



# Maine Human Rights Commission

# 51 State House Station, Augusta, ME 04333-0051

*Physical location: 19 Union Street, Augusta, ME 04330*

Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711

[www.maine.gov/mhrc](http://www.maine.gov/mhrc)

Amy M. Sneirson  
EXECUTIVE DIRECTOR

Barbara Archer Hirsch  
COMMISSION COUNSEL

## INVESTIGATOR'S REPORT MHRC Case Number E15-0325 May 15, 2017

**Nicole L. Bourgeois (Freeport)**

v.

**Antonia's<sup>1</sup> (Freeport)**

### **I. Summary of Case:**

Complainant Nicole L. Bourgeois, a server for Respondent Antonia's from early December 2014 through February 7, 2015, alleged that Respondent retaliated against her for engaging in protected activity (reporting wage problems) when it suspended her from work and ultimately terminated her employment. Respondent, a restaurant, denied retaliating against Complainant for her wage report; Complainant was discharged from her employment for engaging in illegal activity in the workplace and because she requested too much time off. The Investigator conducted a preliminary investigation, which included reviewing all of the documents submitted by the parties and requesting additional information. Based upon all of this information, the Investigator recommends that the Commission find that there are reasonable grounds to believe that Respondent discriminated against Complainant based on her protected class status.

### **II. Jurisdictional Data:**

- 1) Dates of alleged discrimination: February 6, 2015 through February 7, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 7, 2015.
- 3) Respondent has 22 employees and is subject to the Maine Human Rights Act ("MHRA"), the Maine Whistleblowers' Protection Act ("WPA"), as well as state employment regulations.
- 4) Neither Complainant nor Respondent is represented by counsel.

### **III. Development of Facts:**

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

Complainant worked for Respondent as a server. Complainant observed a discrepancy with one of her paychecks and reported her concern to her supervisor ("Supervisor"). Supervisor told her there was no problem with the payment and blamed Complainant for not completing paperwork in a timely fashion.

---

<sup>1</sup> Complainant named Antonia's as the respondent in her complaint; Respondent provided that its legal name is Antonia's Pizzeria LLC. Because Complainant has not amended her complaint, the name used by Complainant has been retained.

Shortly thereafter, Supervisor suspended Complainant for two weeks. When Complainant was supposed to return, Supervisor told her that she was discharged from her employment. Supervisor threatened Complainant to attempt to dissuade her from reporting her wage concerns. Complainant did report her concerns to a state agency (“Agency”), which investigated and told her Respondent owed her money.

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

Respondent paid Complainant in a lawful manner. At the conclusion of Agency’s investigation, Respondent paid the balance of what Agency said was owed to Complainant. Complainant reported a concern about her paycheck. After she made this report, Supervisor learned that Complainant attempted to solicit other employees to purchase illegal drugs. Supervisor suspended Complainant from work and then terminated her employment for engaging in illegal behavior in the workplace and requesting too much time off as a new employee.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties:

- a) From early December 2014 through early February 2015, Complainant worked as a server for Respondent.
- b) On about February 6, 2015, Complainant noticed an error in her paycheck and informed Supervisor about the error via text message. The two exchanged a series of texts about Complainant’s concerns about the wage error. Respondent believed that it paid Complainant lawfully. Complainant said she was going to look into the wage issues with Agency. Complainant recalled Supervisor replying that “I wish you cared this much about your job unfortunately because of slow business I’ll be cutting your hours next week”.
- c) The next day, Supervisor suspended Complainant for two weeks for harassment for texting him about her wage concerns outside of business hours. Supervisor accused Complainant of being incompetent and said his actions were legal.
- d) After her suspension and questioning her pay, two coworkers told Supervisor that Complainant told them they could purchase drugs from her. Supervisor believed that Complainant engaged in illegal activity in the workplace by soliciting her coworkers to purchase drugs.<sup>2</sup>
- e) Complainant learned that Respondent was advertising to hire a full-time server.
- f) Respondent believed that Complainant requested excessive time off as a new employee.
- g) On February 7, 2015, Respondent discharged Complainant based on the suspicion that Complainant was selling drugs in the workplace.<sup>3</sup> Supervisor told Complainant that he never wanted to hear from her again or he would take action.
- h) Complainant made a report to Agency. At the end of its investigation, Agency found that Respondent owed Complainant additional money. Respondent paid Complainant.

