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

July 14, 2014

INVESTIGATOR'S REPORT
E13-0430

[redacted] **L.** [redacted] **(Sidney)**

v.

[redacted] **(Waterville)**

I. Complaint:

Complainant alleges that Respondent unlawfully discriminated against her because of her actual or perceived physical disability (Coronary Artery Disease) by refusing to grant the requested reasonable accommodation of 12 weeks of unpaid medical leave or allowing Complainant to temporarily work in a light duty position and terminating her employment. Complainant also alleges that she was subjected to retaliation for requesting a reasonable accommodation for her disability.

II. Respondent's Answer:

Respondent denies discrimination and retaliation, and states it terminated Complainant's employment due to business needs when it learned that she would be unable to work for 12 weeks due to a health condition.

III. Jurisdictional Data:

1) Date of alleged discrimination: 4/19/13.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 9/5/2013.

3) Respondent employs approximately 27 individuals at its Waterville location and is required to abide by the non-discrimination provisions of the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act, and state and federal employment regulations.

4) Investigative methods used: A thorough review of the written material provided by the parties and a Fact Finding Conference ("FFC"). 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 matter.

---

[1] Complainant named [redacted] in her complaint; Respondent stated that its legal name is Inn Yarmouth LLC, and refers to itself as [redacted] Waterville. Since Complainant has not amended her complaint, the original caption has been retained, and the employer here is referred to as "Respondent".

5) Complainant is represented by [redacted], Esq. Respondent is represented by [redacted], Esq.

IV. Development of Facts:

1) Complainant was hired by Respondent as a Room Attendant ("housekeeper") on 4/27/2012.

2) Respondent owns a line of hotels and motels, including the [redacted] Waterville.

Complainant's Commission Claims

3) Complainant was employed as a housekeeper for just under one year, from 4/27/2012 to 4/19/2013. The only evaluation she received during her period of employment, from July 2012, noted that she was a very good employee, who was "very polite", "does whatever ask[ed] of her", "does a good job cleaning", was "very reliable", and "learned breakfast quickly".

4) Complainant suffers from coronary heart disease. On 4/12/2013, she woke up feeling ill and was admitted to the hospital. It was determined that she had suffered two heart attacks, and she underwent quadruple bypass surgery. Her supervisor was notified at 6:00 A.M. that morning that Complainant was calling in sick to work. Her husband later contacted one of Complainant's co-workers, who notified Complainant's supervisor of the heart attacks and surgery.

5) Complainant was allowed to return home from the hospital four days later, on 4/16/2013. On that day she called Respondent's General Manager to inform him that she had a doctor's note for her absence and that a friend would deliver it for her the following day. The General Manager then informed Complainant that he could not guarantee that he could hold her position open.

6) On 4/17/2013, Complainant's friend delivered her doctor's note to the General Manager. The note stated that Complainant had been recently hospitalized for emergency heart surgery and was "restricted from work for 12 weeks due to sternal precautions due to no heavy lifting (more than 10 pounds). Tentative date to return to work is June 8, 2013. We will release another letter at that time."

7) Complainant's follow-up appointment with her doctor was on 4/30/2013. Because her doctor was pleased with how quickly Complainant was healing, he cleared her to return to work earlier than expected. Complainant immediately texted her direct supervisor with the news that had been cleared to return to work on light-duty. The supervisor told Complainant that she needed to contact the General Manager.

8) On 5/1/2013, Complainant called the General Manager to inform him that she had been cleared to return to work on 5/26/2013 with light-duty restrictions. The General Manager then informed Complainant that her position had been filled and that they could not accommodate her light-duty restrictions. The General Manager told Complainant that she could apply for openings in the future if she made a full recovery.

9) Without Complainant's knowledge, she had been terminated on 4/19/2013. The termination notice states, "I received a doctor's letter [dated 4/16/2013] saying [Complainant] would not be able to work for 12 weeks. We needed to fill the position."

10) Other co-workers who needed time off were treated differently than Complainant. A male employee who worked in the breakfast room two days a week was allowed to take a six-week vacation in Florida and had his position held for him even though he had been an employee for only six weeks at the time. Another

housekeeper was moved to cover the male co-worker's shifts while he was away. Complainant is also aware that other housekeepers have been granted light-duty assignments by her employer.

