



Maine Human Rights Commission  
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INVESTIGATOR'S REPORT  
E12-0023

November 19, 2012

**Barbara Mann (Bangor)**

v.

**Sunbury Primary Care d/b/a Sunbury Medical Associates (Bangor)**

**I. Complainant's Complaint:**

Complainant Barbara Mann (hereinafter "Complainant" or "Mann") alleged that Respondent Sunbury Primary Care d/b/a Sunbury Medical Associates (hereinafter "Respondent" or "Sunbury") gave her a written warning and terminated her in retaliation for her internal complaint about age and sex discrimination.

**II. Respondent's Answer:**

Respondent denied the allegation of retaliation and stated that Mann was terminated because of "lack of fit" and "negative interactions with employees," because it was "dissatisfied with Ms. Mann's refusal to participate in an investigation [she] triggered," and due to the need for cost savings.

**III. Jurisdictional Data:**

- 1) Dates of alleged discrimination: July 5, 2011 (warning) and September 15, 2011 (termination).
- 2) Date complaint filed with the Maine Human Rights Commission: January 17, 2012.
- 3) Respondent has about 150 employees and is subject to the Maine Human Rights Act and Title VII of the Civil Rights Act as well as state and federal employment regulations.
- 4) Respondent is represented by Robert C. Brooks, Esq. Complainant is represented by Edward W. Gould, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, and a Fact Finding Conference. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds."

**IV. Development of Facts:**

- 1) The parties and issues in this case are as follows:
  - a) Complainant Mann worked for Respondent as the Director of Human Resources from June 2003 to September 15, 2011. Mann was responsible for overseeing all of Sunbury's human resource ("HR") functions, including conducting employee training and developing, monitoring, and enforcing all of Sunbury's employee policies.
  - b) Respondent Sunbury is an organization of healthcare providers consisting of seven separate family medical practices in the Bangor, Maine area.
  - a) "CEO" is Sunbury's Chief Executive Officer. CEO interviewed and made the decision to hire Mann. He is also the person who recommended her termination to the partners/shareholders.
  - b) Mann alleged that Sunbury gave her a written warning and terminated in retaliation for her internal complaint about age and sex discrimination.
  - c) Sunbury alleged that Mann was terminated because of "lack of fit" and "negative interactions with employees," because it was "dissatisfied with Ms. Mann's refusal to participate in an investigation [she] triggered," and due to cost savings.
- 2) Relevant Company policies include:
  - a) Sunbury has a Sexual Harassment Policy that strictly prohibits sexual harassment, provides a definition and examples of sexual harassment, and provides a reporting mechanism. Employees are urged to report all incidents promptly. The Company states that it is committed to take prompt and appropriate corrective measures to eliminate the harassment. Employees are instructed to report harassment to his or her supervisor, or the Human Resources Manager. If an employee is not comfortable with those options, he or she is instructed to contact the Executive Director. The policy indicates that no employee will be subject to negative personnel action of any kind for making a complaint under the policy, and that no retaliation of any kind will occur or be permitted against any employee for complaining of sexual harassment in good faith or for honestly cooperating in an investigation of a complaint.
  - b) Sunbury has a progressive disciplinary policy but also states that discharge (dismissal) may occur without notice or progressive discipline.
- 3) Complainant provided the following:
  - a) On or about July 2003, Respondent hired Mann to work as its Human Resources Director. She was closely supervised by CEO and followed his directives. When she was hired, CEO told her that Sunbury had a "warm and fuzzy" HR department and that CEO wanted her to change that approach. He did not want HR to be a place for employees to "vent." He wanted HR to be clear, concise, and black-and-white about policies and expectations. He asked Mann to monitor employees, enforce rules, and report any infractions to him.

