Maine Human Rights Commission

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INVESTIGATOR'S REPORT
MHRC No: E14-0459
August 15, 2016

Lorraine Farris (Auburn, ME)

v.

J&S Oil (Manchester, ME)[1], &
Nouria Energy Corp., and the J&S Division of Nouria Energy (Worcester, MA)

I. Complainant's Complaint:

Complainant Lorraine Farris alleged that Respondents J&S Oil, Nouria Energy Corp., and the J&S Division of Nouria Energy discriminated against her based on her sex when they subjected her to sexual harassment in the workplace, retaliated against her for engaging in protected activity, and unlawfully terminated her employment.

II. Respondents' Answer:

J&S Oil denied discriminating against Complainant based on her sex or retaliating against her. Complainant's employment was terminated based on her violation of Respondent's zero-tolerance theft policy. Respondents Nouria Energy Corp. and the J&S Division of Nouria Energy (collectively "Nouria"), alleged to be the successor(s) to J&S Oil, did not respond in any way to Complainant's complaint. Accordingly, Complainant's allegations, as they relate to Nouria, are deemed to be true. References to "Respondent" in this matter refer to Respondent J&S Oil.[2]

III. Jurisdictional Data:

1) Date of alleged discrimination: March 2013 through March 2014.

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[1] Complainant's complaint listed Respondent's name as "J&S Oil". Respondent provided that its legal name is "J&S Oil Company, Inc.". Because Complainant has not amended her complaint to use Respondent's legal name, the name used by Complainant has been retained.

[2] In April 2016, Complainant amended her complaint to add Respondents Nouria Energy Corp. and the J&S Division of Nouria Energy (collectively "Nouria"), stating that J&S Oil had been sold to Nouria. Respondent J&S Oil's attorney submitted a letter dated June 10, 2016 that stated, "I have been informed that Nouria Energy Corp. did not acquire, never mind merge with the J&S Oil Company, Inc. The shares of J&S Oil Company were sold from one individual to another. A change in the ownership does not affect anything with respect to the company itself. Accordingly, the amendment seeking to add Nouria should be dismissed and J&S Oil Company remains unaffected and the only respondent as it was the employer". Complainant objected to Respondent J&S Oil's dismissal request. The Commission declined to grant the dismissal request, and Nouria remains a party to the complaint and claims here.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): August 27, 2014. Complainant filed an Amended Complaint to add Nouria on April 22, 2016.

3) Respondent J&S Oil has 200 employees and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964, as amended, the Maine Whistleblowers' Protection Act ("WPA"), and state and federal employment regulations. Respondents Nouria Energy Corp. and the J&S Division of Nouria Energy are alleged to be subject to the same statutes.

4) Complainant is represented by Rebecca Webber, Esq. Respondent J&S Oil is represented by John Lambert, Jr., Esq.

5) Investigative methods used: A thorough review of the written materials provided by the parties, a request for additional information, and an Issues and Resolution Conference ("IRC"). This 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) Complainant worked for Respondent as a cashier from January 2013 through March 10, 2014.

   b) Respondent J&S Oil owns and operates a fuel transportation company and variety of retail stores, including service stations and convenience stores, car washes and vacuum centers, and oil change and auto cleaning services.

   c) Nouria completed its acquisition of J&S Oil the week of April 6, 2016; it is a convenience and fuel retailer.

2) Complainant provided the following in support of her position:

   a) Complainant interacted with one of Respondent's Assistant Managers ("Asst. Manager") at her prior employment; he asked her to apply to work for Respondent. Asst. Manager indicated he was impressed with her attitude and work performance. Subsequently, Complainant filled out an application and was hired by Respondent. She began working in January 2013.

   b) Complainant received training on sexual harassment during her orientation; she paid attention in the training because she knew where she was working. She was trained that Respondent is a family-owned company and that they back their employees.

   c) In March 2013, Complainant began to experience sexual harassment on the job. She reported to her Manager ("Manager 1") and Asst. Manager that the Second Shift Leader ("2nd Shift Leader") made sexually explicit comments about his wife's bisexuality and their discussions of Complainant joining them for fun. Complainant told 2nd Shift Leader that she was not interested and that she did not want to know such information.

