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: 1-888-557-6690
www.maine.gov/mhrc

Amy M. Sneirson
Executive Director

John P. Gause
Commission Counsel

August 23, 2013

INVESTIGATOR'S REPORT
E11-0543

[redacted])

v.

[redacted] ([redacted])

I. Complaint:

Complainant [redacted] alleged that Respondent [redacted] ("[redacted] retaliated against her after she engaged in protected activity under the Maine Human Rights Act and the Maine Whistleblowers' Protection Act. Ms. [redacted] also alleged that [redacted] discriminated against her because of her sex and age.[1]

II. Respondent's Answer:

[redacted] denied that it discriminated or retaliated against Ms. [redacted] for any reason.

III. Jurisdictional Data:

1) Date of alleged discrimination: July 5, 2011. The period of October 29, 2010 to August 25, 2011 is timely.

2) Date complaint filed with the Maine Human Rights Commission: August 25, 2011.

3) Respondent employs approximately 100 employees and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964 as amended and the Whistleblowers' Protection Act ("WPA"), as well as state and federal employment regulations.

4) Respondent is represented by [redacted]s, Esq. Complainant is represented by [redacted] Esq.

5) Investigative methods used: A thorough review of the written materials provided by the parties. The Investigator sought an Issues and Resolution Conference, in which Respondent declined to participate. 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.

[1] Age discrimination is not specifically addressed in the charge of discrimination.

IV. Development of Facts:

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

   a) Complainant [redacted] began her employment at the [redacted] in South Portland in 1987 and became its Executive Housekeeper around 1990.

   b) Respondent [redacted] is a subsidiary of Sunburst Hospitality Corporation ("Sunburst"), a privately-held corporation that, through its subsidiaries, owns and operates hotels throughout the United States.[2]

   c) Important third parties: VP, Operations, SW; General Manager, BL; Maintenance Person, RC; Front Desk Manager, JD; Maintenance Assistant, MC; Front Desk Person, RB; Former Employee, GP; Former Employee, MP; Former Employee, AM.

   d) Complainant [redacted] alleged that she was retaliated against after she engaged in protected activity under the WPA. Ms. [redacted] also alleged that Respondent Comfort Inn discriminated against her because of her sex and age. [redacted] denied that it has discriminated or retaliated against Ms. [redacted] for any reason.

2) The following is a summary of Ms. [redacted] s complaint:

   a) I was employed by [redacted] as Executive Housekeeper from July 1995 until July 5, 2011, when I was terminated. I believe that I performed my job duties satisfactorily.

   b) On April 24, 2010, I was approached by two female employees who asked to speak with me. One female employee related to me that she had been sexually harassed by the Maintenance Person and the other female employee was her witness. This was not the first time that Maintenance Person had been accused of sexual harassment against female employees, but an incident in 2007 was covered up by General Manager. Staff believed that General Manager was in love with Maintenance Person and would do anything for him.

   c) On April 27, 2010, both female employees and I met with General Manager to inform her of the sexual harassment. Later, General Manager stated to me that Maintenance Person did not fit the profile of what he was being accused of and that he was just kidding around. Males always seemed to get preferential treatment. Females were always held to a higher standard than men.

   d) Two terminated employees came to the [redacted] on March 2, 2011 to collect their personal belongings. I was berated by General Manager for their being there although I was unaware that there was a problem.

---

[2] Sunburst does not directly own or operate any of its hotels, and is not the employer of any [redacted] employees. Any reference or notation to "Sunburst" on documents submitted with this Position Statement reflects the name [redacted] s ultimate parent company, which is headquartered in Silver Spring, Maryland.

e) On July 5, 2011, I was terminated for violation of company policy by supposedly talking about the termination of a prior employee. When I pointed out that it was another employee, and not me, who had done this, I was told that I was responsible as Supervisor for not stopping the gossiping. My termination letter also stated continued failure to meet job expectations and accumulation of offenses.

3) The following addresses Ms. [redacted] claim that she was terminated because of her age:

a) Complainant was 60 years old at the time of termination.

b) Respondent provided the following information about the ages of employees terminated between 2009 and 2011, and the reasons for termination:

i) A total of 23 employees were involuntarily terminated.

ii) Eight (8) were in their 20's. They were terminated for attendance problems (5), failed probation (2) and poor job performance (1).

iii) Five (5) were in their 30's. They were terminated for attendance problems (3), poor job performance (1), and work rule violations (1).

iv) Four (4) were in their 40's. They were terminated for attendance problems (1), failed probation (1), poor job performance (1), and work rule violation (1).

v) Three (3) were in their 50's. They were terminated for failed probation (2), and work rule violations (2).

vi) Three (3) were in their 60's. They were terminated for attendance problems (1), and work rule violations (2).

