



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/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT MHRC Case Number: E15-0354 June 30 2017

Melody A. McLellan (Augusta)

v.

Quirk Auto Group¹ (Bangor)

I. Summary of Case:

Complainant, who worked as a Service Advisor for Respondent, a car dealership, alleged that Respondent subjected her to less favorable terms and conditions in employment based on sex, and that its termination of her employment also was due to sex discrimination and retaliation for complaining about the adverse treatment. Respondent denied discrimination and retaliation, stating that Complainant was terminated for failing to meet company performance expectations. The Investigator conducted a preliminary investigation, which included reviewing all documents submitted by the parties, issuing written requests for additional information, holding an Issues and Resolution Conference ("IRC") and conducting a phone interview with a witness. Based upon this information, the Investigator recommends that the Commission find that there are no reasonable grounds to believe that Respondent subjected Complainant to less favorable terms and conditions in employment on the basis of sex or unlawfully retaliated against her, but that there are reasonable grounds to believe that Respondent discharged Complainant due to her sex.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: November 2008 to January 9, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 21, 2015.
- 3) Respondent has approximately 400 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") as well as state and federal employment regulations.
- 4) Complainant is represented by Carol Garvan, Esq. Respondent is represented by Stephen Langsdorf, Esq.

III. Development of Facts:

- 1) Complainant provided the following in support of her claim:

¹ Complainant named Respondent as "Quirk Auto Group"; Respondent stated that its legal name is "Quirk Kennebec Co. d/b/a Quirk Ford of Augusta". Because Complainant did not amend her complaint, the name she used has been retained.

Complainant worked for Respondent for eight years; for seven of them, she was a Service Advisor in the Service Department (“Department”). Complainant was the only woman in the Department and one of only a few women working at that dealership (“Dealership”). Throughout her employment, male service technicians (the “Technicians”) made it clear they did not respect Complainant; the Technicians told her that they had been instructed not to listen to her and otherwise treated her less favorably than her male coworker (“Coworker”). The Technicians often refused to do Complainant’s repair jobs and prioritized jobs for Coworker over hers, which directly impacted her pay. Complainant repeatedly complained about the adverse treatment to her immediate supervisor (“Supervisor”) and his superior (“Service Manager”), but Respondent took no corrective action. In late November 2014, the Department hired a third Service Advisor (“New Coworker”), who was male. Complainant helped train New Coworker, as he had no prior Department experience. On January 9, 2015, Respondent told Complainant she was not meeting company expectations and discharged her without prior warning. In the month prior, Complainant had higher gross sales than Coworker and had received a bonus. Around the same time, Respondent also discharged two other female employees working at the Dealership. Complainant was discharged due to her sex and in retaliation for reporting the Technicians’ unequal treatment.

2) Respondent provided the following in support of its position:

It is untrue that the Technicians disrespected Complainant, refused to perform her service jobs, or prioritized Coworker’s jobs over hers. There was little opportunity for the Technicians to choose which jobs they took; to the extent they could, they did so due to the profitability and type of repair, not due to sex. During her employment, Complainant frequently interacted with Respondent’s President, but never reported any adverse treatment based on sex to him. Complainant did not report unlawful discrimination to Supervisor or Service Manager, but did frequently complain about pay issues. The position of Service Advisor is one of the most difficult and stressful positions within a car dealership; it was made more stressful at the Dealership due to a large construction project during much of the last year Complainant was employed. Complainant tended to become flustered and irritable with customers and regularly overshared inappropriate information with them. During the construction project, President and Service Manager were present at the Dealership more often and observed Complainant interacting with customers in an unprofessional manner. Also, Respondent faced pressure from car manufacturers to raise customer satisfaction levels. Respondent discharged Complainant to improve the customer service quality and because she did not meet company expectations, not due to her sex.

3) The Investigator made the following findings of fact based on the information in the record:

- a) Complainant began working as a Service Advisor in the Department in November 2008. Her job duties included interacting with customers who needed maintenance for their cars, scheduling repairs, advising customers on the cost of needed repairs, and selling services related to car maintenance. Complainant drafted repair orders that memorialized the type of work needed to be done on each vehicle (“Repair Orders”); the Technicians were responsible for completing the work specified in the Repair Order. Complainant’s pay was based on commission.
- b) Coworker² is a male Service Advisor and performed substantially similar job duties as Complainant. Coworker had been employed as a Service Advisor approximately three years longer than Complainant.