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- b) On or about June 2010, CEO told Mann that, from now on, she should just hire "young women with big boobs." Prior to that occurrence, CEO had made comments to Mann about hiring young, attractive employees with "big boobs," and he commended her on past female hires because he thought they were "cute and had big boobs." CEO made comments and engaged in behavior regarding women on a number of occasions which Mann found offensive. For example, CEO would ogle a female employee when she drove her motorcycle out of the parking lot, commenting "I just love to watch her ride away." CEO made a bet with his personal assistant, RW, about how big her breasts would get when she was pregnant.
- c) In May 2011, CEO told Mann that he was hiring a woman, who was then working as a waitress, for the position of Assistant Director of Human Resources (hereinafter, "Assistant.") This was not the first waitress that CEO recruited to work for Sunbury. Normally, they did not work out. With regard to hiring Assistant, CEO told Mann that "he needed someone in HR who better understood today's young workforce."
- d) After hiring Assistant, CEO introduced her to staff, including Mann. At the time, Assistant was wearing a low cut sweater which exposed her cleavage. CEO later called Mann in to his office and told her that he did not appreciate the look on Mann's face when he introduced the Assistant to her, and ordered Mann to cooperate in training Assistant. Mann told CEO that she would cooperate in Assistant's training and would train her to the best of Mann's ability, but asked that Assistant be required to wear appropriate business attire. Mann also told CEO that two female employees wear more revealing clothing when they feel they are out of his good graces, that Mann had observed him looking at their breasts, and that this situation made her uncomfortable.
- e) A few days later, Mann was informed that an investigation into her comments was needed. Sunbury hired its human resources attorney ("Attorney") as the investigator. On or about June 6, 2011, Mann met with Attorney and, other than answering some preliminary questions, she told Attorney that she would not discuss her complaints. Mann did not believe that Attorney could be impartial given his position as an advocate for the company. In addition, she did not ask the Company to investigate her complaint, did not seek any remedy from the company, and did not want to be subjected to retaliation. She told CEO about her concerns because she wanted him to stop his behavior. That was the only change she wanted and could be accomplished by CEO respecting her concerns and honoring her request.
- f) On or about June 7, 2011, Attorney sent Mann a letter which memorialized their discussion and gave her a deadline to reconsider her position not to participate in the investigation.
- g) On or about July 5, 2011, Sunbury's President ("President") sent Mann a warning letter that threatened future discipline for her refusal to participate in the investigation.
- h) On September 15, 2011, Mann was terminated.
- i) Other than the warning she was given for refusing to participate in the investigation of her concerns about age and sexual harassment, she did not receive progressive discipline prior to termination.

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- j) Sunbury consistently rewarded Mann's success at accomplishing CEO's vision. She received periodic pay raises from 2004 to 2011 with a final salary of about \$80,000. She also received bonuses ranging in amounts from \$250 to \$1,000.
- k) CEO's last written evaluation of her performance was in 2007. On a scale of 1 (unsatisfactory) to 5 (excellent), CEO gave her 14 "4's" and 10 "5's." He offered two written comments:

"Barbara manages a complex and extensive workload. She is detail specific while simultaneously maintaining a clear vision of corporate Human Resource needs and demands."

"Barbara effectively manages employee issues and requests with a high degree of professional integrity. She has excellent verbal and written communication skills."

- l) She recalls having a conversation with CEO about taking a "softer" approach with a particular employee. She does not recall which employee, or when this discussion occurred.

4) Documents revealed:

- a) The written warning issued to Mann on July 5, 2011 read, in part:

"...I need to counsel you on your refusal to cooperate in the investigation. You made very serious and derogatory allegations about three Sunbury employees. As Sunbury's HR manager, and with all your HR experience, you had to know your comments would trigger an investigation. Your refusal to then cooperate with that investigation, under any circumstances, calls into question your good faith in bringing forward the complaint. . . . Part of your good faith obligation in making a complaint is to cooperate in the subsequent investigation. . . In the future, Sunbury will need to consider discipline beyond a mere warning for your refusal to participate in an HR investigation triggered by your own complaint."