4) Ms. [redacted] provides the following narrative in an effort to clarify the chronology of events during her employ with [redacted]

a) [redacted] has stated that after 24 years of employment, with performance appraisals containing ratings of "exceeds standards" or "meets standards", from June 2010 until July 2011 my performance issues mounted to such a degree that the only solution was to sever the employment relationship.

b) There is nothing in my personnel file which indicates that my employer ever counseled or warned me that my employment was in jeopardy. A review of the facts show that my "performance issues" surfaced shortly after I accompanied two employees to meet with General Manager regarding a complaint that one of the employees had been sexually harassed by Maintenance Man. I reported the matter to General Manager on April 27, 2010. An investigation into the matter was completed a few weeks later. It was apparent that General Manager did not believe that the Maintenance Person had done anything wrong. General Manager told me that Maintenance Person was just kidding around and that he did not fit the profile of what he was being accused of.

c) Instead of acknowledging that I had done the appropriate thing by reporting this problem to General Manager, I was criticized for not having reported it sooner. The incident at issue occurred on April 21, 2010 while I was out on vacation. I learned of the incident on April 24, 2010, a Saturday. I reported the incident to General Manager on April 27, 2010, as that was the first day after I learned of the incident that General Manager and the affected employee and witness were working. General Manager was not pleased that a complaint had been filed and I later learned that the employee who complained felt that General Manager did not want her to pursue her claim.

5) Complainant [redacted] describes a change in the dynamic in her workplace following her report of sexual harassment of one of her direct reports:

a) Shortly after the harassment claim was reported and investigated, I found that my workplace had changed and that I could not do anything right in General Manager's view. In light of the fact that I had been considered such a valuable employee for 24 years, always earning stellar reviews, this was startling. Even after my employment had been terminated, the company criticized me for not having availed myself of the company's procedures for reporting discrimination or retaliation with regard to my own termination of employment. It defies logic that a company would expect an employee who has been terminated from employment to file an internal complaint with the company from which she has been terminated.

b) A review of the "specific performance issues" shows that my performance did not in fact fail to meet standards and that General Manager clearly had an agenda to get rid of me by ignoring the facts when issuing discipline, so as to create a paper trail which could be utilized to terminate my employment. The facts of the "specific performance issues" are as follows:

i. I received a reprimand on June 23, 2010 because I did not issue discipline to an employee for a performance issue, specifically, one no call/no show. This reprimand was issued prior to the session which the company conducted on June 29, 2010 to review with employees the various topics, including properly documenting performance issues. The reprimand was considered part of the "accumulation of offenses" even though the company felt it necessary to conduct a training session on documenting performance issues.

ii. In January, 2011, I was issued a reprimand for discussing an employee's alleged policy violation in front of other employees in a non-private area. At a meeting held by General Manager with supervisory employees, I questioned why one of the supervisory employees had stayed in an off-market room overnight. I believed that the meeting was the appropriate place to raise such a question as I was seeking direction on what the company policy was and how it was to be applied. To the extent that the meeting was held in a non-private area, I attended the meeting at the location chosen by General Manager.

iii. In March of 2011, I was reprimanded for being aware that two of my former employees were on company property without prior approval by management and my failure to take appropriate action. I strongly denied these allegations, yet General Manager refused to listen to my explanation. On March 2, 2011, I came out of my office around 10 a.m. to take my morning break. I saw Former Employee, GP, go into the break room and assumed that she had returned to collect her personal belongings as her employment had recently been terminated. I did not speak with her because I thought that she was angry with me

because she was fired. I never let her come onto company property. Former Employee, GP had to go by the front desk and General Manager in order to get to the break room. I assumed that if she was in the break room that someone had given her permission to do so.

iv. I continued outside for my break and saw Former Employee, MP, driving around the back of the building. General Manager came out of the building and said that both former employees had to leave the property. At that point, I told them to leave. General Manager wanted to know whether they had come to the property to see me on my break. I said that I had nothing to do with letting them in and had no idea that they were coming. I was then written up for allowing these former employees onto the property when I had no idea that they were coming to the property. Former Employee, MP had to have entered through the main entrance as the other doors were locked and I was not at the front desk when they entered the building. The company has stated that after the former employees left, General Manager told me that the Girl Scout cookies that one of the former employees wanted to deliver would be left at the front desk by the former employee's daughter. I recall that conversation very differently. General Manager berated me for letting the former employees onto the property and denied the request that the Girl Scout cookies be left at the front desk.