² In her complaint, Complainant alleged that Coworker had the same job title and job duties as she did; in its written responses, Respondent did not dispute this allegation. At the IRC, Respondent for the first time stated that Coworker had supervisory duties over Complainant and the Department. The Investigator will continue referring to this individual as

- c) Technicians frequently determine which Repair Orders they will complete based on what technical skills they have (which corresponds to the type of job they can complete) and how lucrative a particular type of job might be for the Technician. For example, a Technician might select a Repair Order for a brake job because it pays a flat rate of three hours for service, but can easily be completed in one hour. Conversely, a Technician might be reluctant to take a Repair Order for a leak, because it will take a very long time to locate a leak and then repair it, yet only pays a flat rate for one hour of service.
- d) Complainant explained that when she first began working the Department, the Technicians did not respect her because she was new to the Department and did not know much about repair work. She further explained that as she learned more about the work, she gained the respect of some of the Technicians. Complainant stated that some of the more senior Technicians never gave her respect.
- e) Complainant alleged that, throughout her employment³, the Technicians treated her less favorably than Coworker. At the IRC, Complainant identified two particular senior Technicians (the “Senior Technicians”) who frequently refused to complete her Repair Orders, but did not treat Coworker in a similar manner. Complainant stated that when the Senior Technicians refused to complete her Repair Order, she would inform Coworker; Coworker would take the same Repair Order to the Senior Technicians and the work would be performed. When asked to identify when this conduct occurred, Complainant could not remember specific dates, but stated she believed it happened with increasing frequency during her last three or four years of employment.
- f) Complainant also alleged that the Technicians repeatedly told her she did not know what she was talking about, and that one of the Senior Technicians was instructed only to take orders from Supervisor and Coworker (not from Complainant). Complainant reported that another employee told her that management had instructed him not to listen to her; at the IRC, Complainant could not identify who in management was alleged to have made the remark to the other employee.
- g) On or around August 2013, Complainant sent Supervisor an email outlining a number of incidents in July and August 2013 in which the Technicians treated Complainant less favorably than Coworker. In her email, Complainant stated that, “[b]eing a woman in this department is a challenge, as it had been proven to me daley [*sic*], in the past five years.” Supervisor did not respond to this email. Complainant also alleged that she sent many other emails to Supervisor about mistreatment from the Technicians, and stated that she never received a response.
- h) Complainant alleged that she frequently reported the Technicians’ refusal to complete her Repair Orders

Coworker because the evidence in the record tends to support this conclusion and Respondent did not clarify its position on this issue until nearly two years after this case was filed with the Commission.

³ In her complaint, Complainant alleged that she was subjected to less favorable terms and conditions by the Technicians throughout her employment as a Service Advisor, which began in 2008. The MHRA provides that complaints must be filed with the Commission “not more than 300 days after the alleged act of unlawful discrimination.” See 5 M.R.S. § 4611. In cases involving discrete acts of discrimination (contrasted with hostile-environment claims), the filing deadline runs from the time that a reasonable person would have become aware of the facts supporting a claim of discrimination. *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 11. In this case, Complainant filed her sworn complaint on July 21, 2015, although her written intake was received on February 27, 2015. Since the MHRA’s rules allow a complaint to be perfected to correct defects, including having the complaint notarized, the 300-day period in this case is considered to have begun on May 3, 2014. The Investigator did not analyze any discrete allegations of discrimination before May 3, 2014 in this Report, but has included some references to these allegations for contextual purposes.

to Supervisor and Service Director. At the IRC, Complainant stated that Supervisor responded by telling her he would see what he could do. Supervisor explained that he tried to work the problem out between Complainant and the Technicians, and believed it was just part of the daily stress of the job. Service Director stated that he met with Complainant approximately three to four times a year to discuss various concerns she had about the job. Service Director characterized Complainant as being concerned about how Coworker did things to earn more money than Complainant. Service Director explained that, in his opinion, Coworker was more aggressive and better at presenting more lucrative options to the customer, which explained his success.