   d) In April 2013, Complainant arrived to work while 2nd Shift Leader trained a new employee. He was blocking the time clock that Complainant used to punch in for her shift, and two other employees waited behind her while the trainee sat in a chair watching 2nd Shift Leader. Complainant asked 2nd Shift Leader to move so she could see the time clock; he responded "How about you suck my dick, I'll

even bring you to my house so you can do so." Complainant was so disgusted and appalled that she began crying. Others told her to go outside; one of her coworkers stood with her as she collected herself outside.

i. Asst. Manager arrived, and Complainant recounted what happened with 2nd Shift Leader. Asst. Manager replied that when Manager 1 arrived they would review the tapes and see what was going on. Manager 1 arrived and the office door was closed. Complainant knocked on the closed door and asked if she could go home because she had a rough night; they said OK.
ii. A few weeks went by without a response until Complainant inquired about the outcome. Complainant learned that 2nd Shift Leader was demoted from a supervisory position and relocated to a different store; he was not banned from the store where Complainant worked.
iii. As a result of the incident with 2nd Shift Leader the entire store received training on sexual harassment.

e) As a result of the incident with 2nd Shift Leader, Complainant started calling the Human Resources contact ("HR") from the contact information she transcribed from the posted notice at work. Complainant called, gave her name, was placed on hold and then provided with a reason why HR could not speak; Complainant left messages on his voicemail. HR never returned her call.

f) In April 2013, Asst. Manager began sending Complainant multiple messages on Facebook, indicating that she should watch her back. He wrote things like "find a friend I need a massage".

g) From May 2013 through July 2013, Complainant felt that things became awkward at work. Manager 1 became cross and was always rude and brash. Complainant asked for a transfer to a different shift and was refused. Complainant told her manager and assistant manager that child care for her daughter had become more difficult and was impacting her health.

i. Manager 1 gave Complainant a write up for letting someone sleep in a car outside of the store, stating the Complainant had a friend hanging around the store. Complainant felt there was no harm to let the stranger sleep in the car; she did not know the individual. Manager 1 cornered Complainant in the office to have her sign the warning. Thereafter she went home.

h) Around June 2013, Asst. Manager tried to become more friendly with Complainant, more friendly than Complainant was comfortable with. She did not want a friendship or any other personal relationship with her supervisor. Asst. Manager began showing up at Complainant's personal residence uninvited and unannounced asking to come in; Complainant replied no. Complainant reported the behavior to Manager 1 who said he could not do anything because it happened outside of work.

i) On July 22, 2013, Asst. Manager sent a Facebook message asking if she was working; she said yes. The message did not go through and Asst. Manger 1 wrote back, hello.

j) From August 2013 through October 2013, Asst. Manager's behavior escalated: he tried to come into her home, and at work he made comments about her breasts and ass, asked if she could bend over further, and made a variety of other crude and rude comments. Each time Complainant reported the comments to Manager 1. The more Complainant reported, the worse Asst. Manager's behavior became. Complainant was told to ignore it. Asst. Manager began retaliating against Complainant by threatening to write her up for another employee's actions and by calling her a bitch. He became mean after Complainant reported him. He said things like, "you know how to get yourself out of trouble" with a wink and smile. Complainant told him, with others present, that he needed to stop addressing

her like a hooker on Lisbon Street. In response, he asked how much she would charge if she was a hooker. Complainant went home and cried.

k) On October 29, 2013, Complainant received a Facebook message from Asst. Manager stating that he was not going to be able to protect her very much longer. Complainant asked him to stop contacting, threatening, and harassing her. Then she blocked him on Facebook.

l) From November 2013 through December 2013, a few new employees were hired. One employee ("Employee") began harassing Complainant by asking her to hang out with him and spend time with him. When Complainant rebuffed him, he became mean at work. Sometimes he slid notes across the counter that said "fucking bitch" or "cunt". Complainant reported the behavior to Manager 1.