11) There were several housekeepers who worked part-time and the company was frequently hiring new employees. Three women were hired as housekeepers right after Complainant went out on surgical leave. Complainant believes that there were plenty of people who could have covered her shifts until she was cleared to return to work on light-duty on 5/26/2013.

12) Complainant believes that she was denied reasonable accommodation in employment, discriminated against on the basis of her disability, and retaliated against for requesting a reasonable accommodation for her disability when her employer refused to grant her leave time and light-duty to recover from heart surgery and terminated her employment instead.

Respondent's Answer to Commission Complaint

13) Complainant was a good employee and performed her job at a satisfactory level. On 4/12/2013, Complainant called in due to a medical emergency and she informed her supervisor that she would be unable to come in to work. Complainant followed the company's proper call out procedure.

14) On 4/16/2013, Complainant called General Manager and explained that she would need 12 weeks off due to her health condition and that she had a doctor's note. At that time, General Manager informed Complainant that, due to the nature of the business and size of the hotel, he would be unable to hold her position. He did explain though that when she was able to return to work, she would be eligible for rehire. He asked her to contact him when that time came, and if there was a position available, she would be able to return to work. General Manager received Complainant's doctor's note the following day.

15) On 4/19/2013, Complainant called General Manager and asked him to write a letter to the Department of Health and Human Services ("DHHS"), explaining why she was no longer working at the Hampton Inn in Waterville. At this time, Complainant was aware that she had been terminated. General Manager asked Complainant to request the letter in writing, which she did. A copy of General Manager's letter (dated 4/23/2013) to DHHS is attached hereto as "Exhibit A".

16) On or about the beginning of May 2013, Complainant again contacted General Manager. She informed him that her doctor had told her that she would be able to return to work with restrictions by the end of May. During this conversation General Manager explained that Complainant could reapply to work at the hotel but he would need to look at her work restrictions to determine if the hotel could accommodate them. That was the last time that General Manager ever heard from Complainant. She did not follow up with any more phone calls, emails, or written correspondence providing work restrictions from her doctor.

17) The hotel would have been willing to consider a reasonable accommodation but Complainant never provided any work restrictions aside from the doctor's note stating she needed 12 weeks off from work. The hotel has accommodated light-duty restrictions in the past but Complainant never provided any. She was terminated because the hotel could not hold her position, due to business necessity. Two part-time housekeepers were hired after Complainant's employment was terminated, one on 4/22/2013, and the other on 4/24/2013.

18) Respondent disputes Complainant's claim that she was unaware she had been terminated on 4/19/2013. On that date Complainant asked General Manager to write a letter to DHHS to state why she had been terminated from the hotel.

Complainant's Reply to Respondent's Answer

19) The hotel admits that after Complainant requested unpaid medical leave to recover from emergency heart surgery, it immediately terminated her employment without engaging in any dialogue about reasonable accommodation. The company did not even tell her that her requested accommodation had been denied so that she could propose possible alternative accommodations. Respondent has also not met its burden of showing that accommodating Complainant with unpaid leave would have caused an undue hardship. The hours of other part-time housekeepers could have been temporarily increased or new housekeepers could have been hired on a temporary basis. It also refused to reconsider the decision to discharge her.

20) Respondent's own written medical leave policy allows for employees to take disability leave not to exceed three months *and* that granting this leave prior to completion of the eligibility period [one year] "may be required as a reasonable accommodation..." It has provided no reasons why it would have been a hardship to provide unpaid disability leave to Complainant, who was only two weeks short of the eligibility period.

21) The company also refused to reconsider Complainant's firing or discuss a new light-duty position in view of new medical information provided on 5/1/2013 (that she could return to work on light-duty in late May) and failed to engage in good faith dialogue about reasonable accommodations.

22) Respondent has also falsely suggested that it offered to consider a light-duty accommodation when the evidence shows otherwise, that it refused to consider rehiring Complainant until she could return to "full duty." *See* Exhibit A. Respondent's submitted roster of housekeepers ("Exhibit B") also reflects that when it told Complainant her position had been filled on 5/1/2013, it actually had an opening for a housekeeper, as shown by the fact that one was hired on 5/8/2013. False and shifting explanations are evidence of pretext to conceal discrimination.

