



Maine Human Rights Commission

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EXECUTIVE DIRECTOR

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May 1, 2015

INVESTIGATOR'S REPORT E13-0269

██████████ (Cape Elizabeth)

v.

██████████ ██████████ (Portland)

I. Complaint:

Complainant ██████████ alleged that Respondent ██████████ ██████████ retaliated against her by terminating her employment after she reported unsafe conditions in the workplace.

II. Respondent's Answer:

Respondent denied retaliation and alleged that Complainant's employment was terminated because of her poor communication and interaction with coworkers and management.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: March 5, 2013.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): June 10, 2013.
- 3) Respondent employs 345 people and is subject to the Maine Human Rights Act ("MHRA"), the Maine Whistleblowers' Protection Act ("WPA"), and state employment regulations.
- 4) Complainant is represented by Tim Steigelman, Esq. Respondent is represented by Melissa Hewey, Esq.
- 5) Investigative methods used: A thorough review of the materials submitted by the parties, requests for further information and documents, witness interviews. 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 relevant parties, issues, documents, and facts in this case are as follows:

- a) Complainant worked as the Aquatics Director at the [REDACTED] [REDACTED] [REDACTED] from January 16, 2013, until March 5, 2013.
 - b) Respondent operates a community resource center based in Southern Maine, which is one of thousands of [REDACTED] centers in the United States.
 - c) "Portland Director" was the executive director of the Portland branch where Complainant worked. Portland Director is no longer employed by Respondent.¹
 - d) "HR Director" was the human resources director for Respondent and was based at the Biddeford branch. HR Director oversaw human resources for all of the Southern Maine branches. HR Director is no longer employed by Respondent.²
- 2) Complainant provided the following:
- a) Complainant's job, in part, was to monitor the chlorine and pH levels in the swimming pools to make sure they complied with state regulations and were maintained at a safe level for swimmers. She repeatedly reported safety concerns to Portland Director when the chemical levels were wrong, as she believed the chemical levels in the pool would endanger the health and safety of swimmers.
 - b) Portland Director did not address Complainant's health and safety concerns, and instead pressured her to keep the pools open when the levels were unsafe, and reprimanded her for placing too much importance on safety instead of maintaining a relationship of trust with members and maintaining internal harmony with staff. Complainant believes Respondent discharged her to avoid fixing the safety concerns and to keep up appearances for members.
 - c) Portland Director's notes from a meeting with Complainant show that Portland Director told Complainant that she was "bordering on coming across as obsessive with regards to policy and water testing and pool closures." (See Exhibit B.) Portland Director also placed high importance on Complainant reporting a pool closure to her prior to closing the pool, even if the need to close the pool was immediate. Respondent was clearly concerned with its image with its members and avoiding the perception that there was a safety concern. This is all clear from Portland Director's own notes (see Exhibits).
 - d) On Feb 13, 2013, Complainant had an argument with a coworker (a maintenance employee) regarding her concern for unsafe and noncompliant conditions in the pool area. Complainant had previously spoken to a lifeguard employed by Respondent (who was also a firefighter) who had pointed out to her approximately 8 fire code violations in the pool area and locker rooms. Complainant approached the maintenance employee and attempted to discuss how to fix the issues. The maintenance employee became upset and threw his hands up in the air and walked away, stating something to the effect of "too much". The conversation took place in Complainant's office, and only continued outside of her office (as Respondent alleges) because the employee stormed out. The

¹ The Investigator attempted to interview Portland Director, but she declined to participate in the investigation.

² HR Director was interviewed over the phone, but stated that she had no independent recollection of the events in this case and that Portland Director would be the most useful source of information.

employee later called and apologized to Complainant, stating his frustration that his maintenance department was half-staffed and did not have the manpower to fix all of the violations or even maintain necessary cleanliness.