- i) In response to Complainant's reports, Supervisor and Service Director held group meetings with the Technicians to tell them they were required to complete Repair Orders in the order they were received. Complainant explained that after these meetings, the Technicians would follow management's instructions for approximately a week, until returning to selecting jobs without regard for when the Repair Order was received. Service Director stated that it was common across all dealerships owned by Respondent to have disputes over how Technicians pick up work and when the work is performed.
- j) Complainant did not tell Supervisor, Service Director or any other employee of Respondent that she was being treated differently because of sex. Complainant said she felt it was obvious that sex was the reason for the Technicians' adverse treatment, so did not need to say it to her supervisors.
- k) Complainant alleged that the Technicians' refusal to complete her Repair Orders negatively impacted her pay because a completed Repair Order was a sale. In response to the Investigator's request for information, Respondent produced sales records it stated covered the 18 months prior to Complainant's discharge.⁴ The records show that Complainant wrote more Repair Orders than Coworker in almost every month. The records also show that Complainant's total monthly sales exceeded Coworker's sales in four of the months, while in many other months Complainant's total sales were quite close to Coworker's. Complainant alleged that her gross sales total in December 2014 was approximately \$10,000 higher than Coworker's that month, and that her overall sales for 2014 exceeded her sales for the prior year. Respondent did not dispute these allegations.
- l) Customer Satisfaction Index ("CSI") scores based on surveys customers fill out are used by Respondent and car manufacturers to measure customer satisfaction with the service they receive. Respondent stated that it needed to improve its CSI scores for the Dealership and that Respondent was getting pressure from manufacturers to raise the scores. Service Director stated that CSI scores were always a problem for the Dealership and that Respondent was always striving to do better.
- m) Respondent considers the following factors when assessing a Service Advisor's performance: the number of service hours they sell; the number of repairs they sell; their CSI scores; and, how well they interact with customers. Service Director explained that he tracked Service Advisors' performances at all locations by checking a daily report related to sales numbers and by checking CSI scores on a weekly basis. Respondent tracked Service Advisors' customer service performance by them on the job and by reviewing complaints, or praise, from customers.
- n) In 2014, Respondent instituted a large-scale construction project at the Dealership (the "Construction"). The Construction caused the Department to temporarily relocate, which made communication between

⁴ The Investigator could not locate a date on all of the records produced by Respondent. However, Complainant did not dispute the validity of the records.

the Service Advisors and Technicians more difficult. As a result of the Construction, President and Service Director were at the Dealership more often than was their habit in prior years.

- o) In addition to the information described above, the record contains the following information regarding Complainant's performance:
- i. Complainant alleged that she performed her job well and received positive feedback from many customers; she produced a number of written customer testimonials praising her Service Advisor performance, including her customer service abilities.⁵ Complainant also produced an email dated December 22, 2014 from a customer to Supervisor that stated Complainant, "...was very pleasant to deal with," during the customer's visit on December 17, 2014. Complainant did not receive any written reprimands in the year prior to her discharge. Complainant stated that nobody from Respondent spoke to her about performance issues in the months prior to her discharge; Respondent did not provide evidence to refute this allegation. Complainant produced a screenshot of her CSI report for December 2014 which showed her rating a 100% based on one survey; this CSI reported show the rating for Dealership to be 83.3% based on three surveys and Respondent's overall CSI rating to be 78.3%.⁶
 - ii. In its initial response, Respondent produced four customer letters detailing complaints they had with Dealership service. All of the letters were dated in early 2014, but only two that appear to reference Complainant's job performance. During his interview, President stated that these letters played only a small part in his decision to discharge Complainant.
 - iii. At the IRC, Supervisor described Complainant as a hard worker and stated that he felt she did her job well. Supervisor stated that Complainant had no more difficulty with customer service than Coworker; he explained that stress affected both Service Advisors' performance, but it was not worse for Complainant. Supervisor stated he occasionally provided Complainant with guidance on how better to interact with customers. He stated that Respondent received letters with customer complaints about both Complainant and Coworker, which he believed happened less often with Coworker. When asked to compare Complainant's and Coworker's ability to interact with customers, he stated that Coworker had a quieter tone and a bit more automotive knowledge which might have helped him with customers. Supervisor stated that everyone was stressed out by the Construction, including both Complainant and Coworker.
 - iv. At the IRC, Service Director described Complainant's job performance as average. He stated that Complainant struggled with workflow issues, becoming flustered and irritated when there were several customers scheduled at the same time. When asked what he thought Supervisor's opinion of Complainant was, Service Director stated that he felt Supervisor would say that "she got excited easily." He stated that Complainant frequently shared too much information with customers, including her personal medical history and information about why repairs were delayed that was not appropriate to share. At the IRC, Service Director explained: "It was really a personality...with [Complainant]. I really had a problem with what she would tell a customer." Service Director explained that the Construction made Complainant's performance issues worse

