Maine Human Rights Commission
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August 23, 2013

INVESTIGATOR'S REPORT
E11-0545

[redacted]

v.

[redacted]

I. Complaint:

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

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: February 24, 2011. The period of October 29, 2010 to August 25, 2011 is timely.

2) Date complaint filed with the Maine Human Rights Commission: August 26, 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] 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.

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 on July, 7, 2000 as a Laundry Attendant/Assistant Executive Housekeeper where she worked until the termination of her employment on February 24, 2011.

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.[1]

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

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

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

a) I was employed by [redacted] initially as a Laundry Attendant. As time passed, when Executive Housekeeper was unavailable, I also functioned as Assistant Executive Housekeeper. I was employed by [redacted] beginning on July 7, 2000 until February 24, 2011. I had an excellent employment record and had worked for the company for several years when General Manager terminated my employment.

b) In 2007, an incident of sexual harassment by Maintenance Person was covered up by General Manager as I believe that she was in love with him. It appeared as though male employees could do whatever they wanted in the workplace without consequences of any sort.

c) During my employment, I lodged reports expressing my grave concerns about the safety of the washers we were using. Those serious concerns included machines which leaked water onto the floor, creating a safety hazard and one machine which released a stray part into the air. We had been told by General Manager that the serious hazards with the washers would be addressed and they were not. Maintenance Person was supposed to handle the washers.

d) On April 22, 2010, Maintenance Person came into the breakroom and said, "Hi Nipples," to my female co-worker, AM. She immediately told him that she did not like that and to stop.

e) When Co-worker, AM, informed Executive Housekeeper about what had occurred, adding that Maintenance Person asked her to lift her shirt so that he could suck her nipples, we offered to go with her to report this to management.

[1] 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 "[redacted]" on documents submitted with this Position Statement reflects the name of [redacted] ultimate parent company, which is headquartered in [redacted].

f) On April 27, 2010, we reported this situation to General Manager. General Manager was displeased that a harassment complaint had been filed against Maintenance Person.

g) General Manager retaliated against those of us who were part of that complaint process (or who she believed were part of that complaint process). After these reports, I was closely scrutinized at work, unjustly accused of wrongdoing and just generally harassed.

h) General Manager was eventually able to find a way to terminate me because I was a close friend of the employees who were part of the harassment investigation and supported them, because of my age, and because I complained about the unsafe conditions in the laundry room, which caused concern about the quality of Maintenance Person's work. Three other employees and I who participated in the harassment complaint process or who General Manager thought were part of that process were terminated from our employment with the [redacted] between February, 2011 and July, 2011.

i) One of my co-workers, Former Employee, MP was fired on February 19, 2011 for purchasing a pair of uniform pants without permission. The next day, when I saw other employees about to do the same thing, I told them not to do it and why. I was unaware at the time that Former Employee, MP had told her co-workers why she had been terminated. She had explained that the purchase of a pair of uniform pants had caused the problem. The issue was no longer a secret and General Manager's reaction to my word of caution was disingenuous in light of the fact that it was her intent to send out a message to other employees regarding what action she would take if they failed to follow procedure when purchasing such clothing.

j) On February 24, 2011, I was terminated with the reason given that I had violated company ethics, specifically confidentiality. [redacted] stated that my termination was due to a "critical violation" of work rules and policies. After my ten-year employment, the company decided that my performance was so problematic that the only course of action possible was to sever the employment relationship. I was never counseled or warned that my employment was in jeopardy due to performance deficiencies.

k) A review of the facts reveals that my performance issues began shortly after I reported having witnessed the sexual harassment of a co-worker by Maintenance Person. I had reported the sexual harassment to General Manager on April 27, 2010 and a formal investigation by the company's HR Manager was completed a few weeks later. On June 23, 2010 General Manager reprimanded me for taking a smoke break shortly after punching in to work on June 17, 2010. It is interesting that the three other employees who were terminated from their employment and who subsequently filed with MHRC also received reprimands from General Manager at almost the same time. I was reprimanded for something that had never been an issue for ten years until after the sexual harassment by Maintenance Person was filed.

l) General Manager did not believe that Maintenance Person had done anything wrong. In fact, she told me that Maintenance Person was "just kidding around" and that he did not fit the profile of what he was being accused of. I had actually been criticized for not reporting the sexual harassment incident sooner even though it was brought to the attention of General Manager promptly. General Manager was displeased that a complaint had been filed and I later learned that the employee who complained about having been sexually harassed by

Maintenance Person felt that General Manager did not wish to have her pursue the sexual harassment claim.

m) Soon after the sexual harassment claim was reported and investigated, I sensed that my work environment had changed and suddenly, I could do nothing right in General Manager's view. Strangely, even after the termination of my employment, [redacted] criticized me for not having availed myself of the company's procedures for reporting discrimination or retaliation in regard to the termination of my employment. It defies logic that a company would expect an employee who has been terminated from employment to file an internal complaint instead of pursuing a claim with the Human Rights Commission and that a failure to use the internal process diminishes the claim.

n) I believe that the reason given by the employer for my termination is a pretext. I believe that the real reasons are my sex, age and retaliation after informing the employer of unsafe and/or illegal activity in the workplace.

