Maine Human Rights Commission
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INVESTIGATOR'S REPORT
E11-0404

March 8, 2013

[redacted] ([redacted])

v.

[redacted] **dba** [redacted] ([redacted])

I. Complainant's Charge:

Complainant [redacted] alleged that Respondent [redacted] ("[redacted] treated her differently in the terms and conditions of employment because of her pregnancy. She further alleged that the company's decision to terminate her for not reporting to work when she was sick with the flu violated the Maine Whistleblower's Protection Act.

II. Respondent's Answer:

Respondent [redacted] asserted that Complainant was not explicitly fired from her position at [redacted] Complainant voluntarily ceased working for [redacted] providing de facto notice on February 5, 2011 by not showing up to work a shift that she had agreed to work. Complainant's pregnancy had no bearing on the decision for her termination and [redacted] acted as necessary in this situation to assure that its guests received the proper service and experience they should.

III. Jurisdictional Data:

1) Date of alleged discrimination: February 5, 2011.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): June 14, 2011.

3) Respondent employs 26 employees and is subject to the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, as amended, and the Whistleblowers' Protection Act, as well as state and federal employment regulations.

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

5) Investigative methods used: a thorough review of the written materials provided by the parties and an Issues and Resolution Conference. Based on this review, this complaint has been identified for a brief Investigator's Report, which summarizes the allegations and denials in relationship to the applicable law but does not fully explore the factual issues presented. This preliminary

investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

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

   a) Complainant [redacted] worked as a server for [redacted] having been hired in February 2010 as their first server based upon the owners' prior experience with her in other restaurants in the Portland area. She was pregnant at the time she left the employ [redacted] in February 2011.

   b) [redacted] is a restaurant on Congress Street in Portland.

   c) Ms. [redacted] alleged that [redacted] treated her differently because of her pregnancy when it terminated her employment. She further alleged that the company's decision to terminate her for not reporting to work when she was sick with the flu violated the Maine Whistleblower's Protection Act. Respondent [redacted] asserted that Complainant was not explicitly fired from her position at [redacted] Complainant voluntarily ceased working for [redacted] providing de facto notice on February 5, 2011 by not showing up to work a shift that she had agreed to work.

   d) The important parties in this matter are: Owner 1 MM; Owner 2/Bar Tender TM; Owner 3 TB; Owner/Chef JL.

2) Ms. [redacted] offers the following in support of her position:

   a) [redacted] discriminated against me due to pregnancy when the restaurant fired me for not working when I was incapacitated due to the flu. [redacted] imposed less severe discipline, or no discipline, on similarly situated employees who were not pregnant. Also, firing me for refusing to work in violation of the Maine Food Code was illegal retaliation.

   b) [redacted] hired me to work as a server in February 2010 when the restaurant opened. At [redacted] the members of the waitstaff are young women who are very attractive. I was the oldest female employee; I was 31. All the male employees work in the kitchen or the bar. During the year, I worked at [redacted] no pregnant women worked there.

   c) [redacted] has three owners who work there: MM, JL and TB. I always took my job seriously and did a good job. Whenever other servers or the owners needed a shift covered, I agreed to cover it if I did not have a scheduling conflict. I was hired to work the less-profitable weekday shifts. Other servers called me to work a weekend shift when they had a scheduling conflict. I took these extra shifts whenever I could because I was able to earn much more in tips on the weekends and because I am a dedicated and hardworking employee.

   d) Several months before I was fired, probably in June 2010, a hostess phoned MM and explained that she was too sick to work. He told her that he would cover for her and that she should stay home from work and get better.

   e) In mid-January 2011, Manager TM called me and asked me to cover a weekend shift for a server who was a no call/no show. [redacted] disciplined this server for her no call/no show with a

2 or 4-shift unpaid suspension. I am friends with this server and I know that her no-call/[redacted] was not due to illness.

f) Within the month prior to my filing a complaint with the Commission, a hostess called in a few hours before her shift to report that she could not work due to a problem with her pet. She was excused from work and not disciplined at all.

g) In late January 2011, a server asked me to cover a weekend shift for her on February 5, 2011, so that she could attend a social function. I took the shift because I had just been laid off from my other job due to the employer going out of business and I had $250 in bills due that I could not otherwise pay.

h) Around this time, late January 2011, I told MM (Owner 1/Manager) that I was pregnant. I was 4 ½ months pregnant at this time.

i) On Saturday morning, February 5, 2011, I woke up sick with the flu. I was vomiting and had diarrhea. I was coughing, blowing my nose and my joints ached so badly that I had trouble getting out of bed. I texted all the other servers to try to get someone to cover the shift I had agreed to cover that night. No one would voluntarily agree to cover the shift.