⁵ These testimonials, which are dated after Complainant's termination, were provided by Complainant in response to Respondent's assertion in its response that she was terminated due to issues with customer satisfaction.

⁶ The Investigator requested the CSI reports for Complainant, Coworker and the Dealership for the 18 months prior to Complainant's discharge. Respondent stated it could not produce the documents because it has since changed computer systems and the information has been lost. At the IRC, Respondent's counsel stated Respondent could probably produce the reports if it had to, so the Investigator made a second request. Respondent again stated it was unable to produce the records due to a phasing out of computer systems.

due to increased stress and that he personally observed this more often because he was at the Dealership during Construction.

- p) Around late November or early December 2014, Respondent hired New Coworker, who is male, as a Service Advisor at the Dealership. Respondent stated that it hired New Coworker in order to alleviate some of the disruption and stress caused by the Construction. Complainant and Coworker both trained New Coworker in December 2014 because he did not have experience in the Department.
- q) On January 9, 2015, Respondent discharged Complainant. Complainant alleged that Service Director told her that Respondent had decided to change and was going to move forward with only two Service Advisors. Complainant alleged she attempted to question the basis for termination, but was told that the decision had already been made. Respondent provided Complainant with an Exit Interview Questionnaire that indicated she had been discharged because she “[d]id not meet Company’s expectations for performance.”
- r) In its initial submission, Respondent identified Supervisor, Service Director and President as the decision-makers with respect to discharging Complainant. In a submission made prior to the IRC, Respondent identified President as the party who made the decision to terminate Complainant’s employment. At the IRC, Supervisor stated that he was not involved in the decision-making process, but he might have spoken to Service Director a couple of times about Complainant’s performance.
- s) President and Service Director stated that Respondent had to make a change in the Department because the CSI scores were too low. When asked how he identified Complainant as the person Respondent should replace, President explained that he had a “gut feeling” that things were not going in the right direction. He stated that Respondent needed to find a Service Advisor who could perform the job better than Complainant and that Coworker had been there longer than Complainant. President further explained that he relied on information provided by Service Director in making his decision to terminate Complainant. Service Director stated that customer satisfaction at Dealership was getting worse overall and Respondent had to make a change. He explained that he determined that Complainant should be discharged by observing the Department and speaking with other staff.
- t) Complainant alleged that Respondent discharged another female employee at Dealership on the same day of her discharge. Respondent stated that this female employee was discharged because she was a single parent that had lost childcare and brought her child into work. Complainant also alleged that Respondent discharged another female employee at Dealership shortly thereafter; Respondent did not supply information about why this employee was discharged.
- u) Respondent discharged New Coworker in August 2015 due to performance issues. Coworker still works in the Department along with two other Service Advisors, both of whom are male. At the IRC, Service Director expressed a willingness to hire female Service Advisors, but explained that there are not a lot of female Service Advisors in service departments across Maine because it is “not a woman’s profession.”