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

a) I was 66 years old at the time of my termination. Of the other three [redacted] employees who filed complaints with MHRC, one was in her 50's and two were in their 60's.

b) General Manager frequently asked when I was going to retire. I felt that she wanted me gone from [redacted] after my 65th birthday.

c) In June, 2010, shortly after the sexual harassment investigation was completed, General Manager began to ask when I planned to retire. My response was always the same; that I would let General Manager know when I was ready to retire. Although I had reached age 65, I was not ready to retire and needed to continue to work for financial reasons. General Manager stated that she asked about my retirement plans because Executive Housekeeper did not want to be left without an assistant and was concerned as to who would replace me. Executive Housekeeper, however, denies ever asking General Manager about my retirement plans as she and I worked closely together, were friends outside of work and would have discussed my retirement plans casually between ourselves.

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

a) [redacted] was hired on or about July 6, 2000 as a Laundry Attendant in the Housekeeping Department. Her essential job duties included sorting, loading, unloading, folding and putting away assorted articles in the laundry of the hotel, as well as being responsible for reporting guest or employee safety hazards, maintenance problems or needed repairs to equipment to management immediately.

b) It is unclear from the Charge when or to whom [redacted] allegedly reported "a washer frequently leaking water onto the floor causing a safety hazard and the specific nature of those alleged comments or any alleged safety concerns. General Manager and Maintenance Person are regularly alerted to any maintenance, equipment issues or problems in the laundry by Executive Housekeeper during a daily Manager's Meeting. After any such issues are mentioned to Maintenance Person, he personally inspects issues, orders parts as necessary and repairs the machines. The only such instance of recent memory arose several years ago when a leak in one washing machine was reported to, inspected and verified as a minor leak by Maintenance Person. Maintenance Person ordered the part to replace a broken seal and within several days, took the machine apart and repaired the broken seal.

c) The only instance where General Manager or Maintenance Person recalled mention of "a part being released by a machine" was about ten years ago when it was reported that a belt came off the back of a washing machine and hit the wall behind the machine. Maintenance Person inspected and repaired the machine. At no time did [redacted] report to [redacted] management or any other company representative that the washing machines were unsafe or a safety issue. [redacted] did not avail herself of the several reporting methods provided by [redacted] to report any safety hazard, violation or failure to act by hotel management.

d) [redacted] policy is that disciplinary action is a private matter between hotel management and the affected employee. [redacted] would not and should not know that other employees have indeed been reprimanded for allegedly violating a Company policy. [redacted] co-worker and subordinate was terminated on or about February 19, 2011 after General Manager discovered that the employee had repeatedly improperly purchased and obtained reimbursement for uniform pants without pre-approval from hotel management and without using the authorized vendor through which the hotel would have directly paid the vendor for the uniform. [redacted] was made aware of the reasons for termination in her supervisory role as Assistant Executive Housekeeper. She was informed of the termination by Executive Housekeeper.

e) Shortly thereafter, Executive Housekeeper made General Manager aware on or about February 21, 2011 that the housekeeping staff was upset by the recent employee's termination. The staff had discovered not only that the employee was terminated, but the specific reasons for the

termination. Executive Housekeeper stated that the employees were told the termination details by [redacted] and that Ms. [redacted] "knew better."

f) When [redacted] was questioned by General Manager with Executive Housekeeper as witness on or about February 21, 2011, she admitted to sharing the termination information and details with the other Housekeeping employees on Sunday, February 19, 2011. [redacted] stated that she knew that she should not have done that, but that she was upset about the termination. [redacted] also stated that several employees asked her if they could purchase uniform pants and be reimbursed and that was also the reason she told them the details of the termination. Only after reviewing the statements given through these interviews and consulting with Executive Housekeeper and personnel in [redacted] Human Resources Department was the decision to terminate based on the severity of the offense.

g) On April 24, 2011, [redacted] was brought in to discuss her termination of employment with General Manager and Executive Housekeeper. Before General Manager could inform her about the termination, [redacted] placed her keys on the desk, refused to look at or take a copy of her termination paperwork and walked out the door. A letter addressed to [redacted] was mailed to her home address on March 2, 2011 reiterating the reasons for her termination.