j) At approximately 10:30 a.m., I texted Owner 2 TM and explained that I was too sick to work and that I could not get anyone to agree to cover the shift. I apologized for not being able to work or to get someone to cover. He texted me back and told me that I had to work unless I could find someone to cover for me. I then attempted to reach former [redacted] servers to see if I could get one of them to work that night. I only heard back from one who told me that she could not work that night. I texted Owner 2 TM again and explained that I was really sick and that I could not work even though I desperately needed the work for financial reasons.

k) The Maine Food Code 2-201.11(B) prohibits a server from working if she/he has diarrhea, vomiting or a fever.

l) Owner 2 TM texted me back and told me that if I did not show up at work he would consider it my notice. I told him that I physically could not come in to work. I also told him that it was unfair to fire me when the server who was a no call/no show just a few weeks earlier was not fired even though her absence was unrelated to sickness which prohibited her from working.

m) A day or two later, another server told me that Owner 1 MM had assigned all my shifts to her.

3) [redacted] provided the following in support of its position:

a) Owner 1 MM and Owner/Chef JL had known Ms. [redacted] for several years from around town and from working at other places which they frequented. Ms. [redacted] mentioned that she was looking for part-time work and said that she was interested in picking up hours at [redacted] so they agreed to give her the hours she wanted. During this time, she was also employed at a Portland sushi bar and a night club and, for that reason, she chose not to work weekends at [redacted] She opted to work weeknight shifts for [redacted] She chose her own shifts.

b) Weeknight shifts have proven to be as lucrative, or more so, than weekend shifts since there are fewer servers working. One server is kept on to handle table service until closing. [redacted] serves food until closing, so the server who stays later earns more. We usually sent a server home earlier so the late person made extra money.

c) During her employment with [redacted] Ms. [redacted] was routinely late and made light of it. She was told many times that she needed to be here and ready to work at the scheduled time but the issue persisted. Contrary to her claims, she seldom covered shifts when asked. She always seemed to have other plans. Once, she picked up a Saturday night shift for another server and realized that she had made other plans. Owner 1 MM provided a statement to the Commission that he "called her to ask if she was coming in and she said that she was on the Saco River tubing [and that he] covered the shift because there were no options."

d) On February 5, 2011, she again picked up a shift for another server and did not show up. She claimed that she was sick but never even attempted to come in. Owner 2 TM told her that she was expected to be here or it would be considered her notice. Owner 1 MM again covered the shift himself when she did not show up.

e) Ms. [redacted] never produced documentation after the fact to prove that she was ill and could not work on February 5, 2011. Her claims of other employees getting away with the same actions are false. Ms. [redacted] claims that another server was a no call/no show and Owner 1 MM suspended her. In reality, this employee showed up at the start of service, which is one hour late and Owner 1 MM had done all the setup and found someone else to come in. This is an entirely different situation. This other person actually showed up for work.

f) Ms. [redacted] also mentions a hostess calling out and Owner 1 MM covering her shift or telling her that it was acceptable. The hostess position is a support position and not a necessity like the server position. Guests can seat themselves, but not serve themselves.

g) While at [redacted] Ms. [redacted] received several customer complaints and we had staff from other restaurants, specifically "555" (a nearby restaurant), who would not come in to [redacted] when they knew that she was working. She was often in a bad mood and hoping to be able to leave early. Her overall lack of respect for the company was substantiated by her talking food to restaurant patrons with a lollipop in her mouth. She also had occasional flare-ups with other employees. All of these things occurred prior to any knowledge about her pregnancy. Ms. [redacted] being pregnant had no bearing on the decision for her termination. Her no show would be considered her notice, so she was never actually fired. Since parting ways, [redacted] has been paying unemployment to her.

h) [redacted] made a non-discriminatory business determination when it informed Ms. [redacted] that she had provided her notice of resignation to the company for not finding a replacement server to work a scheduled shift. [redacted] did not terminate Ms. [redacted] outright. Furthermore, [redacted] has an 'open door' policy of encouraging the reporting of employees' perceptions of improper treatment to management and Ms. [redacted] did not avail herself of this policy. Regardless, [redacted] has abided by the constructs of Maine and Federal law, and [redacted] contends that the voluntary resignation of Ms. [redacted] coupled with the amicable payment of Unemployment Compensation for Ms. [redacted] should bring an end to this dispute.