IV. 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.

Terms and Conditions - Sex

- 2) The MHRA provides that it is unlawful to discriminate on the basis of sex in the terms and conditions of employment. 5 M.R.S. § 4572(1)(A).
- 3) 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).
- 4) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that she (1) was a member of a protected class, (2) was qualified for the position she held, (3) suffered an adverse employment action, (4) in circumstances giving rise to an inference of discrimination. See *Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). Cf. *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1st Cir. 2002).
- 5) 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. 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.
- 6) As a threshold matter, Complainant did not provide sufficient evidence to demonstrate that her claim of less favorable treatment from the Technicians was timely raised.⁷ Even if the claim had been timely made, Complainant could not prevail in showing that she was subjected to less favorable terms and conditions in employment due to her sex, with reasoning as follows:
 - a) Complainant could establish a prima-facie claim, as she was a member of a protected class (female), was qualified for the position she held (in that she performed the job for years adequately), she was treated differently than male Service Advisors (in that the Technicians' refusal to do her jobs promptly affected her pay), and in circumstances giving rise to an inference of discrimination. For purposes of the prima-facie claim, the combination of the facts that Complainant was the only female Service Advisor and that the Technicians repeatedly told her that they were treating her differently than the other Service Advisors is sufficient to raise an inference of discrimination.

⁷ Complainant provided only general statements about when the alleged mistreatment occurred, stating that it happened throughout her employment and increased in frequency over her final years of employment. While Complainant provided an email that she sent Supervisor in August 2013 regarding incidents where Technicians refused to work on her Repair Orders, a discrimination claim based on any incidents recounted in that email would be well outside the MHRA's 300-day time period to investigate discrete acts of discrimination. Without more detail, there is not sufficient evidence to conclude that the Technicians refused to work on Complainant's repair orders within 300 days of the filing of her Intake Questionnaire.

- b) Respondent could assert a legitimate, non-discriminatory reason for the Technicians' actions in how they handled Service Orders, in that they were motivated to perform the most lucrative jobs, and that Complainant did not inform management that sex was the reason for the disparate treatment.
 - c) In the final analysis, Complainant did not demonstrate that she was subjected to sex discrimination in the terms and conditions of employment, with reasoning as follows:
 - i. To the extent that the Technicians treated Complainant less favorably, there is not sufficient evidence to conclude that it was because of her sex. Complainant stated that none of the Technicians respected her when she started as a Service Advisor because she was new and did not have mechanical knowledge. Complainant further explained that over time, she gained some Technicians' respect, but not the Senior Technicians who continued to treat her less favorably than Coworker. The record indicates that Coworker had worked in the Department longer than Complainant and had more mechanical knowledge, which tends to suggest that any adverse treatment Complainant suffered was motivated by the Technicians' concerns regarding seniority and knowhow, not sex. There is also evidence in the record that strongly suggests that Technicians chose some jobs simply because they are more lucrative than others and that disputes over getting Repair Orders completed are commonplace in any service department.
 - ii. Complainant did not provide sufficient evidence to establish that Respondent instructed the Technicians not to listen to or take direction from, her, or when this conduct occurred, who made the statements and how it adversely affected her job performance.
 - iii. The objective evidence in the record shows that Complainant wrote more Repair Orders than Coworker and had similar total monthly sales as Coworker. This would tend not to show that the Technicians were failing to perform Complainant's Repair Orders. Indeed, in her own allegations, Complainant stated that she performed better in 2014 than in previous years.
 - iv. Complainant simply was not able to meet her burden of showing that Respondent's explanations were pretextual or irrelevant, and that the Technicians would have treated her better but for her sex.
- 7) It is not found that Complainant was subjected to less favorable terms and conditions in employment on the basis of sex.

MHRA & WPA Retaliation

- 8) The MHRA prohibits retaliation against employees who, pursuant to the WPA, make good faith reports of what they reasonably believe to be a violation of law or a condition jeopardizing the health and safety of the employee or others in the workplace. *See* 5 M.R.S. § 4572(1)(A); 26 M.R.S. § 833(1)(A)&(B). The MHRA also 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).
- 9) 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 action, which may be proven by a "close proximity" between them. *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). The prima-facie case for a claim of MHRA retaliation requires, in addition, that the adverse employment action be "material," which 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 & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).