h) [redacted] was terminated because of her collective actions and misconduct during the events of February 19, 2011 and not because of her sex, age or retaliation.

i) [redacted] Associate Handbook states in the Corrective Discipline section that "In some cases, the offense is so serious that progressive discipline does not apply and termination upon completion of investigation is appropriate." The specific offense committed by [redacted] was considered a "violation of the [redacted] Ethics Policies involving serious unethical conduct such as breaches of confidentiality or professional ethics, as determined by the Company" and is a Critical Offense under [redacted] list of violation of work rules. Critical Offenses are serious violations of work rules or misconduct which justifies immediate termination without regard to the employee's length of service or prior conduct. It is the severity of the offense that is the deciding factor in disciplinary action. All employees regardless of sex, age or any other classification who commit a Critical Offense would be subject to the same consequences resulting in termination of employment as did [redacted]

j) The filing of the Charge for the alleged discrimination based on sex, age or retaliation for reporting alleged illegal or unsafe activity in the workplace is vague, unsubstantiated and without merit. At no point did [redacted] avail herself of [redacted] procedures for reporting an alleged incident of discrimination or retaliation.

5) Further investigation reveals:

a) The company's Corrective Discipline Chart describes the manner in which Minor Offenses are dealt with. The first offense is dealt with by Oral Reprimand. The second offense is dealt with by the issuance of a Written Warning. The third offense warrants discharge from employment.

b) [redacted] was disciplined for one issue prior to her termination. A Performance Discussion Record dated June 23, 2010 was submitted, in the form of a Written Warning. The description

of policies violated: Minor Offense – smoking on other than designated areas; Major Offense – Failure to perform the essential job duties and requirements of the job in a timely and satisfactory manner.

i. The specific explanation of inappropriate behavior: General Manager observed [redacted] and a line-level employee smoking against the hotel building by the employee break room at 7:00 a.m. on June 17, 2010. While reviewing the punch detail for that day, it was noted that [redacted] had punched in at 6:53 a.m. for her scheduled start of 7:00 a.m., was smoking on the clock and in an area that is not a designated smoking area. The "Impact of Inappropriate Behavior on Hotel/Company" stated that Employees must take their smoke breaks according to policy which is during scheduled meal and rest breaks. Employees may only smoke in the designated smoke areas without exception. Failure to adhere to these existing policies is negative for employee morale, sets a negative example for co-workers and guests and is unacceptable. Clocking in early and then going out to smoke in an area not designated as the smoking area sets a terrible example to co-workers and subordinates. As a Supervisor, you are expected and required to lead by example. Failure by a Supervisor or Manager to uphold those higher standards is unacceptable under any circumstances. The Consequences of Continued Inappropriate Behavior indicate that "Further incidents or violations of company policy could lead to disciplinary action up to and including termination of employment. Further incidents need not be related as per Sunburst Hospitality's Progressive/Corrective Discipline Policy.

ii. This particular Performance Discussion Record dated June 23, 2010 refers back to a prior incident on April 27, 2007 of smoking in a guest room while staying overnight so that I could be available for work the next morning.

2) 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.

d) Notably, [redacted] worked for [redacted] for ten years, was formally written up once; June 23, 2010. She had accompanied Former Employee, AM to speak with General Manager following egregious, sexually harassing behavior on the part of Maintenance Person which had taken place on April 22, 2010.

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 [redacted] vague comment that "male employees seemed to get preferential treatment in the workplace" 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 laundry work to be completed.

10. Respondent articulated a legitimate, nondiscriminatory reason for the termination, namely that [redacted] employment was terminated for a violation of company policy (critical offense – violation of the Company's ethics – breach of confidentiality).

11. Complainant was unable to demonstrate that the reason cited by Respondent was a pretext for sex discrimination, with reasoning as follows:

    a) Ms. [redacted] had no disciplinary actions in her file before 2010, and the one she got in June 2010 related to clocking in late and smoking at the wrong place and time. Ms. [redacted] did not contest that this occurred, and the reprimand itself explicitly warned that she could be terminated for further incidents.

    b) Ms. [redacted] was terminated after another disciplinary action in

    c) Ms. [redacted] felt that no action was taken in 2007 following a report of Maintenance Person's egregious sexual harassment, and also that General Manager did nothing to ensure that Maintenance Person fixed the washers about which she complained. She believed that General Manager gave unfair preference or latitude to Maintenance Person because he was a male.

    d) In contrast, Ms. [redacted] was held harshly accountable for less serious infractions of company rules, leading to her termination of employment. What seemed to Ms. [redacted] to be a distinctly different approach to disciplining males than disciplining her (a female) forms the basis for [redacted] perception 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.

    e) [redacted] did not compare her termination for violating confidentiality to how another, male employee was treated in a similar incident.