v. On June 28, 2011, General Manager told me that there was "gossip" circulating at the hotel as to why a former employee had quit. I replied that the only person in my department who I was aware of having discussed it was Former Employee, AM, and that she had already been spoken to about the issue. I also told General Manager that she should speak with the front desk staff as Former Employee, AM, had told me that the front desk staff who worked in the afternoon had told her that the employee had quit. I did not believe it necessary to issue any formal discipline to Former Employee, AM, as I was satisfied that she would not discuss the matter in the workplace. Again, General Manager refused to listen to my explanation and terminated my 24-year employment allegedly due to a "continued failure to meet standards of performance and essential job duties" and an "accumulation of offenses."

c) It is clear that General Manager wanted me gone from the [redacted] and she made sure that it happened. The evidence shows that General Manager was not pleased that a harassment complaint was filed against Maintenance Person and that she retaliated against those who were part of that complaint process. The other three employees and I participated in the harassment complaint process, or were believed by General Manager to have participated in that process and were terminated from our employment with the [redacted] between February and July, 2011. All four of us were long-time employees and three of us were over 60 years of age. One was over 50 years of age. A review of the evidence provided by Respondent shows that during the 2-year period of July 1, 2009 to June 30, 2011, thirty three employees, including the four complainants either left or were terminated from their employment and that the four complainants were the longest tenured employees to be terminated and generally much older than other terminated employees.[3]

[3] Three other former [redacted] employees also filed Commission complaints, alleging that after Complainant brought complaints forward on behalf of people she supervised that the other employees were treated in a discriminatory/retaliatory fashion as well.

d) General Manager was eventually able to find a way to terminate the employment of all the employees who were part of the harassment complaint or who she thought were part of it. General Manager terminated my employment because I assisted and supported an employee who filed a harassment complaint against another employee. That action was retaliation and violated the Maine Human Rights Act.

6) Comfort Inn provided the following in support of its position:

a) On or about April 21, 2010, Maintenance Person allegedly made several comments which were offensive to a female employee who worked in housekeeping. Ms. [redacted] states that the other female employee was a witness and in fact that person was the Assistant Executive Housekeeper. Ms. [redacted] was told of the alleged incidents from April 21, 2011 on April 24, 2011. However, she did not report the incident that she was told about nor did she inform General Manager, Corporate Human Resources Department or any other resource available to her as per company policy.

b) The incident was not reported to the General Manager by Ms. [redacted] and the two female employees until April 27, 2011, almost a week after the alleged incidents. Immediately after the incident was reported to General Manager, an investigation was initiated in consultation with [redacted]s Legal and Human Resources Department. As part of the investigation into those allegations, [redacted] Human Resources Manager led the investigation and traveled to the hotel to interview all parties involved and any potential witnesses. The investigation into those allegations was conducted and appropriate action was promptly taken by [redacted]

c) Although not timely in any event, there are no records of any alleged incident of sexual harassment by any employee in 2007 nor were any allegations properly reported at that time by Ms. [redacted] or any other employee. This alleged incident in 2007 was learned only after [redacted] began its internal investigation into the events of April 21, 2010. According to Ms. [redacted] statement from April 29, 2010 which was obtained while investigating the April 21, 2010 allegations of sexual harassment, a female employee asked Ms. [redacted] to speak to Maintenance Man because he was allegedly making sexual gestures while walking and holding a plunger. Ms. [redacted] spoke to Maintenance Man and asked him to stop whatever he was doing and he said that he was just fooling around but would stop. Ms. [redacted] commented in her statement that this incident happened so long ago that Maintenance Person probably didn't "remember it any more than I do." Ms. [redacted] never reported this incident to General Manager or any other company outlet to allow for any alleged cover up. Ms. [redacted] vague comments that "male employees seemed to get preferential treatment" or that "female employees were always held to a higher standard than men" does not specifically mention any instances that [redacted] could investigate or verify.