Investigator

23) The following additional information was provided by Complainant and Respondent's witnesses at the FFC:

a) Complainant:
   i. Housekeepers worked their assigned rooms independently but they also sometimes worked together such as to help other housekeepers catch up at the end of the day.
   ii. Although the General Manager did tell her during a telephone call on 4/17/2013 that he "can't hold [her] job open," she did not think she had been discharged because the General Manager told Complainant he still wanted to see her doctor's note.
   iii. Complainant did not contact the hotel again until 4/30/2013, when she texted the housekeeping supervisor regarding a possible return to work date, and the supervisor told Complainant she needed to speak with the General Manager regarding this. Complainant telephoned the General Manager the next day, 5/1/2013, to inform him she could return to work on 5/26/2013, with work restrictions, although no specific restrictions were discussed between them at that time. Complainant mentioned the possibility of light-duty but the General Manager told her that they did not do light-duty and that Complainant's position had already been filled, although he did not say by whom, or when.
   iv. The General Manager never told Complainant to contact him on 5/26/2013 after she was to be cleared to return to work. When she called on 5/1/2013, he told her that she had been discharged.

b) Respondent (General Manager):

i. He is responsible for overseeing all aspects of business operations at the Waterville location.
ii. The average number of housekeepers on staff is about 14. The majority of them work a rotating schedule and are part-time, under 30 hours per week. Some employees in other positions, such as public space cleaners, are also cross-trained to do housekeeping work if needed.
iii. He agreed that the hotel did grant a six-week vacation request and hold open a position for a male employee who worked in breakfast setup, but that employee only worked two days per week and it was during the slow time of year (January). His shifts were covered by co-workers on the breakfast staff, so it was not a hardship for the hotel to cover his shifts while he was out.
iv. The hotel has also granted employee leaves for pregnancy, but those employees only required 4-6 weeks of leave while Complainant asked for 12 weeks. The General Manager also considered that a return from a pregnancy leave was more predictable than a return to work from a heart condition, such as Complainant's. Her request for leave also came at the start of the busy time (March to October) of year.
v. Complainant should have understood that she had been discharged when the General Manager told her on 4/16/2013 that he could not hold her job open after she requested 12 weeks of medical leave, although he may not have used the word "terminated."
vi. He did not actually ask other part-time housekeepers on staff to see if they might be willing to work some of Complainant's shifts while she needed to be out because he believed all were satisfied with the set hours that they had. The General Manager believes that he did speak with the housekeeping supervisor to see if she believed Complainant's leave could be covered.
vii. A housekeeper was hired on 5/8/2013, so it is possible that a housekeeper position was available when Complainant contacted him on 5/1/2013 about a return to work on 5/26/2013. He does not believe that any of the positions at the hotel, aside from maybe the front desk, would have been within a light-duty (10 pound) restriction, and the front desk positions were all filled at that time. Other people on light-duty in the past were allowed to do such tasks as folding towels.

V. Analysis and Conclusions

1) The MHRA requires the Commission here 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 Discrimination – Failure to Accommodate

2) Here, Complainant alleges that her employer unlawfully discriminated against her because of her disability by refusing to grant the reasonable accommodation of granting her 12 weeks of unpaid medical leave, and/or by refusing to discuss a temporary light-duty work assignment.

3) The MHRA provides that it is unlawful to discriminate against an employee because of physical or mental disability. *See* 5 M.R.S. § 4572(1)(A). Pursuant to the MHRA, unlawful discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity." 5 M.R.S. §§ 4553(2)(E), 4572(2).

4) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that she was a "qualified individual with a disability" within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant's physical or mental limitations, did not

reasonably accommodate those limitations; and (3) that Respondent's failure to do so affected the terms, conditions, or privileges of Complainant's employment. *See id.*

5) Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies". 5 M.R.S. § 4553(9-A).

6) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." *See Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm'n Reg. 3.08(D)(1) (July 17, 1999). The term "undue hardship" means "an action requiring undue financial or administrative hardship." 5 M.R.S. § 4553(9-B).