12. Although this reason (as is described below) is found to be a pretext for unlawful retaliation, in the final analysis, [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); *Cumpiano 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. Respondent's records show that the majority of employees terminated were under the age of forty (13 out of 23, or 56%).

21. 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 the Complainant, either left or were terminated

from their employment. It is true that Complainant was among the longest tenured employees to be terminated and generally much older than other terminated employees.[2]

22. However, 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.

23. Despite Ms. [redacted] recounting that General Manager asked about when she would retire, there is no indication that Respondent terminated employees – or Ms. [redacted] due to age-based prejudice or stereotypes.

24. It is not found that [redacted] was discriminated against because of her age.

Retaliation

25. 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).

26. 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).

27. 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.

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

[2] Three other former [redacted] employees also filed Commission complaints.

"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 [redacted] has established a prima-facie case that she was terminated for engaging in protected activity under the WPA, as she previously and repeatedly reported safety issues with the hotel's washing machines and was terminated. The causal link between the two is as follows:

    a) Ms. [redacted] previously made repeated complaints about safety related to the hotel's washing machines, which broke down and forced her and others to walk through standing water while the power was still on, and which also ejected metal pieces around workers. The person responsible for repairing these issues was Maintenance Person.

    b) In April of 2010, Former Employee, AM filed a sexual harassment complaint against Maintenance Person. [redacted] worked closely with Former Employee, AM and the other employees who brought the complaint forward (Executive Housekeeper, Housekeeping Supervisor). As a result, [redacted] was targeted "by association" and soon found that her employment was more closely scrutinized by General Manager. This is not, however, the protected activity which creates the causal link to retaliation. While there may be strong public policy reasons for extending whistleblower protection to an individual who was targeted for workplace retaliation after being mistakenly believed to by a whistleblower, there is no such protection currently found in the MHRA or WPA. Instead, Complainant's retaliation claim is one based on a sequence of events that started when she reported workplace safety issues from the washing machines, safety issues Maintenance Person was responsible for addressing and

which he failed to address. The subsequent sexual harassment complaint – which did increase General Manager's focus on [redacted] is not the source of the retaliation complaint.

c) Because General Manager sought to eliminate perceived threats to Maintenance Person's continued employment, she subjected [redacted] to disproportionate discipline when she suddenly terminated her for telling her co-workers not to purchase uniform pants because her sister, Former Employee, MP was just fired for having done so.

33. [redacted] provided a legitimate, non-retaliatory reason for the termination, namely that [redacted] had violated the company's breach of confidentiality policy.

34. In the final analysis, the explanation provided by Respondent that Complainant was fired after ten years of service that met job standards because she told co-workers not to purchase uniform pants, expecting reimbursement. Additionally, she explained that her sister, Former Employee, MP had just been fired for doing so, after ten years of service.

a) Comfort Inn asserted that [redacted] "knew better" and that there was a very clear policy regarding "ethics and breach of confidentiality." This explanation for termination following ten years of dedicated service fails the "straight-face" test. Breach of confidentiality and ethical violations reside in the realm of malfeasance which causes harm, usually. When one's co-worker, sister, friend is about to commit an "innocuous" act which could result in an unfortunate outcome, (termination) for something as trite as parking in the wrong parking space, one must recognize that credulity is being strained.

b) General Manager had an agenda and intended to protect Maintenance Person's job security even if it required tossing long-term co-workers under the bus. Notably, [redacted] worked for [redacted] for ten years and was formally written up once on June 23, 2010. She had recently accompanied Former Employee, AM to speak with General Manager following egregious, sexually harassing behavior on the part of Maintenance Person, which had taken place on April 22, 2010.

c) The facts suggest that because [redacted] had previously complained about unsafe conditions which Maintenance Person failed to address, and that because Former Employee, AM, filed a sexual harassment complaint against Maintenance Person in April, 2010 which General Manager assumed [redacted] was part of, [redacted] employment was more closely scrutinized by General Manager than it had been before.

d) As a result of [redacted] prior reports of safety concerns for which Maintenance Person was responsible, General Manager assumed that she was involved with the sexual harassment complaints against Maintenance Person. Due to this sequence of events, General Manager chose to terminate Complainant's employment.

e) Complainant carried her overall burden of proving that there was, in fact, a causal connection between her reports of safety hazards in the laundry and her termination of employment. But for [redacted] reports of safety hazards in the hotel's laundry, Respondent more likely would not have terminated her employment.

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

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 activity protected by the Maine Human Rights Act and 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. These claims should be dismissed in accordance with 5 M.R.S. § 4612(2).

Amy M. Sneirson, Executive Director

Michèle Dion, Investigator