Maine Human Rights Commission
51 State House Station, Augusta, ME 04333-0051
Physical location: 19 Union Street, Augusta, ME 04330
Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711
www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT
MHRC Case No. E17-0002
July 30, 2018

Madeline Auclair (Saco)

v.

Coasters[1] (Biddeford)

I. Summary of Case:

Complainant, who worked for Respondent as a bartender and server, claimed that Respondent discriminated against her due to her disability and retaliated against her because she reported an unsafe condition by discharging her. Respondent, a bar, denied discrimination and asserted that it did not discharge Complainant and it did not know of her disability. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, holding an Issues and Resolution Conference ("IRC"), and requesting additional information. Based upon this information, the Investigator recommends a finding that there are no reasonable grounds to believe Respondent unlawfully discriminated against Complainant due to her disability, but there are reasonable grounds to believe Respondent unlawfully retaliated against Complainant.

II. Jurisdictional Data:

1) Dates of alleged discrimination: August 8, 2016.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): January 3, 2017.

3) Respondent has five employees and is subject to the Maine Human Rights Act ("MHRA") and the Maine Whistleblowers' Protection Act ("WPA").

4) Complainant is represented by Chad T. Hansen, Esq. Respondent is represented by Jeffrey Bennett, Esq.

III. Development of Facts:

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

> Complainant worked for Respondent as a bartender and server. While at work on August 6, 2016, Complainant attempted to plug her phone into an electrical outlet behind the bar and received an electrical shock that caused a physical reaction. Complainant called the manager ("Manager") to inform her of the incident, and called [redacted]. Complainant went to the

[1] Complainant named Respondent as Coasters. Respondent provided that its legal name is Burke Enterprises. As Complainant did not amend her complaint, the name she used has been retained.

[redacted], and was told there that she could return to work on August 8, 2016. Before she could return, however, Respondent called Complainant and told her she was "done" and it was stupid for her to stick her fingers in an outlet. Complainant believes she was discharged because of her disability and in retaliation for reporting the unsafe outlet.

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

Complainant was not discharged, she quit. She never requested an accommodation for her disability and Respondent was not aware she had a disability. Complainant is not protected by the WPA because all she reported was receiving a shock while plugging in her phone. Furthermore, Complainant was routinely absent and not profitable.

3) The Investigator made the following findings of fact:

a) Complainant worked for Respondent as a bartender and server until August 8, 2016.[2]

b) Complainant has a [redacted], and asserted the condition is a '[redacted]'[3] It is undisputed that Respondent did not know about this condition prior to August 6, 2016.

c) On August 6, 2018, while at work, Complainant reached under the counter to plug in her phone into an electrical outlet and felt a sensation that shot up her right arm into her neck. Complainant believes she received an electric shock from the outlet. She had a tingling and stiff sensation in her right arm with spasms in her muscles and chest pain.

d) Complainant messaged Manager asking if she could go to the hospital because of the electrical shock. She also [redacted] to get advice on whether this would affect [redacted].

e) [redacted] returned Complainant's call and [redacted]. Complainant called Manager to inform her that she was going [redacted], and believes she told Manager of [redacted] at that time.[3] Manager replied that Complainant was being ridiculous and told her to go home.

f) Complainant went to the [redacted] and was told she could return to work on August 8, 2018. Complainant informed Manager that she would not be able to work on August 7, 2018, because of the restriction.[4] Complainant believes she dropped off the work restriction note at the bar. The note had attached to it ten pages of [redacted] It had two short references to Complainant stating her past medical history included '[redacted]'

g) On August 8, 2018, Owner 1 told Complainant that she was "done"[5] and that it was not a smart thing for

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[2] Respondent is owned by a husband and wife ("Owner 1 and Owner 2") and managed by their daughter (Manager).

[3] [redacted] is a disability without regard to severity under the MHRA. 5 M.R.S. § 4553.

[3] At the IRC, Complainant initially stated that she was not sure if she notified Respondent of a disability. Later, after having her memory refreshed by the complaint, she stated the version in the complaint was accurate.

[4] Complainant did not assert that this was a request for reasonable accommodation. Even if she had, there was not enough provided to Respondent at the time that would have put it fairly on notice that the work restriction was for a disability.

[5] Complainant recalls Respondent saying, "you're done." Respondent recalls saying, "you're done I guess".

her to put her finger in the outlet.

h) Complainant believes she contacted Manager to find out when she could pick up her personal belongings at the bar and was told that she could come back in and get her "shit."[6] Respondent maintains that Complainant took her belongings with her when she left to go to the hospital.[7] Complainant's mother provided an affidavit stating that she had taken Complainant back to the bar to retrieve her belongings on two separate occasions after her employment ended.

i) On August 16, 2016, Complainant's attorney wrote Respondent asking it to provide written reasons for Complainant's termination. Respondent wrote back stating that it was because she did not make enough money, she was not well liked by customers or employees, and she took time off and asked to leave early often.[8] Respondent also wrote "The night she stuck her finger into a[sic] electrical outlet trying to plug in her phone charger… was unnecessary. I tried doing it in the two outlets that was[sic] behind that bar and nothing happened. Try it sometime. Not that it did not happen."

j) There are no written records of Complainant being absent or having other performance issues. Respondent does not keep such records.

k) In its submissions to the Commission, Respondent asserted that Complainant was not discharged, but quit. Respondent could not provide any contemporaneous documents to support this assertion.