- 10) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in 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).
- 11) Complainant established a prima-facie case of retaliation by showing that she engaged in protected activity (reporting less favorable treatment from the Technicians), that she was subject to an adverse employment action (discharge) and that there was a causal connection between the protected activity and adverse action. For purposes of this prima-facie case only, the nature of the report (alleging disparate treatment by Technicians from one of the few women employed by Respondent at the Dealership) is considered to establish a causal connection to the adverse action (which occurred at around the same time that the Dealership discharged other female employees).
- 12) Respondent provided evidence of a non-discriminatory reason for the discharge, namely, management’s observation that Complainant did not meet company performance expectations.
- 13) Ultimately, Complainant could not establish that she would not have been discharged but for her protected activity, with reasoning as follows:
 - a) By Complainant’s own allegations, she complained about the Technicians’ less favorable treatment throughout her years of employment with Respondent. There is no indication that her reports of mistreatment increased in frequency immediately prior to her termination. Thus, there is little evidence to support an argument that the protected activity is temporally connected to the discharge.
 - b) Further, there is no indication that Respondent held any animus toward Complainant for reporting the Technicians’ conduct. In fact, there is no evidence in the record that Respondent even viewed Complainant’s reports as alleging sex discrimination (e.g. as protected activity at all). Complainant stated she never reported that she was treated differently *because of sex* due to her feelings that such a fact was obvious. Service Director testified credibly that he viewed Complainant’s reports as complaints regarding pay, which were common among employees of the various service departments he managed. There is no evidence that President was even aware that Complainant made the reports. The evidence shows that Supervisor was relatively indifferent to the reports, as he did not return any of Complainant’s emails in which she reported mistreatment and continued to view her as a good employee. Complainant did not present any evidence to suggest that Respondent instructed her to stop making the reports or otherwise held her complaints against her.
 - c) Additionally, it appears that Respondent made some effort to address Complainant’s concerns by holding group meetings with the Technicians and requiring them (albeit loosely) to pick up Repair Orders in the order they were written. This tends to show that Respondent credited Complainant with

making a valid report on an issue that needed to be address in the Department as a whole.

- d) While Complainant established that she engaged in protected activity and that she was discharged, she did not provide sufficient evidence to establish a causal connection between the two.

14) Unlawful retaliation in violation of the MHRA and WPA is not found.

Termination - Sex

15) The MHRA provides that it is unlawful to discharge an employee because of sex. 5 M.R.S. § 4572(1)(A).

16) 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).

17) 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.

18) 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. 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.

19) Here, Complainant established a prima-facie case showing that she belonged to a protected class (female), she performed her job satisfactorily (good overall sales, no discipline), that Respondent took an adverse employment decision against her (discharge) and that the employer continued to have her duties performed (here, Coworker, New Coworker, and eventually a third male Service Advisor performed those duties).

20) Respondent articulated a legitimate, nondiscriminatory reason for the adverse job action, namely, that Complainant was discharged for failing to meet company performance expectations.

21) Though it is a close case, under the Commission's "reasonable grounds" standard, the Complainant established that she would not have been discharged but for her sex, with reasoning as follows:

- a) The objective evidence in the record shows that Complainant performed her job nearly as well as, or in some respects better than, Coworker. Complainant wrote more Repair Orders than Coworker and had similar total monthly sales as Coworker, outperforming him in some months. Additionally, Complainant's sales in 2014 were higher than they had been in the previous year; she earned a large commission in the month prior to her discharge due to high sales. Both Supervisor and Service Director testified they assessed Service Advisors' performances by monitoring their sales on a daily basis, thus it is clear that the objective aspects of the job were important to Respondent.
- b) The Investigator finds Respondent's explanation for why Complainant was discharged to be problematic because the reasons it offered shifted over time. Respondent initially stated that Complainant was terminated for the generic reason of 'not meeting company performance expectations,' without providing further explanation. Respondent then supplemented its response by stating Complainant was discharged due to issues concerning customer satisfaction. In support of this position, Respondent attached four written customer complaints, of which only two appear to reference Complainant; later, President explained that he did not really rely on those complaints in making his decision to discharge Complainant. In its submission prior to the IRC, Respondent then further explained that Complainant was discharged because her interactions with customers were not professional or appropriate, particularly when she was observed by during Construction. At best, the ever-evolving reasons offered by Respondent raise questions about why it could not articulate its detailed reasoning for Complainant's discharge at an earlier date; at worst, this scenario could support a finding that Respondent's explanations are a pretext.
- c) Respondent's various explanations for the discharge are not well supported in the record, as the evidence it offered to support its articulated reasons is entirely subjective and lacks any documentary support. Except for two write-ups years before she was discharged, there are no records of any written discipline that Complainant received. Similarly, Respondent did not produce any evidence from Complainant's personnel file documenting her alleged performance issues. Additionally, when asked if he spoke to Complainant about his concerns about her customer service, Service Director stated he held group meetings where he gave employees pep talks about improving their performance. Complainant credibly stated that she never received negative feedback from Respondent about her customer service. These facts tend to indicate that Respondent did not find Complainant's performance issues serious enough to address in any formal or one-on-one setting, which casts doubt on the notion that the performance concerns somehow led to termination of Complainant's employment.
- d) Further, the subjective evidence offered by Respondent is not entirely consistent. Respondent did not maintain a consistent position on who was involved in the decision-making process, initially identifying Supervisor as a decision maker; at the IRC, Supervisor stated he was not involved in the decision to discharge Complainant. Furthermore, Supervisor indicated that he worked with Complainant every day, did not have any concerns about her performance, and viewed Complainant's customer service skills and reaction to the stress created by the Construction as comparable to Coworker. This is inconsistent with Service Director's statements that Complainant was inappropriate and unprofessional with customers. Though this could arguably represent simply a difference of opinion between Supervisor and Service Director, the inconsistency casts doubt on whether Complainant truly did have performance issues that warranted discharge.
- e) Additionally, in explaining its reasons for discharging Complainant, Respondent relied on vague wording that could well indicate masked unlawful bias. Service Director indicated that he thought Supervisor viewed Complainant as someone who got "excited easily"; Service Director also stated that