- e) On February 21, 2013 Complainant was involved in a heated conversation with a camp instructor employed by Respondent on the pool deck. The incident was a result of an accident that had occurred the day prior involving the safety of a child camper. The child had gotten into the water without being required to take a swim test or wear a life jacket (which was a new safety policy Complainant had helped to implement). The child could not swim and had to be pulled out of the water after becoming distressed. Complainant felt this incident should not have happened, and approached the camp instructor the following day and asked which of the campers would take the swim test and which of them would wear life jackets. The camp instructor became agitated, raised his voice, and loudly berated Complainant in front of staff and members.
 - f) Complainant reported her altercation with the camp instructor to Portland Director that day. She also called HR Director and expressed her concern about the incident, as well as her concern that Portland Director seemed to be taking Complainant's pool safety concerns personally. Complainant then met with Portland Director and HR Director on February 22, 2013. Complainant never offered Portland Director her resignation, or mentioned this before or during this meeting. Portland Director abruptly offered to "accept" her resignation during the meeting, and Complainant refused.
 - g) On February 28, 2013 and March 2, 2013, Complainant was forced to close the pool because of unsafe chemical levels. Portland Director reprimanded Complainant (as shown in her own notes) for not notifying Portland Director prior to closing the pools, even though this is not a practical expectation, especially if a need to close the pool occurs early in the morning or on a weekend when Portland Director and other administrative staff are not working or reachable. Also, when the pool has unsafe chemical levels, it must be closed immediately regardless of whether it occurs before or after alerting Portland Director. Complainant was attempting to do her job appropriately to maintain safety, and it was clear that Portland Director did not value safety on this level.
- 3) Respondent provided the following:
- a) Complainant was not discharged for reporting safety issues. Complainant's job was to monitor safety and report concerns, and she was always praised for doing so. Complainant was discharged for unacceptable interactions with her coworkers and others, which is well documented in the record. Complainant was warned about this issue, and management attempted to work with her to help her improve. When Complainant's behavior did not improve, she was discharged.
 - b) Complainant was involved in several altercations with her coworkers shortly after she began employment which required Portland Director's involvement. On February 14, 2013, Complainant and a coworker were involved in a heated exchange. On February 21, 2013, Complainant was involved in a dispute with a different coworker over the change in a safety procedure regarding personal flotation devices. Portland Director's notes of these incidents show that Complainant was counseled about her response to the situations and her interaction with employees (*see* Exhibit A). Portland Director was supportive of Complainant's concerns about safety and praised her for them.
 - c) Portland Director and HR Director met with Complainant on February 22, 2013, to discuss the previous day's incident. The day prior, Complainant had attempted to resign but Portland Director would not accept her resignation at the time. During the meeting on February 22, 2013, Complain-

ant apologized for some of her previous interactions with coworkers. Complainant and management agreed that Complainant would receive coaching on her employee communication and interaction.

- d) On February 28, 2013, Complainant closed the pools because she believed the chemical levels were unsafe. She did this without first notifying Portland Director. Portland Director told Complainant to always notify her first so that members could be notified of the closure. Despite these instructions, Complainant closed the pool before notifying Portland Director on March 2, 2013.
- e) The March 2, 2013 incident occurred over the weekend, and caused significant concern and upheaval for staff. Portland Director met with Complainant on March 4, 2013, and discussed her concerns. Portland Director told Complainant that she felt Complainant was being borderline obsessive with water testing and pool closures, and that Portland Director was concerned that Respondent's members and employees were "picking up on a level of anxiety that had not been present before". See Exhibits B and C.
- f) Shortly after this meeting, a coworker approached Portland Director and told her that Complainant had caused an intolerable level of stress over the weekend and had called the pool vendor (an outside contractor) approximately 40 times regarding the pool issues. Portland Director verified this with the pool vendor, and subsequently decided to terminate Complainant's employment.

V. Analysis:

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The WPA protects an employee who "acting in good faith... reports to the employer or a public body, orally or in writing, 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. § 833(1)(B).
- 3) The MHRA prohibits discharging an employee because of previous actions that are protected under the WPA. See 5 M.R.S. § 4572(1)(A).
- 4) 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.
- 5) 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 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 employment action." *Id.*
- 6) 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*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).