IV. 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.

Disability

2) The MHRA provides that it is unlawful to discharge an employee because of physical or mental disability. *See* 5 M.R.S. § 4572(1)(A).

3) Because here there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).

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[6] In an early submission, Complainant alleged that this conversation was done via text message. When asked at the IRC if she could provide the text messages, Complainant asserted that the phone she used had since broken. Respondent was asked if Manager could provide a statement as to whether she sent or received any text messages from Complainant from August 6, 2016 to August 8, 2016 and, if so, provide those messages. Respondent did not provide the documents.

[7] Respondent alleged that Complainant told the supervisor on duty that night ("Supervisor") that she would not be returning to work. Neither party could provide contact information for Supervisor.

[8] At the IRC, Owner 1 claimed that he was unaware that he was writing reasons for Complainant's discharge. Respondent backs this assertion by pointing to a passage in the letter that states, "But if you want us to say she was laid off, … so be it. She can apply for unemployment." Respondent suggested Owner 1 was alluding to saying that Complainant laid off as opposed to quitting, which would allow her to get unemployment benefits; the difference between being laid off and being discharged would not be relevant to unemployment benefits. This explanation is not completely persuasive, since it is not particularly credible that Owner 1 did not understand that the phrase "termination" meant discharge.

4) First, Complainant establishes a prima-facie case of unlawful disability discrimination by showing that: (1) she had a disability, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *cf. City of Auburn*, 408 A.2d at 1261.

5) If Complainant establishes 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 does so, 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. 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. *Id.* In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.

6) Complainant has not established her prima-facie case. In the first instance, it is unclear whether Complainant has a disability as defined by the MHRA: while she asserted that [redacted], there is no evidence that the condition significantly impaired her health as compared to the general public, and her condition is not '[redacted] (although it may be caused by [redacted]). In any event, even assuming Complainant had established a prima-facie case, Respondent provided that it was unaware of any disability.

7) In the final analysis, Complainant has not shown that the reason for her discharge was any alleged disability. Respondent was not on notice of a disability and therefore could not have discharged Complainant *because of* any disability. The parties dispute whether Complainant notified Respondent of a disability. At the IRC, Complainant was unsure if she had. Even taking the version where Complainant told Manager that she had a [redacted] and dropped off the work restriction notice, there is not enough in the record to infer that Manager told Owner 1 (the decision maker) about it. Furthermore, the work restriction note, in itself, is not enough to put Respondent fairly on notice of a disability. The note is for the electric shock injury and only has passing reference to '[redacted]' buried within it.

8) Discrimination on the basis of disability is not found.

WPA Retaliation

9) The MHRA prohibits retaliation against employees who, pursuant to the WPA, make good faith reports of what they reasonably believe to be 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)(B).

10) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse action, which may be proven by a "close proximity" between them. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991).

11) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. *See also Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse action." *Id.* Complainant must show that she would not have suffered the adverse action but for her protected activity, although the protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII).

12) Complainant established a prima-facie case by showing that she reported in good faith what she had reasonable cause to believe was an unsafe condition (telling Manager that there was an electrical outlet that gave her a shock), she performed her job satisfactorily, she was discharged, and Respondent at least arguably had a continuing need for the work to be performed. Respondent in turn provided a legitimate, nondiscriminatory reason for Complainant's discharge by explaining that her performance was poor; it also stated that Complainant was not discharged, but rather quit her job.

13) Here, Complainant has shown that her discharge was in retaliation for reporting an unsafe condition, with reasoning as follows:

a. As an initial matter, the totality of the circumstances tends to suggest that it was more likely that Complainant was discharged and did not quit. In the response to the letter from Complainant's attorney, Respondent made no mention of Complainant walking out. Instead, Respondent provided several reasons to justify her discharge.

b. Respondent's shifting reasons for Complainant's separation is affirmative evidence of pretext. Furthermore, the electrical outlet was mentioned by Respondent in its final phone call to Complainant and in two letters to Complainant's attorney. Lastly, Complainant's discharge was in close proximity to her telling Respondent that the outlet gave her an electrical shock.

14) Retaliation on the basis of protected activity is found.

V. Recommendation:

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

1) There are **No Reasonable Grounds** to believe that Coasters discriminated against Madeline Auclair due to her disability, and the claim should be dismissed in accordance with 5 M.R.S. § 4612(2).

2) There are **Reasonable Grounds** to believe that Coasters retaliated against Madeline Auclair due to protected activity, and the claim should be conciliated in accordance with 5 M.R.S. § 4612(3).

Amy M. Sneirson, Executive Director

Joseph H. Hensley, Investigator