment and a hostile work environment.

### **Retaliation**

- 14) 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. § 4572(1)(E).
- 15) 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).
- 16) 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).

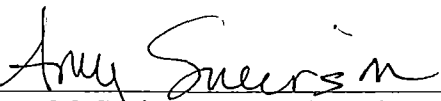
- 17) In order to establish a prima-facie case of retaliation, Complainant must show that she engaged in statutorily protected activity, she was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human 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.*


- 18) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wyrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> 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 must show that she would not have suffered the adverse action but for her protected activity, although the 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).
- 19) Here, Complainant established a prima-facie claim for retaliation. She expressed her intent to complain about sexual harassment and soon thereafter was terminated for unspecified reasons known only to Owner and never explained to her. The closeness in time to these incidents creates an inference of retaliation.
- 20) Respondent claimed that there were many performance issues with Ms. [REDACTED]
- 21) In the final analysis, Complainant established her retaliation claim:
- a) Respondent's list of performance deficiencies appears to be nothing more than an after-the-fact attempt at justifying a retaliatory termination of employment.
  - b) Owner never brought forward any evidence that he had documented issues or discussed them with Ms. [REDACTED] (or anyone else at [REDACTED] for that matter). Respondent's presentation at the IRC, and his lack of contemporaneous notes to support his litany of performance problems, both were unconvincing.
  - c) Furthermore, Manager, Former Employer described an employee who was efficient, friendly, knowledgeable of the state's Health and Safety Codes and competent in an employment setting.
  - d) Complainant showed that but for her discussion of unlawful sexual harassment, she likely would not have been terminated from [REDACTED]
- 22) Unlawful retaliation is found.

**VI. Recommendation:**

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

1. There are **REASONABLE GROUNDS** to believe that Respondent [REDACTED] subjected Complainant [REDACTED] to a hostile work environment based on sex;
2. There are **REASONABLE GROUNDS** to believe that Respondent [REDACTED] retaliated against Complainant [REDACTED] in violation of the Maine Human Rights Act by terminating her employment; and
3. Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).

  
Amy M. Sneyerson, Executive Director

  
Michèle Dion, Human Rights Investigator