- 7) Here, Complainant establishes a prima-facie case of WPA retaliation by showing that she engaged in protected activity (reporting what she felt were unsafe chemical levels in the pool and pool practices),³ she was discharged, and her discharge was in close proximity to her complaints of safety concerns.
- 8) Respondent produced some probative evidence to show that Complainant was discharged for her negative interactions with coworkers and her handling of tense situations that were documented in Portland Director's incident notes (see Exhibits). It is undisputed that Complainant was involved in heated conversations with coworkers and that a coworker had reported to Portland Director that Complainant was causing her stress.
- 9) In the end, however, Complainant was able to show that were it not for her safety complaints, Respondent would not have likely terminated her employment. Reasoning is as follows:
 - a) While it is undisputed Complainant was involved in two heated conversations with coworkers regarding incidents on February 14, 2013 and February 21, 2013, it is also undisputed that these incidents arose directly from Complainant expressing concerns about safety. The February 14, 2013 incident involved a maintenance employee who Complainant approached regarding fire code violations, and the February 21, 2013 incident involved a camp instructor who Complainant approached regarding child safety in the pool.
 - b) Respondent does not allege that Complainant's safety concerns on these two dates were unwarranted. Instead, Respondent alleges that Complainant's communication and interaction with the employees during these incidents was unprofessional unacceptable. It is unclear, however, why Complainant was blamed for how the interactions unfolded. Portland Director's own notes from the February 14th incident state that the maintenance employee had apologized to Complainant and admitted that he had not handled the situation well (see Exhibit A). Her notes from the February 21st incident acknowledge that an argument ensued because the camp instructor was "resistant and not pleased" because Complainant was attempting to implement a safety policy that was new to him. Furthermore, it is undisputed that Complainant was upset by the interaction and reported it that day to Portland Director and called HR Director to discuss her concerns further. There is no evidence that Complainant was at fault for the escalation of this interaction, and in fact the record reflects that

³ Respondent argued that Complainant could not establish a prima-facie case because her reports fell within her regular job duties, and therefore were not protected activity under the WPA, citing *Capalbo v. Kris-Way Truck Leasing, Inc.*, 821 F. Supp. 2d. 397 (D.Me. 2011). While federal courts have recognized a job duties exception under the WPA, the Law Court has not yet done so. Moreover, applicable federal precedent demonstrates that to fall within the job duties exception, the employee's reports have to be aligned with the employer's instructions and interest. See *Winslow v. Aroostook County*, 736 F.3d 23 (1st Cir. 2013). Oppositional behavior which defies the employer's interests is protected activity. In this case, Complainant's written job description required her to "[c]heck and record pool chemistry and discuss related concerns with Facilities department", and also made her responsible for participants' health and safety. Her actual instruction from her employer, however, made clear that she was not expected to be "obsessive" about water testing, and that the perception of Respondent's members was more important. She was also told to notify Portland Director before closing the pool, even though state regulations required her to do so immediately. Under the circumstances of this case, it is found that Complainant went beyond her job duties and acted in opposition to her employer in order to oppose health and safety risks. As such, her conduct amounts to protected activity under the WPA.

the camp instructor was at least the same if not more unprofessional in his behavior during the incident (*see* Exhibit A).

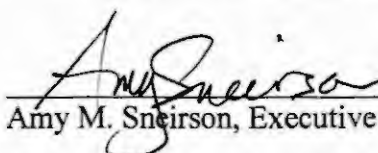
- c) On March 2, 2013, which fell on a weekend, Complainant closed the pool due to unsafe chemical levels in the pool. Respondent does not dispute the chemical levels in the pool that day or Complainant's decision to close the pool. A statement by a coworker who was working that day (and who later complained to Portland Director about the stress level over the weekend) corroborates that she and other employees were working to fix the problem and bring the pool up to standard. There is no evidence that Complainant was at fault for the incident or that she failed to act appropriately to remedy the situation.
- d) Respondent alleged that Complainant acted inappropriately during this incident by not notifying Portland Director prior to closing the pool, and by causing an unacceptable level of stress among staff. Respondent alleged that these are the reasons Portland Director decided to terminate her employment. Respondent failed to point out, however, what Complainant could have done differently to avoid the stress caused to employees by an unavoidable situation beyond her control, or what difference it would have made to call Portland Director prior to closing the pool, since she would have closed it immediately anyway for safety reasons. Furthermore, Portland Director's notes regarding the incident (Exhibit C) show that Complainant did call Portland Director at 7 a.m. prior to closing the pool to discuss her concern with the chemical levels. Portland Director notes that she discussed the issue with Complainant, but then does not state what she told Complainant to do (close the pool or not) or whether there was any resolution.
- e) Portland Director's note about Complainant being "borderline obsessive" with testing the pool water and closing the pool can be seen as indicative of retaliatory intent. Portland Director was plainly unhappy that Complainant was focusing on these safety concerns, and worried about creating a perception that the pool was unsafe. However, Portland Director cannot dispute that the chemical levels in the pool were unsafe.
- f) In [REDACTED] while Complainant's safety concerns may have caused stress or anxiety among staff and management, it appears that were it not for her safety complaints, she would not have been discharged.