he had concerns with her “personality”. Similarly, when asked how he determined Complainant should be discharged instead of Coworker, President stated that it was a “gut feeling”. While these comments are not facially connected to Complainant’s sex, it is certainly not a leap to believe that she would have at least an even chance of proving at trial that they were related to her sex. Such comments also do not provide a clear picture of whether Respondent engaged in an unbiased assessment of which Service Advisor might have been causing customer satisfaction numbers to remain low at the Dealership.

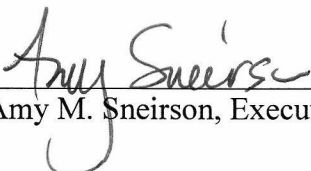
- f) It is worth noting that one of the few objective reports that is part of the record here - the CSI report from the month prior to Complainant’s discharge - shows that Complainant was rated at 100% customer satisfaction. This is objective evidence that conflicts with the position taken by Respondent. Additionally, Respondent failed to preserve the remaining CSI reports, despite being on notice that Complainant had filed a claim against Respondent; an inference that this evidence would have been preserved had it been favorable to Respondent’s position is not unwarranted.
- g) Respondent’s other defenses are also unpersuasive. The fact that Respondent discharged New Coworker for similar reasons to Complainant is not particularly helpful because it appears that this occurred after Respondent learned that Complainant filed a claim with the Commission. Additionally, New Coworker had eight months of experience as a Service Advisor, while Complainant had seven years of experience – this not only makes them less than ideal comparators, but also raises questions about why Respondent believed it would improve customer satisfaction numbers to replace a seasoned (female) employee with an inexperienced (male) employee. Finally, Respondent did not provide clear, non-discriminatory reasons for why it discharged two other female employees at Dealership around the same time as Complainant; while the fact that the Respondent terminated two other females at the same time as Complainant would not be dispositive of Complainant’s claims, it would have provided helpful context for evaluating Complainant’s claims and Respondent’s defenses.

22) It is found that Respondent subjected Complainant to sex discrimination when it discharged her from employment.

V. Recommendation:

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

- 1) There are **No Reasonable Grounds** to believe that Quirk Auto Group subjected Melody A. McLellan to less favorable terms and conditions in employment on the basis of sex, and this claim should be dismissed in accordance with 5 M.R.S. § 4612(2);
- 2) There are **No Reasonable Grounds** to believe that Quirk Auto Group unlawfully retaliated against Melody A. McLellan in violation of the MHRA and/or WPA, and this claim should be dismissed in accordance with 5 M.R.S. § 4612(2); and
- 3) There are **Reasonable Grounds** to believe that Quirk Auto Group discriminated against Complainant Melody A. McLellan by discharging her on the basis of sex, this claim should be conciliated in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneider, Executive Director



Stuart W. Evans, Investigator