---

<sup>2</sup> Complainant reported that she has never been criminally charged for selling drugs.

<sup>3</sup> In Respondent’s close of evidence submission, submitted May 2, 2017, it raised for the first time that Supervisor had planned to cut Complainant’s shifts in February when business slowed down and give Complainant’s shifts to top servers.

**IV. Analysis:**

- 1) The MHRA provides that the Commission or its delegated investigator “shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 Maine Revised Statutes (“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) The MHRA prohibits retaliation against employees who, pursuant to the WPA, make good faith reports of what they reasonably believe to be a violation of law or a condition jeopardizing the health and safety of the employee or others in the workplace. *See* 5 M.R.S. § 4572(1)(A); 26 M.R.S. § 833(1)(A)&(B).
- 3) To establish a prima-facie case of retaliation in violation of the WPA,<sup>4</sup> 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; One method of proving the causal link is if the adverse job action happens in “close proximity” to the protected conduct. *Id.* at 1998 ME 227, ¶ 16, 719 A.2d at 514-15.
- 4) 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 (1<sup>st</sup> 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.* 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 Maine Human Rights Comm’n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).
- 5) Complainant established a prima-facie case by showing that she reported concerns about unlawful pay practices and she was suspended the following day and then discharged.
- 6) Respondent provided a legitimate, nondiscriminatory reason for Complainant’s discharge by explaining that Complainant was discharged for selling drugs in the workplace.
- 7) At the final stage of the analysis, Complainant has demonstrated that Respondent’s reason was false or irrelevant and that unlawful retaliation was the reason for her discharge, with reasoning as follows:
  - a) Complainant alleged that she reported concerns about unlawful payment practices when Respondent combined her training pay and her tips. Complainant told Respondent she would contact Agency. In response, Respondent suspended her for two weeks. The next day Respondent terminated her employment. Respondent argued that after Supervisor suspended Complainant he learned from employees that she was soliciting employees to purchase drugs from her. The record is devoid of any evidence that Respondent discussed the accusations related to selling drugs with Complainant.

---

<sup>4</sup> In order to determine whether Complainant has met the reasonable grounds standard, the Commission must determine whether the Complainant has at least an even chance of succeeding *at trial*. Accordingly, *Brady v. Cumberland County*, 2015 ME 143, ¶39 which holds that the burden-shifting analysis used here is unnecessary when a court is deciding a motion for summary judgment, is inapplicable. *Id.* at ¶ 39, n.9 (expressly not considering applicability of burden-shifting structure at trial).

- b) The record shows that Complainant complained about what she believed to be an unlawful practice and she was immediately suspended, then discharged the next day. Based on the “even chance” standard of prevailing in a civil action, the timing is enough to establish a causal connection between her reporting and her suspension and discharge. It is curious that Respondent raised for the first time in its close of evidence submission that Supervisor planned to give Complainant’s hours away based on an alleged business slow down. The record contained no evidence supporting this new explanation. Further, Respondent acknowledged that Supervisor suspended Complainant for harassing him about her wages after hours. Thus there is an inference that the adverse employment actions were based on her protected activity.
  - c) Respondent argued that Agency investigated and determined that Complainant was only owed \$20.00 and that because the money was paid, it did nothing wrong. Respondent’s payment of money at the conclusion of Agency’s investigation does not factor into the WPA analysis.
- 8) Retaliation in violation of the MHRA is found.

**V. Recommendation:**

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

There are **Reasonable Grounds** to believe Respondent Antonia’s retaliated against Complainant Nicole L. Bourgeois in violation of the WPA when it discharged her from her employment, and the complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).

  
\_\_\_\_\_  
Amy M. Sneirson, Executive Director

  
\_\_\_\_\_  
Alice A. Neal, Chief Investigator