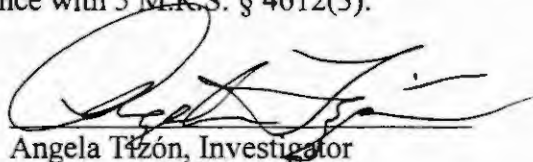
10) Retaliation in violation of the WPA was found.

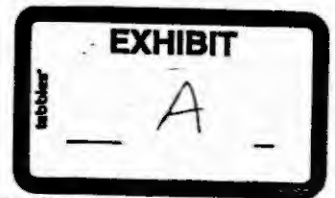
VI. Recommendation:

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

1. There are **Reasonable Grounds** to believe that [REDACTED] [REDACTED] Maine retaliated against [REDACTED] Gray in violation of the WPA by terminating her employment after she reported unsafe conditions in the workplace;
2. Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).


Amy M. Sneider, Executive Director


Angela Tizon, Investigator



On Thursday, February 14, [redacted] and [redacted] had a conversation on the cardio floor about facility items that [redacted] was trying to bring to his attention. The exchange – which included a misunderstanding that was cleared up later – got heated and ended when [redacted] threw up his arms and walked away. He got to his office and called [redacted] right away to apologize. He said that he realized he didn't handle it well. [redacted] was emotional about it and came to see me. We set up a meeting with [redacted] Mary and myself for Friday morning.

That evening, I sent an agenda for the meeting that included each of them coming to talk about their individual styles and how better understanding each other could help them to communicate better.

On Friday, February 15, we had a conversation that, while at times it was difficult to stay on topic, ultimately resulted in key action items that could be implemented immediately to help them to better work together.


Through follow-up (casual) conversations in the early part of the following week, it was clear that both were making an effort to build their working relationship.

What I felt [redacted] learned from this:

- How to utilize the work order process instead of verbally tossing facility issues to [redacted], sometimes in public venues or at inopportune times
- An appreciation for [redacted] workload and an understanding of what constitutes a priority item
- That professional conversations need to happen off the floor
- Not to make assumptions that [redacted] is intentionally ignoring facility issues, which she acknowledged was framing her approach

What I felt [redacted] learned from this:

- That he could play a stronger role in informing [redacted] about where her work orders were on the priority list and the progress that was being made with them



On Thursday, February 21, [REDACTED] and [REDACTED] had a heated conversation on the I-Pool deck about a change in our swim test and flotation device use that [REDACTED] was trying to bring to his attention. The conversation was prefaced by confusion over who was supposed to be using the pool at that time [REDACTED], had reserved the pool time for Vacation Camp, through [REDACTED] by email and copied [REDACTED]. However, Open Swim was still listed on the published schedule that members and membership staff had access to. While [REDACTED] went back and forth between [REDACTED] group and members changing in the Family Locker Room, her state was described as frenetic by [REDACTED] and by one of the family members I spoke with later.

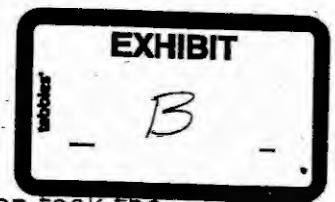
Once it was established that [REDACTED] would stay in the I-Pool, she approached the subject of which of his children would be getting swim tested and which would be expected to wear PFD's. Because this was a change in procedure for [REDACTED] and his staff, they were resistant and not pleased. By all accounts, [REDACTED], was getting frustrated with what he described as the scattered approach at implementing this [REDACTED] and later in a meeting with [REDACTED], described it as berating). The exchange on the deck got heated and at 10:20 (10am was the swim start time), [REDACTED] - emotionally - interrupted a meeting I was in and asked if she could speak with me. We talked in her office from 10:30 until we moved to my office to bring [REDACTED], into the conversation at 1:00 and then finally ended for the day at 1:45.

What came out of these conversations:

- That our expectations are for directors to handle unexpected situations (such as a scheduling mix-up) with professionalism and to take it in stride so that members are understanding and that co-workers can work together to solve the problem
- That when emotions flare, directors are expected to temper them and take the conversation off the deck and into a private space
- [REDACTED] jumped to the conclusion that [REDACTED] did not want to keep his children safe in the water because he was resistant to the procedure change, she learned that making that assumption is not accurate but that it was in how she was receiving the information that made the situation so awkward
- [REDACTED], and [REDACTED] will work together to come up with a comprehensive plan for rolling out the policy changes, which will include discussing as a senior staff team on Tuesday the 26th, putting it in writing, sharing with all staff and members and educating aquatics staff so that all understand it thoroughly
- We set the expectation that any changes going forward will follow a procedure before implementing and not approach it piece meal.
- [REDACTED] took issue with [REDACTED] words, body language and demeanor, which she expressed in a follow-up meeting with [REDACTED] on Friday, February 22. An investigative conversation will follow with [REDACTED] on Monday, February 25.