- b) In a letter dated September 27, 2011, Sunbury provided Complainant's counsel with a written explanation for Mann's termination:

"...First, and overall, Ms. Mann was separated for lack of fit. Ms. Mann carries out her HR duties in what can be characterized as a brusque manner. While there may have been a time when her approach was appropriate to the circumstances by the Company, the Company has evolved and that time has come and gone. At this point in time, Sunbury desires an HR operation that has a more employee-friendly approach, and which can build greater rapport with Sunbury's employees.

"Second, as it was becoming apparent over time that Ms. Mann's style and approach were not consistent with Sunbury's actual needs, Sunbury began to have some performance issues with Ms. Mann. In particular, Sunbury became dissatisfied with Ms. Mann's interactions with some employees. Additionally, Sunbury was dissatisfied with Ms. Mann's refusal to participate in an investigation triggered by comments made by Ms. Mann. ...

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"Third, Ms. Mann's separation from employment was driven in large part by a need to save costs in the current economic slowdown. Sunbury has been trying to trim administrative costs, and it was felt that Ms. Mann's duties could be redistributed to existing employees resulting in an overall savings from staffing the position.

"No one of the above factors led to Ms. Mann's separation; rather, all of the factors working together led Sunbury to determine that it was appropriate to separate Ms. Mann from employment. Sunbury wishes Ms. Mann well, and as you know has offered to provide Ms. Mann with a reference letter in conjunction with a separation from employment packet."

- 5) CEO provided the following with regard to Mann's allegation of unwelcome sexual conduct :
- a) The female employees named by Mann do not dress inappropriately and do not show their breasts. He does not focus his attention on their breasts. He does not play favorites with female employees based on how they dress. He never used any term like "big boobs".
  - b) He has hired female employees who worked as waitresses. He met them while eating out with his wife. One of them had just graduated from school as a medical assistant school. One had a degree in human behavior (identified here as Assistant) and he thought Sunbury could offer her a good opportunity for her to learn HR.
  - c) During the May 2011 meeting with Mann, he explained to her that he planned to hire Assistant to provide her with back up in the HR department. He told Mann that he believed that she would be a good fit, but that she would need training because she did not have HR experience. Mann suggested that CEO's motive was to hire a younger and better-looking workforce. Mann also stated during that she did not want to train someone who would be wearing a low cut top that would show cleavage. She said that two female co-workers were successful in getting special treatment from CEO by wearing low cut tops. Mann said she was uncomfortable working around the two female co-workers with CEO looking at their chests. CEO denied that he made hiring decisions based on age or looks, denied staring at women's breasts, and said that he wanted to hire Assistant as part of a company-wide effort to have backup for all functions.
  - d) CEO was "fascinated" by the "110 pound" female employee who drove a "big motorcycle." He denied staring at her.
  - e) CEO referred to the female employee who replaced Mann when she was terminated as a "young lady."
- 6) The Company Report of Investigation prepared by Attorney included the following:
- a) On May 20, 2011, CEO contacted him by telephone to request that he investigate Mann's complaint. Attorney interviewed CEO immediately during that telephone call. CEO reported that he had already talked directly to the two female employees mentioned by Mann and that neither of them expressed any concerns.

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- b) On June 6, 2011, Attorney attempted to interview Mann but she did not want to cooperate based on her belief that Attorney was not impartial and that she felt that her job was "teetering on the edge." She said that all she wanted was to be respected and have policies enforced, including the dress code. She admitted that she had never counseled anyone for inappropriate dress at work.
  - c) On June 6, 2012, Attorney also interviewed the two female employees mentioned by Mann as well as CEO's female personal assistant. They all denied the allegations that female employees dress provocatively to get favors or attention from CEO.
  - d) Attorney issued a report of his investigation on June 13, 2011. He concluded that there was no basis to Mann's allegations.
- 7) CEO made the decision to terminate Mann's employment. He reviewed his recommendations with the Board and they concurred with his recommendation. A member of the Board suggested that the termination occur sooner than the date proposed by CEO.
- 8) CEO provided the following with regard to the four reasons cited as the reasons for terminating Mann's employment:

a) "Lack of fit" and "interactions with some employees"