i) During her time at [redacted] management addressed a number of issues with Ms. [redacted] attitude towards co-workers and customers; consistently laid-back attitude when late for shifts; lack of motivation; and constant complaints from customers. Management addressed her failure to ever help the team with regard to switching and picking up shifts (she always had the opportunity). We discussed the fact that she did not work well with management, the issue of always getting shifts picked up or changing without letting management know. Her lack of

communication was discussed with Owner 2/Bar Tender because she never called but opted to text, which is not a suitable way to communicate with one's employer. Her overall lack of respect for her job and the company were also discussed.

j) According to Owner 2/Bartender, while Ms. [redacted] worked for [redacted] two of her family members worked for them and [redacted] paid unemployment to two family members during hard times and refrained from fighting the relevant documents. "We even tried to help Ms. [redacted] get a job when she was let go from [redacted] offering several options and contacts. However, her actions on February 5, 2011 were more than reason to make it her final actions with us as a company."

k) As to the incident which occurred on February 5, 2011, Owner 2/Bartender stated that "Ms. [redacted] sent me a text message stating that she was not feeling well and would not be in. Number one, text message is not an acceptable way to call out, but that was also a shift she had agreed to pick up earlier in the week because she did not make it in for a previous shift. I was very upset, letting her know that the only way that was possible is if she could find someone to work for her. She had agreed to work a busy shift, had been complaining about her financial situation and we, as a very small company, need people who understand and are willing to work hard."

4) Summary of the most salient evidence reveals:

a) Complainant [redacted] alleged that after she divulged the fact that she was pregnant, in late January of 2011, the dynamic at [redacted] shifted for her. She confirmed that she had told another server that she would work her shift on February 5, 2011, but that she woke that morning with the flu virus and was too sick to work. As discussed above, when she texted [redacted] management, explaining that she was too sick to work, she was informed that her act of not coming in to work would be evidence of her "giving notice." [redacted] did not have a policy in place whereby an employee must present a doctor's note proving that one had actually been sick. Ms. [redacted] did not see her doctor, nor did she go to a walk-in clinic. She had no documentation to prove that she had been sick.

b) In the documentation sent to the Commission, [redacted] has shown that it has a Disciplinary/Corrective Action Process including Verbal Warning, Written Warning and Further Action. When asked during the Issues and Resolution Conference why this progressive discipline process was not utilized in Ms. [redacted] situation, Respondent stated that the policy had been proposed and not actually adopted until after her resignation.

c) Respondent's October 3, 2011 submission asserted that Ms. [redacted] was "routinely and serially" late for work. Owner 1 MM has stated that she was always tardy, and that when she did finally arrive for her shift, she was not ready to start work. "She had to use the bathroom, she had to make a call on her cell phone, etc." When asked during the Issues and Resolution Conference why there was no disciplinary documentation which addresses this tardiness problem, Respondent stated that they were all Verbal Warnings. "Ms. [redacted] was warned by the manager on duty every time." Further, Respondent stated that there "are processes in place now, since the summer of 2011."

d) [redacted] states that Ms. [redacted] conduct was a constant problem, and that there were servers from "555" who would not even come into [redacted] if she was working. When this investigator asked why a business would continue to employ a person with such consistent and predictable

performance problems, Owner 1 MM stated that Ms. [redacted] "had off nights, but basically I had faith in her ability to do the job well."

e) Ms. [redacted] responds to [redacted] accusations by stating that "during the year and a month that I worked for them, I was never informed of their accusations they state as their reason for my termination. I was never given a verbal or written warning to any of their accusations and in fact, had I been made aware of these accusations, I would be in agreement for my termination as I would completely understand why they would not want to employ me. But, in fact, these issues were never addressed and I feel that had these accusations been true, that there would be written warnings available for them to show as proof and [redacted] would have submitted these written warnings in their formal response and there is no such documentation submitted. The only complaint I ever heard from them was the fact that I had been late and I agree that I was. It was a very lax environment and there was no formal policy instilled at the time I was employed there. I was a dedicated employee and did what was required of me and beyond. I was hired before they even opened based on my prior reputation of being a hard and dedicated worker in other local establishments which is recognized in Owner 1, MM's statement. I did my best to help build their reputation in many ways. I was constantly recommending people to go there by highlighting how great the food was and that it was an all around wonderful restaurant. During my employment there, I sent many of my friends and family as well as other customers from my other jobs to experience [redacted] since I was proud to work there. I have always been a dedicated and hard worker at all of the jobs I have had and took my role as an employee [redacted] seriously. It is a shock to hear the accusations made by them and I truly believe they are false statements because for one I was never informed of these issues and it would not make sense for them to keep me on for a year in which time I was frequently asked to cover other shifts. Why would I be allowed to do that if I was such a terrible employee as they claim and why would they hire my sister without a formal interview? I am only now hearing of these issues after the fact. I was never addressed during the time I was employed there and more importantly, there are no written warnings to warrant such claims. I believe [redacted] must submit proof of the claims they have made in order to justify their action of terminating me. They have not done so. It is all hearsay with no documentation to substantiate their reason for termination."

f) Ms. [redacted] timesheets provided by [redacted] from January 28, 2010 through February 6, 2011 do not indicate that there was any shift in the number of hours worked after she told management about her pregnancy.