Also discussed while in her office from 10:30-12:45, we talked about her role as a director and how I was concerned that she was mired in the details but that it seemed like the transitional period was taking more than both of us had anticipated. I repeatedly voiced my support (on this and several occasions) for her good work in studying the codes and uncovering areas of improvement.

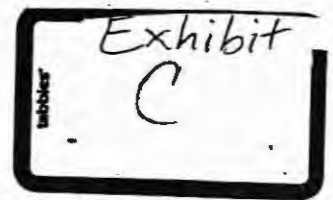
I want to note here that during her first few weeks, Mary had many questions about safety concerns. I agreed with investigating her concerns and made it a point of supporting her by researching and emailing her my research on questions that she had. I used [redacted] website, I communicated with our [redacted] rep through [redacted], and I researched information that the Y has available to us through their website and in best practices manuals. I also tried to work collaboratively with her by approving her policy change recommendation that she put into writing, regarding the PFD's and swim testing, and by including her on the staff meeting agenda on 2/26 to present to the rest of the senior team.



On Monday, March 4, I met with [REDACTED] at 9:45 (she stopped by and then took the time I had reserved with [REDACTED] at 10:00). She was feeling as though I was not as concerned about the pool chemical levels as I was about the member service that we are providing. She asked to get on the same page with me. I reiterated my philosophy that without people, we have no pools.

What came out of this conversation:

- [REDACTED] gained a deeper understanding of my philosophy on keeping people safe while building trust and confidence in our management of our programs through our relationships with members
- I was able to express that I felt we were bordering on coming across as obsessive with regards to policy and water testing and pool closures
- I was able to express that I felt we had been dealing with dramatic moments lately and I was concerned that it was no longer just transition but perhaps something that would remain
- I was able to express that I was worried that our members and certainly our co-workers are picking up on a level of anxiety that had not been present before



On Thursday, February 28, I arrived at the Y at 8am for a Corporate Board Meeting, ran into [REDACTED] in the hall and was told that the pool did not open that morning due to unsafe chemical levels. My immediate response was to impress upon her that I need to be notified of this *before* the decision is made and that there are communication avenues for us to use to let our members know – through [REDACTED] and the front desks. She apologized.

On Saturday, March 2 at 7am, I received a text and then a call from [REDACTED]. She was concerned about the levels in the I-Pool and would be closing the pool to perform a test that would take 20-30 minutes, but anticipated having the pool back up and running in time for 8:30 am swim lessons. I was sick in bed and had been awoken by her text/call, and I told her this because she was going on for 15 minutes with many details and I was trying to focus her to get to the crux of the issue in that moment.

We hung up and at 10am, I received a text from [REDACTED] asking if I was aware that the I-Pool was closed. All lessons had been moved down to the Malcolm Pool. I had not been made aware and it had not gone through [REDACTED] for communication out to members.

I confirmed with [REDACTED] by text. Also reminded her not to give any unnecessary information to members with regards to unsafe levels in the pool and asked her to talk with me on Monday. She responded that she would be calling another pool company for help on Monday so that we could get to a solution as soon as possible. My message to her was to fix the issue, quickly, and with as little fanfare as possible so that we could continue to serve our members.

I received a voice mail from [REDACTED], at 11:30am, she was tearful and obviously stressed out, she was the one on site dealing with the pool issues on Saturday. We arranged for a Monday morning conversation in person.

On Monday, March 4th in the afternoon, [REDACTED] convened a meeting regarding the pool maintenance, which included herself,

[REDACTED] I have impressed upon her the importance of working well with the facilities department and getting on the same page and I do feel this meeting was important. I have a watchful eye, at this point, to the sheer number of hours that everyone is spending on pool maintenance, as countless hours have been absorbed and is beginning to have an effect on their other obligations.

After [REDACTED] and I spoke on 3/2 at 7am, I received a text from [REDACTED] at 9:49 am informing me that the pool was still closed. After the 10am "Seriously!!!???" comment, I texted [REDACTED] to ask her to confirm this new information by text. I wanted it in writing, because I had a suspicion it was going to be necessary to document as she was clearly not understanding the importance of communicating with me prior to making pool closure decisions.