(CEO) Mann was "brusque." She made cruel comments about employees, e.g., saying that an employee was "stupid." Her approach was acceptable in the past. She did exactly what he wanted her to do when he hired her. She was successful up through the time he gave her the performance evaluation in 2007 (see page 4, paragraph 3k above.) Her job performance declined after that, especially during her last 18 months of employment.

(CEO) Over time, the company was accumulating a younger workforce, and Mann couldn't relate to the younger employees. Mann was not approachable or willing to talk to employees. He did not issue any written warnings or written performance improvement plans to her about these issues. He discussed his concerns with her when issues came up. He would say, "You need to be a little softer." He thought they could work it out. He does not recall the last time he spoke to her about this issue prior to her termination.

b) Refusal to participate in an investigation triggered by her own comments

(CEO) There is no policy or rule that an employee must participate in an internal investigation of harassment or discrimination.

(CEO) Mann participated in an investigation conducted by the company the previous year. She disagreed with Attorney's findings in that instance.<sup>1</sup>

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<sup>1</sup> (Mann) One of the clinicians cornered her, alone, in an office and told her "You're not leaving the building with those keys." She felt threatened and intimidated. Attorney investigated her complaint and concluded it was a "he said, she said" situation so nothing would happen.

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(CEO) Although the warning letter from President reads, in part, that “[p]art of your good faith obligation in making a complaint is to cooperate in the subsequent investigation,” he “has no idea” whether her complaint was made in bad faith. “I have no idea what her motive was.”

c) Saving administrative costs in the current economic slowdown

(CEO) Efforts to trim costs dated back to 2008-2009. Among other things, the owners have all taken reductions in pay.

(CEO) Assistant was promoted to HR Manager (not HR Director) when Mann was terminated at a substantially lower salary (\$30,000 vs. \$80,000).<sup>2</sup>

Data submitted by Respondent shows that during the two years prior to Mann's termination and the six months thereafter, 123 employees were separated from employment and 72 employees were hired, for a net loss of 50 employees. The number of employees who were separated due to “position eliminated” and “staff reduction” is 22. From June to October 2011, three administrative positions were eliminated: two people in June 2011 including a charge entry (\$32,000) and a collections position (\$41,000).

Nine positions were eliminated in September 2011, including Mann's, but Mann was the only salaried employee terminated that month. The other positions eliminated were six *per diem* therapists, an x-ray technician and a medical assistant.

d) Documented co-worker complaint prior to Mann's termination:

Respondent submitted a copy of an exit interview with one employee who worked with Mann for less than two months. The employee wrote, in part: “Reporting to Barbara was very difficult. I never knew what type of mood she was going to be in from day to day. ... On numerous occasions, Barbara referenced that I was stupid, useless and incompetent, if I did something different than the way she expected it to be done. ...”

(Mann) Complainant denied telling the employee she was “stupid, useless and incompetent.” Mann states that CEO ordered her to terminate the employee because he thought she was incompetent. She lobbied CEO and convinced him not to fire the employee and to offer her another open position in the company. Mann was the person who delivered the bad news to the employee which may explain the animosity of her note.

- 9) Respondent submitted signed statements obtained from six current and two former Sunbury employees in October 2012. The statements contain harsh comments about their negative interactions with Mann and their observations about her negative behavior toward others between 2004 and September 2011 when Mann was terminated. They provided these specific examples of complaining about Mann to management:

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<sup>2</sup> By the end of 2011, CEO made the judgment that Assistant “did not work out” in that position and she was terminated. Assistant was replaced by an existing employee who was promoted to HR Manager at a salary of \$44,000 per year.