d) Two former employees who had been terminated came to the hotel on or about March 1, 2011 to gather personal belongings and distribute personal gifts to other employees. Ms. [redacted] states in the Charge that "I ended up being berated by General Manager for them being there, although I was not aware that there was any problem." As a supervisor and long-tenured employee, Ms. [redacted] should have been aware that any individual, former employee or not, who is not authorized to be on the premises or is not using the hotel's services or amenities (someone who is not a customer), is considered to be trespassing. The Distribution and Solicitation Policy is in place in order to avoid disruption of company operations as well as to

avoid potential safety concerns. Ms. [redacted] neglected to mention that these former employees joined her to smoke in the hotel's designated smoking area after handing out gifts until they were asked to leave by General Manager.

e) Ms. [redacted] had a one-on-one conversation with General Manager after the regular manager's meeting on the afternoon of March 2, 2011. Ms. [redacted] and General Manager spoke in the break room as it was a quiet and private place to discuss the former employees who came back to the hotel and discussed that the Girl Scout cookies that one of the former employees wanted to deliver would be left at the front desk by her daughter instead. Ms. [redacted] was not berated as alleged in the Charge, but instead ended the conversation by thanking General Manager for working in the hotel's laundry to give Ms. [redacted] her days off from work.

7) Further investigation reveals:

a) The company's Distribution and Solicitation Policy is defined in the following manner: "It is the policy of Starburst Hospitality Corporation that, in order to avoid disruption of Company operations, the following rules shall apply to the solicitation and distribution of literature and other materials on Company property." **Solicitation** refers to employee(s) and/or non-employees approaching employees for the purpose of influencing them to take a specific course of action (other than regular work duties) or to make purchases. Solicitation includes, but is not limited to the soliciting of membership in any organization, the soliciting of gifts, money pledges or subscriptions, or the sale of merchandise, produce, tickets or raffles. **Distribution** includes, but is not limited to, the distribution of such things as merchandise, leaflets, pamphlets, newspapers, petitions, pictures, pins, buttons or handbills.

b) The company's discrimination and sexual harassment policy states:

Discrimination and sexual harassment are damaging to the work environment: they are illegal. Therefore, the company will treat discrimination and sexual harassment as a serious form of employee misconduct which can result in the discharge of the offender. All employees are responsible for ensuring that the workplace is free from discrimination, harassment and intimidation on the basis of sex, race, religion, national origin, age or disability. Sunburst Hospitality's strong disapproval of offensive or inappropriate behavior at work requires that all employees must avoid any action or conduct which could be viewed as discrimination or sexual harassment. This policy requires that all employees must do their best to be sensitive to their own behavior toward others. Keep in mind that what one person considers common, appropriate behavior may be considered offensive and out of line by a co-worker. Violations of this policy will be handled under the Corrective Discipline Procedure. Any employee who has a complaint of discrimination or sexual harassment at work by anyone including supervisors, co-workers, vendors or visitors should bring the problem to the attention of company officials and may do so without fear of reprisal.

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. § 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 she was subject to discrimination based on age and sex, and that she was retaliated against for reporting sexual harassment of other employees. Respondent denies any discrimination or retaliation.

Claim of Sex Discrimination

3. 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. § 4572(1)(A).

4. Complainant alleged that Respondent discriminated against her on the basis of her sex by treating her differently than males and giving males "preferential treatment." Respondent denied the claim of sex discrimination, and asserted that Ms. [redacted] vague comments that "male employees seemed to get preferential treatment" or that "female employees were always held to a higher standard than men" does not specifically mention any instances that [redacted] could investigate or verify.

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 (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).

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 and was terminated, and Respondent presumably continued to require housekeeping work to be completed.

10. Respondent articulated a legitimate, nondiscriminatory reason for the termination, namely that Ms. [redacted] employment was terminated for continued failure to meet standards of performance and essential job duties.

11. Complainant was unable to demonstrate that the circumstances cited by Respondent were not true and that Respondent actually did give preferential treatment to similarly situated male employees:

    a) Ms. [redacted] recalled that no action had been taken in 2007 following a report of Maintenance Person's egregious sexual harassment. She believed that General Manager gave unfair preference or latitude to Maintenance Person because he was a male.

    b) Making another report about Maintenance Person in April 2010, Complainant found again that General Manager would do nothing to discipline Maintenance Person, again because he was male. In fact, General Manager stated to her that Maintenance Person did not fit the profile of what he was being accused of and that he was just "kidding around."

    c) In contrast, after reporting sexual harassment, Ms. [redacted] was held harshly accountable for less serious infractions of company rules, including:

        i) A June 23, 2010 reprimand for not issuing discipline to an employee for a performance issue, specifically, one no call/no show.