7) Respondent does not appear to contest that Complainant has a "disability" under the MHRA, so - for purposes of this analysis - it will be assumed that Complainant has a disability for MHRA purposes. In order to prevail, Complainant needs to demonstrate that Respondent denied her a reasonable accommodation, and that the denial affected the terms and conditions of her employment. Since the denial of the requested accommodation resulted in the termination of Complainant's employment, the only matter in dispute is whether Complainant's requested accommodation was reasonable.

8) On 4/16/2013, Complainant requested the accommodation of a 12-week medical leave of absence as an accommodation. Respondent took the position that the request was not reasonable, because the nature of the business and size of the hotel prevented Respondent from holding her position open for her while she was out. Respondent denies that it ever told Complainant that it would not consider any light-duty work restrictions.

9) Complainant's requested accommodation(s) is/are found to be reasonable, and not an undue burden on Respondent, with reasoning as follows:

   a) 12-week unpaid medical leave of absence:

      i. Although Respondent claims that it was unable to grant Complainant's request for 12 weeks of unpaid medical leave due to the "nature of the business and size of the hotel," there is little if any evidence that Respondent did anything to see if Complainant's shifts could have been covered by other staff, either new or existing.

      ii. Respondent has been inconsistent in its responses as to whether other housekeepers were contacted to gauge their interest in covering Complainant's shifts while she needed to be out. In its written answer to the complaint, no reference is made to any other housekeepers being contacted by anyone regarding possible additional hours. At the FFC, General Manager stated that he never actually asked any housekeepers about covering these hours, because he believed that all of them had set hours with which they were satisfied. General Manager did claim that he discussed this issue with the housekeeping supervisor.

      iii. After the FFC, the housing supervisor submitted a written statement stating that on the day

Complainant was out due to a heart attack (4/12/2013), the supervisor had three housekeepers on and that she "asked other housekeepers to fill in on [Complainant's] days out as we were busy. Most of the employees did not want any more hours. So I had to hire to fill shifts. Also it was the beginning of our busy season and needed more staff." Aside from the fact that Respondent never mentioned this consultation with housing supervisor/housekeepers until after the FFC, and even if "*most* of the employees did not want any more hours," this statement still suggests that at least *some* housekeepers may have been willing to accept additional hours, at least on a temporary basis.

iv. Respondent offered no evidence that it would have been an undue hardship to hire two or three part-time housekeepers to cover Complainant's full-time shifts while she needed to be out, especially since part-time employees were not even eligible for benefits. This may be because Respondent admitted it was already in a hiring mode due to the beginning of the busy season.

v. Respondent's written leave policy also allows explicitly for unpaid medical leave of up to three months for any employee who has been with the company for at least one year. The policy extends the same leave period to employees who have less than one full year of employment "if required as a reasonable accommodation." There is no dispute that Complainant requested this amount of unpaid leave as an accommodation and that it was deemed "required" by her healthcare provider. Respondent also stated unequivocally at the FFC that, had Complainant worked a full year at the time the request for accommodation was made, it would have had no choice expect to cover Complainant's shifts while she was out of work and hold her position open, presumably by using existing or newly-hired housekeepers. There has been no evidence submitted that providing the same coverage to a housekeeper who was two weeks short of her one year anniversary would have been any more of a hardship than providing the exact same coverage to an employee who had reached that milestone.

b) Light-Duty:

i. There is some dispute between the parties as to whether a specific request for a light-duty position was ever discussed. Complainant claims that she was told by General Manager during a telephone call in early May that Respondent "could not accommodate light-duty restrictions." Respondent asserts that General Manager told Complainant that the hotel would evaluate whether it could accommodate any suggested light-duty restrictions once they were made known to the company at some future point in time. Both parties agree that at no time after that telephone call did Complainant ever actually provide specific work restrictions to management.

ii. It is unclear why an employee who had been discharged, such as Complainant, would need to have provided work restrictions prior to being considered for potential reemployment by the hotel, although General Manager agrees that he told Complainant she would need to do so to be considered for a housekeeper position.[2] Complainant claims that General Manager told her that she would need to make a "full recovery" in order to be considered for reemployment. This is consistent with the letter that General Manager wrote to DHHS which stated that the company