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At some point between 2009 and Mann's termination, RD told her supervisor that Mann was mean to her (RD) and wasn't a nice person to be around.

In August 2010, MP-1 told her supervisor that she was leaving her job because she didn't want to work with Mann.

In about September 2010, CEO told MP-2 and other managers that he had received complaints from staff about Mann's attitude and poor treatment of employees, and that he had spoken to her about the problem. CEO had mentioned having a similar conversation with Mann before that date.

In about October 2010, RW told CEO that several people asked her (RW) HR related questions because they did not want to talk to Mann.

In December 2010, Mann made sarcastic comments and asked intrusive questions about RA's family's use of medical insurance. RA told CEO that Mann's comments were inappropriate.

In March 2011, NH told CEO that she (NH) asked RW questions about human resource issues, and not Mann, because she (NH) did not feel 100% comfortable going to Mann because Mann was unapproachable.

In June 2011, CC told her supervisor that Mann was mean to her (CC) and believes that her supervisor reported this to CEO.

During the summer of 2011, DD told President that Mann made mean, sarcastic comments to her (DD).

10) See file for Complainant's detailed response to the employee statements submitted by Respondent.

### V. Analysis:

- 1) The Maine Human Rights Act 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.A. § 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 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 MHRA] . . ." 5 M.R.S.A. § 4572(1)(E).
- 3) The MHRA further defines unlawful discrimination to include "punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act. . . ." 5 M.R.S.A. § 4553(10)(D).
- 4) The Maine Human Rights Commission regulations provide as follows:



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No employer . . . shall discharge or otherwise discriminate against any employee . . . because of any action taken by such employee . . . to exercise their rights under the Maine Human Rights Act . . . *Me. Hum. Rights Comm'n Reg. 3.12* (July 17, 1999).

- 5) Here, Complainant Mann alleged that Respondent Sunbury gave her a written warning and terminated her in retaliation for her internal complaint about age and sex discrimination.
- 6) Sunbury denied the allegation of retaliation and stated that Mann was terminated because of "lack of fit" and "negative interactions with employees," because it was "dissatisfied with Ms. Mann's refusal to participate in an investigation [she] triggered," and due to cost savings.
- 7) In order to establish a prima-facie case of 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. One method of proving the causal link is if the adverse action happens in "close proximity" to the protected conduct. *See Id.*
- 8) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily 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 action. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry her overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.*
- 9) Here, Complainant established a prima-face case by showing that she engaged in protected activity and was subsequently disciplined and terminated. Her protected activity was telling the CEO of the company that she was offended by his sexist behavior toward young female subordinates and his preference for hiring younger females. Her comments came within the context of CEO hiring a young, inexperienced waitress for a position at Sunbury for the third time. CEO was telling Mann that he expected her to train the young inexperienced employee to be her "back-up." Mann told CEO she was willing to do so but she anticipated that this new hire, like other inexperienced women hired by CEO s, would not work out. About one month later, Mann received the first and only written reprimand from Sunbury, when she was chastised for refusing to participate in Sunbury's internal investigation of her opposition to CEO's sexist and ageist words and conduct. Less than four months after Mann's protected activity, CEO recommended and carried out the termination of her employment.
- 10) Respondent denied the allegation of retaliation and stated that Mann was terminated because of "lack of fit" and "negative interactions with employees," because it was "dissatisfied with Ms. Mann's refusal to participate in an investigation [she] triggered," and due to the need for cost savings.

- 11) There is some truth to Respondent's stated reasons for terminating Mann.
- 12) With regard to the stated reason, "negative interactions with employees," a sizeable number of current and former employees had said that Mann was "mean," "sarcastic," "not a nice person to be around," and "not approachable." They reported that they did not want to work with her or talk to her about personnel issues. However, there is also evidence that this reason for termination is pretextual and not the real reason for termination.