5) Affidavit of K.I. (Complainant's sister)

a) I was employed at [redacted] from May of 2010 until July of 2011. During that time, I worked as a hostess and was well familiar with the work environment, my co-workers, and the owners and my immediate bosses, Owner 1 MM and Owner 2 TM.

b) The work environment at [redacted] was extremely casual. There were no guidelines or rules for staff behavior. While some girls were spoken to for being late or talking on their cell phones, others were not. The owners played favorites and seemed to have different rules and expectations of different people. If one was pretty and a close friend of one of the owners, it was unlikely that they would be spoken to or disciplined in any way. This made for a very awkward work environment.

c) The waitstaff were all women and very pretty. I believe that it was not possible to wait tables at [redacted] unless the owners believed you were very pretty. Although I asked several times to wait tables so that I could earn more money, I was not permitted to do so, even when there was an open shift because someone had texted-in sick. I believe this is because I was overweight.

d) It was common at [redacted] for girls to text-in sick just before their shift. This was never a problem in my experience. Owner 1, MM, would always reply that it was no problem and that he would find a way to cover the shift. In June of 2010, for example, I texted-in just hours before my shift and it was not a problem at all.

e) I worked with [redacted] at [redacted] during the time that she announced her pregnancy and was subsequently fired. I believe that [redacted] was fired because she was pregnant. After she announced her pregnancy, things changed and she was treated differently than the other girls. The owners became dismissive of her and often rude. She was not given the flexibility and friendly interactions that had been common until then.

f) I left [redacted] in the summer of 2011 because I did not like the way employees were being treated.

V. Analysis:

1) The Maine Human Rights Act ("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.A. § 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) The MHRA provides, in part, that "[i]t is unlawful employment discrimination, in violation of this Act ... for any employer to ... because of ... sex ... discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. ..." 5 M.R.S.A. § 4572(1)(A).

3) Here, Complainant alleged that Respondent has discriminated against her on the basis of her sex by treating her differently from other waitresses who missed work and firing her because of her pregnancy. She further alleged that Respondent decided to terminate her employment because she did not report to work when she was vomiting and had diarrhea, in violation of the Maine Whistleblower Protection Act.

4) Respondent denied the claims of sex discrimination based upon pregnancy and Maine Whistleblower's Protection Act retaliation.

Claim of Sex Discrimination

5) Here, because 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).

6) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that she

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).

7) 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.

8) 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.

9) Here, Complainant has established a prima-facie case of unlawful discrimination. She is a woman who performed her job satisfactorily, who told her employer in late January 2011 that she was 4 ½ months pregnant, and who was told on February 5, 2011 that if she did not come in to work that her absence would be interpreted as her "giving notice", although she had called out during what she represented as a serious bout with the flu.

10) Respondent offered several nondiscriminatory reasons for the adverse actions, namely, that she had a poor attitude toward co-workers and customers, that she had a consistently laid-back attitude when she was late for shifts, that she lacked motivation, that there were constant complaints about her from customers, that she failed to help the team with respect to switching and picking up shifts, that she didn't work well with management, that she was always having shifts picked up or changing shifts without letting management know and that she texted as an alternative to communicating with her employers by phone.

11) It strains credulity to think that a restaurant would continue to employ a server who was chronically late, arrived with little intention of beginning to work upon arrival, had poor working relationships with both management and staff, was frequently looking for other to cover her scheduled shifts and was disrespectful of both co-workers and customers. Furthermore, one would wonder why a restaurant would continue to employ a person whose mere presence would keep certain patrons from coming in.

12) [redacted] has offered up a litany of performance deficiencies yet there is absolutely no objective evidence to support the existence of these alleged deficiencies. [redacted] has no record of the "constant verbal warnings about tardiness, attitude, cell phone usage, etc." or any other substantiation for what it describes as Ms. [redacted] lackluster performance.