[2] In Complainant's post FFC submission it was first asserted that Respondent requesting information about a job applicant's disability before offering them employment was a violation of both the MHRA and the ADA. However, since this issue was not raised in Complainant's original complaint, or in in her rebuttal to Respondent's Answer to the complaint, or added as an amendment to the original complaint, this issue will not be considered as part of this investigation. In any event, Complainant did not seek reemployment once she was able to return to work.

would consider rehiring her "when she is able to return to *full duty*..." It is unlawful for an employer to require an employee be 100%, with no work restrictions whatsoever, in order to be considered for a position. Although General Manager claimed at the FFC that this was merely a poor choice of words on his part, and that he would have been willing to evaluate work restrictions if and when Complainant presented them, at the very least his message to Complainant would understandably have given her the impression that she could not return with any work restrictions in place.

iii. Further, as noted earlier, it does not appear that Respondent expended any effort to determine if it might be able to accommodate temporary work restrictions. It did not request additional information from Complainant or her doctor about what potential work restrictions might be or whether there were any existing positions that might be within her restrictions, or whether she could be temporarily assigned other duties (such as folding towels) for all or a portion of the time that she needed to be on light-duty.

10) Disability discrimination in the failure to accommodate Complainant is found in this case.

Disability Discrimination - Termination

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

12) As noted above, Respondent has not disputed that Complainant has an actual or perceived disability for MHRA purposes.

13) A mixed-motive analysis applies in cases involving "direct evidence" of unlawful discrimination. *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination. . . ." *Id.* Where this evidence exists, Complainant "need prove only that the discriminatory action was a motivating factor in an adverse employment decision." *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Doyle*, 2003 ME 61, ¶ 14, n.6, 824 A.2d at 54, n.6. Upon such a showing, in order to avoid liability, Respondent must prove "that it would have taken the same action in the absence of the impermissible motivating factor." *Id.*; *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 276-77, 109 S. Ct. 1775, 1804 (1989) (O'Connor, J., concurring).[3]

14) Here, there is direct evidence of discrimination, because Respondent clearly and explicitly ended Complainant's employment solely because of her physical condition and need for accommodations to do the job. In addition, it is undisputed that the discriminatory factor was a motivation in the decision to discharge Complainant. The parties agree that Complainant was a good employee, and that the only reason for her discharge was her need for time off because of her disability.

15) Respondent can avoid liability only if it can show that Complainant, "because of the physical or mental disability, is unable to perform the duties or to perform the duties in a manner that would not endanger the

[3] The continued application of the mixed-motive analysis has been called into question as a result of the U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2348 (2009), in which the Court held that the burden of persuasion does not shift to defendant even with "direct evidence" of unlawful discrimination in a federal Age Discrimination in Employment Act case. That decision did not interpret the Maine Human Rights Act, however, and the guidance from the Maine Supreme Court in *Doyle* will continue to be followed.

health or safety of the individual or others. . . ." 5 M.R.S. § 4573-A(1-B). The defense requires an individualized assessment of the relationship between an employee or job applicant's physical or mental disability and the specific legitimate requirements of the job. *See Higgins v. Maine C. R. Co.*, 471 A.2d 288, 290 (Me. 1984); *Maine Human Rights Com. v. Canadian Pacific, Ltd.*, 458 A.2d 1225, 1234 (Me. 1983). The defense imposes upon the employer the burden of establishing that it had a factual basis to believe that, to a reasonable probability, the employee or job applicant's physical or mental disability renders him or her unable to perform the duties or to perform them in a manner that would not endanger the health or safety of the employee or job applicant or others. *See Canadian Pacific, Ltd.*, 458 A.2d at 1234. An employer cannot deny an employee or applicant an equal opportunity to obtain gainful employment on the mere possibility that a physical or mental disability might endanger health or safety. *See id.*

16) In this case, Respondent has failed to establish that Complainant "because of the physical or mental disability, [was] unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or others."

a. Here, Respondent did not perform an individualized assessment of the relationship between Complainant's physical disability and limitations and the specific legitimate requirements of the job. It instead applied a blanket policy to her, without individually considering her medical limitations, accommodation request, or ability to do the essential elements of the job. At no time did Respondent assert that its denial of the requested accommodations (12 weeks unpaid medical leave and/or a temporary light-duty assignment) would have endangered the health or safety of Complainant or others. Instead, its sole basis for denying Complainant's requested accommodation (medical leave) was impossible due to the "nature of the business."

b. Here, Respondent did precisely what it should not have done: denied an employee an equal opportunity to retain employment on the mere possibility that a physical disability (heart condition) might make it difficult for her to return to work at the conclusion of her medical leave.