First: CEO did not dispute Mann's contention that she was following his instructions when she eliminated the "warm and fuzzy" approach of her predecessor. There is no clear evidence that CEO ever clearly reversed that order and instructed Mann to take a different approach. The oral guidance Mann received from CEO (e.g., "you need to be a little softer") was delivered as support and feedback to the HR Director, not as a warning that Mann's behavior was jeopardizing her job.

Second: There was only one document produced by Respondent showing that an employee complained about Mann prior to her termination. Mann was never given any written warnings, performance improvement plans, or other written guidance to improve her relations with employees.

Third: CEO's claim that Mann's behavior deteriorated after he gave her an above-average employee evaluation in 2007 is completely self-serving and unsupported by the witness statements. There was no demonstrated downward trend in Mann's attitude and behavior toward the end of her employment. The first alleged complaint was made in 2009 and the last alleged complaint was during the summer of 2011.

Fourth: Mann received periodic pay raises throughout her employment, most recently in 2011-prior to her opposition to CEO's sexist and ageist behavior.

- 13) With regard to the stated reason, "saving administrative costs," Respondent demonstrated that Mann was replaced by an HR *Manager* (not Director) who was paid less than half her salary. This was in the context of an overall reduction in force that resulted in a net loss of 50 employees over a 2.5 year period. Here again, however, there is evidence that the stated reason, while true, is nonetheless pretextual. In this as in most cases, the employer had options for cost reduction other than eliminating the HR Director's position. For example, Sunbury could have offered Mann a reduction in pay or instituted an across-the-board freeze or reduction in administrative wages and salaries. In addition, as noted above, Sunbury gave Mann pay raises most recently as 2011 when it was laying off other employees to save costs.
- 14) The final stated reason is most obviously retaliatory. Sunbury terminated Mann because it was "dissatisfied with [her] refusal to participate in an investigation [she] triggered" by her opposition to what she reasonably believed to be sexist behavior on the part of CEO. CEO readily admitted that there is no rule or policy requiring employees to participate in an internal sexual harassment investigation and yet Sunbury issued Mann a written warning for her refusal to participate and then fired her for the same reason, even though there was no recurrence of the behavior that was allegedly unsatisfactory.

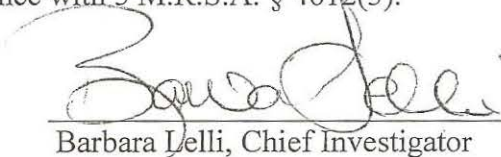
- 15) In addition, although the termination letter indicates that Mann's lack of cooperation with the investigation was evidence that her complaint was not made in good faith, CEO did not corroborate this. CEO, the person who made the recommendation for Mann's termination, stated "I have no idea what her motive was" in accusing him of age and sex bias. During the Commission's investigation of this complaint, there was credible evidence to show that Mann's internal complaint about CEO's behavior was made in good faith. CEO referred to one employee as a "young lady" without any insight into the ageist, patronizing tone of his words. CEO admitted that he was "fascinated" by the sight of a "110 pound" female driving a "big motorcycle." CEO also admitted that he has hired young, inexperienced women that he meets in restaurants to work in jobs for Sunbury for which they have no experience.
- 16) The fact that CEO, who was the target of Mann's protected activity (her opposition to sex and age discrimination), also is the one who recommended and carried out the termination of her employment, is strong evidence of retaliation.
- 17) In conclusion, Complainant established a prima-facie case of retaliation by showing that she engaged in protected activity and was soon thereafter disciplined and terminated. Respondent produced legitimate, non-retaliatory reasons for the discipline and termination. At the final stage of analysis, there is at least an even chance that Respondent's stated reasons for termination are not the real reasons and are a pretext for retaliation.

**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 Sunbury Primary Care d/b/a Sunbury Medical Associates Medical terminated Complainant Barbara Mann's employment in retaliation for her protected activity under the MHRA; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).

  
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Amy M. Sneirson, Executive Director

  
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Barbara Lelli, Chief Investigator