m) Manager 1 told Complainant that if she did not stop complaining about the men that she would be fired. He yelled, pointed in her face, used profanity, and told her to keep her mouth shut and that he did not want to hear any more complaints.

n) In January 2014, Asst. Manager and Employee continued to harass Complainant. Asst. Manger 1 ended his employment with Respondent that month. Employee continued to call Complainant "fucking whore," "fucking cunt," "cold hearted fucking bitch," and say things like "what makes you that much more important than me that I can't have your attention". Employee never left a shift without calling Complainant a "bitch," a "cunt," or a "heartless evil bitch". Complainant did not report the behavior to Manager 1 because of his threats to end her employment.

o) Later in the month, Employee observed Complainant kissing her boyfriend goodbye outside, and reacted inside by slamming a stool so hard that it reverberated off the floor. Complainant was nervous to start her shift. That night he called her "cunt" and "bitch"; she was scared.

p) Before the month was over, Manager 1 walked out and a new manager ("Manager 2") replaced him.

q) In February 2014, Employee's behavior continued and Manager 2 did not help despite Complainant's reports about the harassment. Complainant again requested a transfer and was refused.

r) On February 2, 2014, Employee wrote a message on the white board. Complainant reported to Manager 2 that Employee threatened to put her in a body bag if she did not stop refusing his advances. She said something to her boyfriend. On February 4, 2014, a message on the white board said "Hey Rainey, it was a box not a body-bag".[2] Complainant told Manager 2 about the message after she photographed it. Nothing was done. Manager 2 laughed when she reported the message. Complainant pointed to the board to show it was real, Manager 2 turned and went into his office.

s) In February 2014, Complainant had a heart attack related to the stress from work.

t) In March 2014, Manager 2 left and a new manager started ("Manager 3"). Manager 3 announced that he was brought on to "clean house". Complainant told Manager 3 about her work environment. She reported incidents on a daily basis about what she experienced at work and about unsafe conditions in the workplace. Complainant asked him to be the manager that helped her. Manager 3 patted her on the back and said, "I'll see what I can do about that."

u) Shortly after the conversation, Complainant went to Manager 3 and said she was tired of being called

[2] Complainant's nickname is Rainey.

names and that Employee would not leave her alone. She requested a transfer and he said he would see what he could do.

v) Complainant requested a transfer or asked about how to request a transfer multiple times to multiple people in the company. A different store manager and a different shift leader were receptive to Complainant and wanted to help her. Complainant's reason for the transfer was the sexual harassment at work and that working at her store was getting hard on her.

w) On March 5, 2014, Complainant received a positive performance evaluation.

x) On March 8, 2014, Complainant purchased a pack of cigarettes, placed a rubber band around them with the receipt per company policy, and then forgot them, and her jelly beans (not purchased at the same time), on the counter at the end of her shift because she was in a rush. Someone placed Complainant's cigarettes and jelly beans next to each other in the breakroom. Complainant also left her coffee cup. She went back the next day for her cigarettes and found her cigarettes and jelly beans in the breakroom.

   i. Complainant routinely left items behind at work. This was not uncharacteristic.

y) On March 10, 2014, Employee worked outside and he was upset that Complainant was inside. He opined that she should be outside freezing where her "bitch ass" belonged. He walked by and called her a "fucking cunt," sometimes with customers present. He threw notes at her. Complainant took one of the notes and told Manager 3 what was happening. A few hours later, Manager 3 asked if Complainant could stay late to stock the cooler; Complainant did so. After she completed the task, Manager 3 asked her to come into the office. He said he was terminating her employment for allegedly stealing a pack of cigarettes. Complainant expressed incredulity, saying that he should talk to the employees who were working when she purchased the cigarettes. She observed the video Manager 3 played and said those were her cigarettes she reached for on the shelf when an employee was in the room with her, not a customer's as alleged. Despite this information, Manager 3 indicated that Complainant needed to sign a termination form, so Complainant wrote that she disagreed. Manager 3 told her to have a nice day, and Complainant left.