17) Disability discrimination in Complainant's termination from employment is found in this case.[4]

Retaliation

18) Complainant also alleges that she was subjected to retaliation for requesting a reasonable accommodation.

19) 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] 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).

20) 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).

21) The Commission's Employment Regulations provide as follows:

[4] The result here would be the same if this claim had been analyzed under a non-direct evidence standard pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).

> 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. Ch. 3, § 3.12 (July 17, 1999).

22) 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.*

23) 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 (1st 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.* 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); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).

24) Complainant did establish a prima-facie case of retaliation by showing that: a) she engaged in statutorily protected activity (requesting a reasonable accommodation for a disability); b) she was the subject of a materially adverse action (employment terminated), and c) there was a causal link between the protected activity and the adverse action (termination occurred only days after accommodation was requested).

25) Respondent has articulated a legitimate non-discriminatory reason for the adverse employment action: that it could not grant Complainant's requested accommodation (12 weeks of medical leave) due to the nature of the business (start of busy season) and the size of the hotel.

26) Complainant must then, in order to prevail, carry her burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. She 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.

27) It is found that Complainant failed to carry her burden at the final state of this analysis for the following reasons:

a) In deciding this issue it is necessary to separate the *act* of requesting an accommodation for a disability from the *substance* of the request itself. There is little if any evidence to suggest that it was the mere fact that Complainant requested any accommodation was a likely factor in the termination of her employment.

b) Rather, it appears clear that the likely reason why the termination occurred was because of the specific request Complainant made, that she be allowed 12 weeks of medical leave, which Respondent determined was too long to hold her job open. Although it is unclear what length of time off from work would have been reasonable from Respondent's perspective, it appears that in this case it was the fact that Complainant would need such an extended period of leave (three months) as opposed to request for *any* time off, that resulted in her termination. The fact that Respondent was able to hold open another employee's job for at least six weeks (albeit at a slower time of year) suggests that it may have been willing to hold Complainant's job open as well had a shorter period of time away from work been requested.

28) Complainant was not subjected to retaliation for requesting a reasonable accommodation for her disability.

VI. Recommendations

Based upon the information contained herein, the following recommendation is made to the Maine Human Rights Commission:

1. There are **REASONABLE GROUNDS** to believe that [redacted] was subjected to disability discrimination (failure to accommodate) by Hampton Inn; and conciliation should be attempted on this claim in keeping with 5 M.R.S. § 4612(3).

2. There are **REASONABLE GROUNDS** to believe that [redacted] was subjected to disability discrimination (termination) by [redacted] and conciliation should be attempted on this claim in keeping with 5 M.R.S. § 4612(3).

3. There are **NO REASONABLE GROUNDS** to believe that [redacted] was subjected to unlawful retaliation by [redacted] for requesting a reasonable accommodation for her disability, and this claim should be dismissed in keeping with 5 M.R.S. § 4612(2).

Amy M. Sneirson
Executive Director

Robert D. Beauchesne
MHRC Investigator

Ex. A

Waterville Hampton Inn 425 Kennedy Memorial Drive, Waterville, ME 04901
tel: 207.873.0400
fax: 207.873.5486

To: Department of Health & Human Services April 23th, 2013

From:

Re: [redacted] [redacted]

[redacted] was employed at the Hampton Inn Waterville Maine. [redacted] gave me a note from her doctor stating she could not work until at least June 8th of 2013. Due to the nature of our business, we will not be able to hold her position open for her. [redacted] can apply and we will consider re-hiring her when she is able to return to full duty and there is a suitable position open.

Sincerely,

General Manager