        ii) A January, 2011 reprimand for discussing an employee's alleged policy violation in front of other employees in a non-private area.

        iii) A March 2011 reprimand for being aware that two of my former employees were on company property (with Girl Scout cookies) without prior approval by management and failing to take appropriate action.

        iv) A June 28, 2011 reprimand for not disciplining other employees for "gossip" circulating at the hotel as to why a former employee had quit.

    d) What seemed to Ms. [redacted] to be a distinctly different approach to disciplining males than disciplining her (a female) forms the basis for Ms. [redacted] contention that "males always seemed to get preferential treatment and that females were always held to a higher standard than men." She has presented no objective evidence in support for this contention, however.

12. In the final analysis, Ms. [redacted] has not demonstrated that males were treated more favorably than females or given preferential treatment.

13. Discrimination based on sex is not found.

Age Discrimination

14. The MHRA provides, in part, that "[i]t is unlawful employment discrimination, in violation of this Act ... for any employer to ... because of ... age ... 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).

15. 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).

16. First, Complainant establishes a prima-facie case of unlawful age discrimination by showing that: (1) she performed her job satisfactorily, (2) her employer took an adverse employment decision against her, (3) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed, and (4) those who continued to perform Complainant's job duties were a substantially different age than Complainant. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Campiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (federal ADEA).

17. 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.

18. 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.

19. 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.

20. A review of the evidence provided by Respondent shows that during the 2-year period of July 1, 2009 to June 30, 2011, 33 employees (including Ms. [redacted] either left or were terminated from their employment.

21. Although Ms. [redacted] was one of the longest tenured employees to be terminated and much older than other terminated employees, that – in and of itself – does not evidence age discrimination. [4]

22. Respondent's records show that the majority of employees terminated were under the age of forty (13 out of 23, or 56%).

23. Employees of all ages were terminated for the same or similar reasons. For example, employees in their 20's, 30's, 40's and 60's were fired for attendance problems. Employees in their 30's, 40's, 50's and 60's were fired for work rule violations.

24. There is no indication that Respondent terminated employees based on age-based prejudice or stereotypes.

25. There is no evidence offered or found which substantiates Ms. [redacted] s allegation that she was discriminated against because of her age.

Retaliation

26. With respect to Complainant's retaliation claim, the MHRA prohibits termination 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).

27. In addition, 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).

    The Maine Human Rights Commission regulations further provide as follows:

    No employer, employment agency or labor organization shall discharge or otherwise discriminate against any employee or applicant because of any action taken by such employee or applicant to exercise their rights under the Maine Human Rights Act or because they assisted in the enforcement of the Act. Such action or assistance includes, but is not limited to: filing a complaint, stating an intent to contact the Commission or to file a complaint, supporting employees who are involved in the complaint process, cooperating with representatives of the Commission during the investigative process, and educating others concerning the coverage of the Maine Human Rights Act.

[4] Three other former [redacted] employees also filed Commission complaints, alleging that after Complainant brought complaints forward on behalf of people she supervised that the other employees were treated in a discriminatory/retaliatory fashion as well. All four of these complainants either left or were terminated from their employment, and all four complainants were the longest tenured employees to be terminated and generally much older than other terminated employees.

Me. Hum. Rights Comm'n Reg. § 3.12.

28. In order to establish a prima-facie case of WPA-protected retaliation, 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.

29. In order to establish a prima-facie case of MHRA retaliation, Complainant must show that she engaged in statutorily protected activity, she was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56; *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006). The term "materially adverse action" covers only those employer actions "that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 126 S. Ct. 2405.

30. The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in MHRA or 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.*

31. In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant's protected activity, although protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 2013 WL 3155234, *16 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).

32. Here, Complainant has established a prima-facie case that she was terminated for engaging in protected activity under the MHRA and the WPA. Ms. [redacted] alleges that [redacted] terminated her employment after she reported sexual harassment on the part of Maintenance Person in April, 2010. The termination took place five months after her report of sexual harassment, a time sequence that in this case – given Complainant's glowing performance reviews for the prior 20+ years – that raises an inference of a causal link.

33. Respondent provided evidence to demonstrate a nondiscriminatory reason for the termination, namely that Complainant violated a number of company rules and expectations.