   i. It was against the rules to put customers' items in the breakroom; items left by customers were left near the registers in case the customer returned for the items.
   ii. Respondent did not preserve the full video from March 8, 2014 showing Complainant purchasing and leaving behind the cigarettes.
   iii. Respondent did not interview or speak with Complainant about the alleged issue before making the decision to terminate her employment.

z) Complainant kept her job and persevered through the treatment to support her child.

aa) On March 13, 2014, Complainant went to the store for her paycheck because Respondent refused to hand it over until she returned coveralls that she did not use, she pointed this out to Manager 3. He took her to the breakroom where she showed him the coveralls. Complainant inquired if he spoke to anyone else about the cigarettes. He said no, apologized, and said he would use the incident as an example of how not to manage in the future.

bb) Complainant provided a statement from a coworker ("Coworker") corroborating that Asst. Manager sexually harassed Complainant. Coworker began working for Respondent in September 2013. Coworker also overhead Manager 3 tell Complainant that he made a terrible mistake and apologized for

letting Complainant go on the day she returned her coveralls. Coworker was discharged from her employment the next day.

cc) Complainant followed the State of Maine's process in reporting the sexual harassment: she told her managers and she told coworkers. Her supervisors did not inform HR.

3) Respondent J&S Oil provided the following in response to Complainant's allegations:

a) Asst. Manager and Manager 1 recommended that Complainant talk to HR. HR was hesitant to hire Complainant due to a prior conviction for theft, yet he deferred to Asst. Manager and Manger's recommendation.[3]

b) Around the time that Complainant started working, HR gave Complainant a three-and-a-half-hour training and orientation on a variety of topics, including sexual harassment in the workplace, prohibited conduct in the workplace, and the Rules of Conduct.

c) On March 22, 2013, 2nd Shift Leader made a very inappropriate statement to Complainant. Complainant reported to Manager, who reported the incident to HR. HR immediately investigated Complainant's accusation and confirmed the statement. On March 25, 2013, Complainant provided Respondent with a handwritten note repeating the reported information. The same day, HR issued a written warning to 2nd Shift Leader; he was suspended, demoted, banned from the Lewiston store, his pay was reduced, his next two discretionary bonuses were suspended, and he attended a sexual harassment training on April 1, 2013.[4]

i. HR spoke to Complainant prior to imposing sanctions on 2nd Shift Leader. She told HR that she did not want 2nd Shift Leader discharged from his employment.[5]

d) On April 10, 2013, HR and the District Manager ("Dist. Manager") conducted a sexual harassment and employee behavior training; Complainant attended. The retraining happened as a result of information learned during the investigation into 2nd Shift Leader's behavior. HR learned that other employees engaged in inappropriate conduct in the workplace. During the meeting, HR encouraged employees to contact him if they experienced further sexual harassment.

e) Neither HR nor the Dist. Manager heard any further complaints from Complainant about sexual harassment until Complainant's Charge of Discrimination was received.

f) After March 22, 2013, Complainant had multiple contacts with Respondent; Complainant did not report sexual harassment during any of her contacts with Respondent:

i. On May 13, 2013, Complainant received a verbal notice for a friend hanging around the store;
ii. In June 2013, Complainant and HR attended a meeting about Respondent's retirement program;
iii. On June 29, 2103, Complainant received a verbal notice;
iv. On July 31, 2013, Complainant signed a performance appraisal completed by Manager;

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[3] Complainant acknowledges that she had a prior conviction. She asserts that she made a bad decision about ten years before working for Respondent when she was living under different circumstances.

[4] Complainant provided that 2nd Shift Leader was not banned from the store. He came into the store after his demotion.