13) [redacted] now contends that Ms. [redacted] conduct was intolerably bad, but Owner 1 MM stated that it did not terminate her because she "had off nights, but basically [he] had faith in her ability to do the job well." Respondent cannot have it both ways.

14) Given the "even chance" standard (50/50), the evidence supports a reasonable inference that Respondent discriminated and retaliated against Complainant because of her sex (pregnancy).

Protected Whistleblower Activity

15) Maine's Whistleblowers' Protection Act ("WPA") prohibits employers from discharging, threatening or otherwise discriminating against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting in good faith, or a person acting on behalf of the employee, reports orally or in writing to the employer or a public body what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual. 26 M.R.S.A. § 833(1)(B).

16) The Maine Human Rights Act provides, in part, that it is unlawful employment discrimination to discharge an employee because of previous actions protected under the WPA. 5 M.R.S.A. § 4572(1)(A).

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

18) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA-protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondents make that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*

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

20) Here, Complainant has failed to establish a prima-facie case that she was terminated in violation of the WPA. Ms. [redacted] alleges that her employer terminated her employment after she called in to report that she was unable to cover a shift which she had agreed to cover. Complainant alleged that she told her employer that she had the flu, vomiting and diarrhea and that there was no possibility of her coming in to work. She was told that she had to come in or, if she did not find a

replacement, the company would consider her having "given notice." In fact, she asserts that she was unable to find a replacement and as a result, management gave her shifts to other waitstaff.

21) Complainant has alleged that the Maine Food Code 2-201.11(B) prohibits a server from working if she/he has diarrhea, vomiting or fever. The following State of Maine Food Code - 2001 addresses the issue:

10-144– *Department of Human Services, Chapter 200 – State of Maine Food Code – 2001*

2-2 Employee Health

2-201 Disease or Medical Condition

2-201.11 Responsibility of the Person in Charge to Require Reporting by Food Employees andApplicants.*

The Permit Holder shall require … Food Employees to report to the person in charge, information about their health and activities as they relate to diseases that are transmissible through food. A food employee or applicant shall report the information in a manner that allows the person in charge to prevent the likelihood of foodborne disease transmission, including the date of onset of jaundice or of an illness specified under ¶ (C) of this section, if the food employee or applicant:

(A) Is diagnosed with an illness due to:
.....
(B) Has a symptom caused by illness, infection, or other source that is:
(1) Associated with an acute gastrointestinal illness such as:
(a) Diarrhea,
(b) Fever,
(c) Vomiting,
(d) Jaundice, or
(e) Sore throat with fever, or

2-201.12 Exclusions and Restrictions.*

The Person in Charge shall:
(A) Exclude a Food Employee from a Food Establishment if the Food Employee is diagnosed with an infectious agent specified under ¶ 2-201.11(A);
(B) Except as specified under ¶ (C) or (D) of this section, restrict a Food Employee from working with exposed Food; clean Equipment, Utensils, and Linens; and unwrapped Single-Service and Single-Use Articles, in a Food Establishment if the Food Employee is:
(1) Suffering from a symptom specified under ¶ 2-201.11(B)….

22) Under the Maine Food Code, if Complainant truly had the symptoms she described to Respondent, Respondent should have excluded her from serving food that shift. However, Respondent demanded that Complainant appear for work or find a replacement or be deemed to have quit. Complainant allegedly told Respondent that this violated the law.

23) Complainant has established a prima facie case. She has shown that she engaged in activity protected by the WPA by reporting to her employer her good-faith belief that it was asking her to violate the law and to do so in a fashion that would endanger others, and she was the subject of adverse employment action, and the timing of the two leads to an inference that there was a causal link between the protected activity and the adverse employment action.

24) Respondent produced some probative evidence to demonstrate a nondiscriminatory reason for the termination, namely that Ms. [redacted] conduct at work was inappropriate and unprofessional and that she was serially tardy for work.

25) Complainant did not carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action," because – as noted above – her employment was terminated due to unlawful sex discrimination. There is no evidence provided that Complainant's objection to working while sick was the actual cause of the termination.

26) Whistleblower retaliation is not found.

VI. <u>Recommendation</u>:

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

1. There are **REASONABLE GROUNDS** to believe that Respondent [redacted] dba [redacted] subjected Complainant [redacted] to different terms and conditions because of her sex;

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

3. There are **No Reasonable Grounds** to believe that [redacted] dba [redacted] retaliated against Complainant [redacted] in violation of the Whistleblowers' Protection Act by terminating her employment.

4. This claim should be dismissed in accordance with 5 M.R.S. § 4612(2).

Amy M. Sneirson, Executive Director

Michèle Dion, Investigator