34. In the final analysis, none of the explanations provided by Respondent pass the straight-face test, particularly in light of the fact that Complainant had been employed by the company for 24 years, earning glowing performance appraisals, and had nothing in her personnel file which indicated or inferred that her employment was in jeopardy.

a) The first performance issue cited was a reprimand issued on June 23, 2010 because Complainant did not issue discipline to an employee for a performance issue, specifically, one no call/no show. This reprimand was issued prior to the training session which the company conducted on June 29, 2010 to review with employees the various topics, including properly documenting performance issues. The reprimand was considered part of the "accumulation of offenses" even though the company felt it necessary to conduct a training session on documenting performance issues. It was patently unfair for Respondent to reprimand Complainant for a supervisory issue upon which it had not trained her. Additionally, the issue at hand – not issuing disciplinary action for one no call/no show – hardly seems serious enough to warrant a formal reprimand.

b) In January, 2011, Ms. [redacted] was issued a reprimand for discussing an employee's alleged policy violation in front of other employees in a non-private area. At a meeting held by General Manager with supervisory employees, Complainant questioned why one of the supervisory employees had stayed in an off-market room overnight. Complainant believed that the meeting was the appropriate place to raise such a question, as she was seeking direction on what the company policy was and how it was to be applied. To the extent that the meeting was held in a non-private area, Ms. [redacted] attended the meeting at the location chosen by General Manager. Again, as Ms. [redacted] was seeking general information on how to understand and implement a policy, a formal reprimand seems like an overreaction in that instance.

c) In March of 2011, Ms. [redacted] was reprimanded for being aware that two of her former employees, GP and MP, were on company property without prior approval by management, and for Ms. [redacted] failure to take appropriate action. Ms. [redacted] had no idea that the former employees were there; she assumed that someone else had given the employees permission to retrieve their belongings because she did not let them onto the property. General Manager berated Ms. [redacted] for letting the employees onto the property and refused to listen to her explanations. Ms. [redacted] was then written up for allowing these former employees onto the property when she had no idea that they were coming to the property. Since General Manager did no investigation into who was responsible for allowing MP and GP onto the premises, this reprimand, too, was unwarranted.

d) On June 28, 2011, General Manager told Ms. [redacted] that there was "gossip" circulating at the hotel as to why a former employee had quit. Ms. [redacted] replied that the only person in my department who she was aware of having discussed it was Former Employee, AM, and that she had already been spoken to about the issue. Ms. [redacted] also told General Manager that she should speak with the front desk staff as Former Employee, AM, had told her that the front desk staff who worked in the afternoon had told her that the employee had quit. Ms. [redacted] did not believe it necessary to issue any formal discipline to Former Employee, AM, as she was satisfied that she would not discuss the matter in the workplace. General Manager's issuance of a reprimand for other employees' gossip went beyond the pale, especially since this final instance of a minor infraction led General Manager to terminate Complainant's 24-year employment due to a "continued failure to meet standards of performance and essential job duties" and an "accumulation of offenses."

e) Even after Ms. [redacted] s termination, the company criticized her for not having availed herself of the company's process for reporting discrimination or retaliation. It defies logic that a

company would expect an employee who has been terminated from employment to file an internal complaint with the company from which she has been terminated.

35. Complainant carried her overall burden of proving that there was, in fact, a causal connection between her reports of sexual harassment and her termination, because – as noted above – her employment was terminated for reasons which are tenuous at best. Shortly after she reported the sexual harassment by Maintenance Person in April, 2010, she sensed that the dynamic between General Manager and her had significantly shifted; it was apparent to her that, in General Manager's view, she could do nothing right. Complainant was right. After a 24-year career with the company and incidents which were always overlooked, the message that General Manager wanted to eliminate potential threats to Maintenance Person's job security seems very clear. General Manager followed through, and caused Complainant to be terminated as a result of her complaints of sexual harassment. Complainant showed that but for her reports of sexual harassment, Respondent likely would not have terminated her employment.

36. It is found that Respondent unlawfully retaliated against Complainant for her MHRA and WPA-protected activity.

37. Unlawful retaliation is found.

VI. Recommendation:

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

1. There are **REASONABLE GROUNDS** to believe that Respondent [redacted] retaliated against Complainant [redacted] for engaging in protected activity under the Maine Human Rights Act and the Whistleblowers' Protection Act by terminating her employment;

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

3. There are **No Reasonable Grounds** to believe that Respondent [redacted] discriminated against Complainant [redacted] due to age or sex; and

4. The claims should be dismissed in accordance with 5 M.R.S. § 4612(2);

Amy M. Sneirson, Executive Director

Michèle Dion, Investigator