[5] Complainant denied saying that she requested that 2nd Shift Asst. Manager not be fired.

v. On December 9, 2013, Complainant signed training forms;
vi. On December 13, 2013, Complainant signed more training forms;
vii. On February 11, 2014, Complainant completed an Employee Report of Work-Related Injury, and Family and Medical Leave Act paperwork was mailed to her the same day; and
viii. On March 5, 2014, Complainant signed a performance appraisal completed by Asst. Manager.

g) Manager 1, Manager 2, Asst. Manager, and Employee no longer work for Respondent.

h) Respondent spoke to Manager 2 about his recollection of the events during his employment:

i. Manager 2 managed the Lewiston store from January 2014 through March 2014. Manager 2 learned from coworkers, not Complainant, that there was a problem between Complainant and Employee. At some point, Manager 2 met with them individually, telling them that they needed to put aside their personal differences and not allow those differences to interfere with their work. Complainant told Manager 2 that Employee was a jerk, hard to work with, and implied he was not trustworthy. Complainant did not request to transfer to a different store.
ii. Manager 2 recalled that something negative was written on the white board and that Complainant told him that it was directed at him, something along the lines of the employees would tear him apart.[6]
iii. Manager 2 had no knowledge of Complainant being subjected to sexual harassment or hearing anything like that from Complainant or anyone else. He would have informed HR immediately.

i) Another coworker who worked with Complainant recalled the incident with 2nd Shift Leader. That coworker later moved to a different shift and did not recall any hearing about any other inappropriate conduct, Complainant complaining about any inappropriate conduct, or Complainant's wish to transfer.

j) Complainant discussed the possibility of a transfer with a shift leader from a different store; Complainant did not mention that conduct or language was a reason for wanting to transfer. Complainant said she moved to Auburn and that is why she wanted to transfer, not that someone else's conduct was the reason for transferring.

k) On March 5, 2014, Manager 3 started as Complainant's manager.

l) On March 8, 2014, a cashier at Complainant's store sold a pack of cigarettes to a customer who left them on the counter after purchasing them.[7] The cashier put a rubber band with the receipt around the cigarettes and put them in the breakroom for when the customer returned. On March 9, 2014, Complainant took the cigarettes from the shelf in the breakroom, threw away the receipt, and placed the cigarettes in her bag. Manager 3 was informed that the cigarettes from the breakroom were missing. Manager 3 reviewed the video observing Complainant take the cigarettes.

i. Respondent's policies on what to do with items left by customers varies from store to store.

m) On March 10, 2014, Manager 3 met with Complainant and reviewed the video and ended her

[6] Complainant denied telling Manager 2 that the statement was about Manager 2; she told him it was about and her nickname was used as the salutation to the message.

[7] Complainant denies that the cashier is the person identified by Respondent; a different cashier was in the video provided by Respondent.

employment for theft.[8] Manager 3 verified that the cigarettes were purchased by a customer. Manager 3 made the decision to discharge Complainant from her employment. Complainant told Manager 3 that they were her cigarettes. Manager 3 did not believe her because he thought she took them and did not believe she would attach a receipt to a pack of cigarettes she purchased. Respondent has a zero-tolerance theft policy.

i. Employees have been discharged for taking combs and hot dogs. Discharges are handled at the store level; Managers review video and may interview the parties involved before a decision is made.

n) On March 10, 2014, Complainant did not make any reports to Manager 3 about Employee's behavior. Manager 3 had not personally observed any harassment.

o) On March 12, 2014, when meeting with a payroll employee, Complainant stated that she was mistaken about the cigarettes.[9]

p) On March 14, 2014, Complainant met with Dist. Manager who provided her with paperwork confirming the termination of her employment. Complainant did not complaint about harassment.[10]

q) Complainant made no reports about unsafe or illegal activity in the workplace.

r) At the IRC, Respondent provided separation checklists for Asst. Manager and Coworker. Respondent claimed that Coworker was not employed by when Asst. Manager was at the store and that her start date was January 6, 2014.[11]

V. Analysis:

1) The MHRA provides that the Commission or its delegated investigator "shall 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. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

2) Complainant alleged that Respondent discriminated against her based on her sex by subjecting her to sexual harassment in the workplace, retaliated against her for engaging in protected activity and unlawfully terminated her employment. Respondent denied discriminating against Complainant based on her sex or retaliating against her, and provided that Complainant's employment was terminated based on her violation of Respondent's zero-tolerance theft policy.

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[8] Complainant provided a copy of an internal Respondent email reflecting the decision to discharge Complainant's employment was made prior to her meeting with Manager 3.

[9] Complainant told payroll the reason for her discharge from employment was false and that people should be interviewed.

[10] Complainant denied meeting with Dist. Manager.

[11] *Investigator Note*: Respondent also provided a list of employees it had separated from employment as part of its Answer. That spreadsheet reflected that Coworker was hired on September 30, 2013, overlapping with Asst. Manager at the store. Respondent acknowledged the clerical error and provided logs of the overlapping hours that Complainant and Coworker worked.

Sex Discrimination – Hostile Work Environment Claim

3) The MHRA provides, in part, that 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).

4) The Commission's Employment 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).

5) "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.

6) 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 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.

7) 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.*

8) The Commission's Employment Regulations provide the following standard for determining employer liability for sexual harassment committed by a supervisor:

> An 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).

9) With regard to employer liability for sexual harassment by a non-supervisor, the Regulations provide:

> [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 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,* 2009 ME 47, ¶ 28, 969 A.2d at 905.

10) Complainant has established her claim of unlawful sexual harassment. She has shown that:

a) She is a member of a protected class as a woman.

b) She experienced unwelcome conduct related to sex. 2nd Shift Leader made many inappropriate statements to Complainant, including an invitation to suck his dick. Asst. Manager made comments about her breasts and ass, said Complainant knew how to get herself out of trouble with a wink and smile, and asked how much she would charge if she were a hooker. Employee called Complainant "fucking whore," "fucking cunt," "cold hearted fucking bitch," "bitch," a "cunt," or a "heartless evil

bitch". Employee threatened to put Complainant in a body-bag. Complainant communicated to 2nd Shift Leader, Asst. Manager, and Employee to stop the behavior.

c) Complainant found 2nd Shift Leader's, Asst. Manager's, and Employee's behavior offensive and reported it to Asst. Manager, Manager 1, Manager 2, and Manager 3, each of whom did nothing helpful to stop the sexual harassment. Manager 1 led Complainant to believe that if Complainant reported Asst. Manager's and Employee's behavior, she would be discharged. Asst. Manager had no incentive to report his own behavior.

d) The harassment was severe and pervasive, altered the conditions of Complainant's employment, and created an abusive work environment. Complainant was subjected to inappropriate statements about her body, asked how much she would charge if she were a hooker, and called a variety of offensive words and names during her shifts. The behavior Complainant experienced was objectively offensive; a reasonable person would find the collective behavior hostile and abusive.

e) Complainant's ability to perform her job became more difficult. Her physical health was affected when she had a heart attack from the stress. Complainant was accused of theft and was discharged.

f) Employer liability attached when Respondent discharged Complainant, because Complainant experienced a tangible employment action. It is worth noting that Respondent would not have been able to take advantage of the affirmative defense in any event, since it did not exercise reasonable care to prevent or correct the harassment: Asst. Manager had no incentive to report himself for sexual harassment, Manger 1, Manager 2, and Manager 3 did not report Complainant's complaints to HR, and when Complainant did report harassment to Manager 1, she was threatened with discharge. Respondent provided that it was unable to get a statement from Manager 1 about his recollection of the events; the lack of a statement from Manger 1 does not absolve Respondent's liability. Respondent did promptly reply to the complaint related to 2nd Shift Leader, not the subsequent complaints made to her managers and assistant manager.

11) It is found that Respondent is liable for subjecting Complainant to unlawful sexual harassment.

Sex Discrimination– Termination from Employment

12) 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).

13) 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.

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

15) 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.

16) Complainant has established her prima-facie case. Complainant belongs to a protected class (female), her most recent performance evaluation was positive, Respondent discharged Complainant five days later, and Respondent had a continuing need for cashiers in its store.

17) Respondent has articulated a legitimate, nondiscriminatory reason for Complainant's discharge, namely, that she violated the zero-tolerance policy on theft.

18) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason was false or irrelevant and that unlawful discrimination was the reason for her discharge, with reasoning as follows:

a) Manager 3 had worked with Complainant for less than five days at the time of her discharge. Complainant provided that she reported sexualized statements by Employee to Manager 3 earlier in the day that she was discharged. Manager 3's response to Complainant's initial discussion of sexual harassment, just a few days earlier, was met with a pat on the shoulder and the comment "I'll see what I can do about that."

b) Complainant stated that she was discharged for an alleged violation of Respondent's zero-tolerance theft policy, yet 2nd Shift Leader - a male - was only demoted for his sexual harassment of her in 2013. Respondent had no good explanation for the disparity in treatment of these offenses.

c) Manager 3 had discretion on how he proceeded with the alleged report of Complainant's theft. It is undisputed that he did not speak to Complainant about the alleged theft before making the decision to discharge her. Complainant stated that Manager 3 apologized to her for the decision to discharge her shortly after March 10, 2014; he acknowledged that he did not talk to other employees before deciding to discharge Complainant. This suggests that Respondent did not really care about the theft, but rather simply wanted to get rid of Complainant.

d) The discharge decision here can be considered the culmination of a lengthy pattern of hostile treatment on the basis of Complainant's sex.

19) Discrimination on the basis of sex is found.

WPA and MHRA Retaliation Claims

20) With respect to the WPA claim, the MHRA prohibits discharge because of previous actions that are protected under the WPA. *See* 5 M.R.S. § 4572(1)(A). The WPA protects an employee who "acting in good faith . . . reports orally or in writing to the employer . . . 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." 26 M.R.S. § 833(1)(A).

21) With respect to the retaliation claim, 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 Act] 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).

22) 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). To establish a prima-facie case of MHRA retaliation, Complainant must make essentially the same showing, although the adverse action must be "material". *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.

23) 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.

24) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA or MHRA 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." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. *See also Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. 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 action." *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*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).

25) Complainant has established her prima-facie case. Complainant reported sexual harassment in the workplace, she was discharged, and the events occurred in close proximity.

26) Respondent has articulated a legitimate, nondiscriminatory reason for discharging Complainant, namely, that she violated that zero-tolerance theft policy.

27) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason was false or irrelevant and that unlawful discrimination was the reason for her discharge, with reasoning as follows:

a) Complainant provided that she complained about sexual harassment to Manager 3 the same day as her discharge and soon after Manager 3 began working. When Manger 3 started the job, Complainant asked him to be the manager who helped her and he said he would see what he could do. Respondent denied that Complainant complained about harassment and said Manager 3 did not observe any. Complainant provided credible testimony about her reports of unlawful or illegal activity to her managers, including Manager 3.

b) Respondent argued that Complainant violated its zero-tolerance theft policy, that it previously discharged employees for taking hot dogs or combs, and that Manager 3 had no knowledge of

Complainant's complaints about unlawful or illegal activity. Further Respondent provided that Manager 3 had not worked with Complainant long enough to develop any ill will towards her. However, Manager 3 announced that he was brought on to "clean house".

c) It defies logic that Complainant had a positive performance review just five days before her discharge and a good employment record with Respondent, yet Manager 3 did not discuss the alleged theft with her or review the video of her purchasing the cigarettes as she alleged before making the decision to discharge her. This tends to show that Respondent likely had had a retaliatory reason for Complainant's discharge.

28) Retaliation in violation of the WPA and MHRA 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 J&S Oil, Nouria Energy Corp., and the J&S Division of Nouria Energy discriminated against Complainant Lorraine Farris in violation of the MHRA based upon her sex when it subjected her to a hostile work environment;

2) There are **Reasonable Grounds** to believe J&S Oil, Nouria Energy Corp., and the J&S Division of Nouria Energy discriminated against Complainant Lorraine Farris in violation of the MHRA based upon her sex when it discharged her from employment;

3) There are **Reasonable Grounds** to believe that J&S Oil, Nouria Energy Corp., and the J&S Division of Nouria Energy retaliated against Complainant Lorraine Farris in violation of the MHRA and WPA because she engaged in protected activity; and

4) The complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).

Amy M. Sneirson, Executive Director

Alice A. Neal, Chief Investigator