



Maine Human Rights Commission

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October 17, 2014

Investigator's Report E14-0011

██████████ (Auburn)

v.

I. The Complaint:

Complainant ██████████ alleged that ██████████ Inc., d/b/a ██████████ ("██████████") discriminated against her in the terms and conditions of her employment because of her religious beliefs, subjected her to a hostile work environment based on her religion, and retaliated against her for complaining about the discrimination and harassment she experienced.

II. Respondent's Answer:

Respondent denied unlawful discrimination or retaliation and asserted that Complainant has failed to show that any adverse employment action was taken against her.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: November 2012 and continuing action.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): January 10, 2014.
- 3) Respondent employs an average of 65 full and part-time employees¹, and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964 as amended, as well as state and federal employment regulations.
- 4) Complainant is represented by ██████████, Esq. Respondent is represented by ██████████, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution Conference. 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.

¹ The number of employees peaks to approximately 90 during the busiest months of the year (April to October).

IV. Development of Facts:

- 1) [REDACTED] was hired by [REDACTED] in May of 2002 and has worked at [REDACTED] ever since. She is a current employee [REDACTED] working as a server.
- 2) [REDACTED] a family-owned and -operated business in Waldoboro, includes a diner, motel, and gift shop.
- 3) Complainant offered the following in support of her claim of religious discrimination and retaliation:
 - a) Complainant has been employed for [REDACTED] for eleven years. At this time, she works as a server. During all the years that she worked at the diner, her religion was not an issue, although [REDACTED] is, in her experience, a Christian workplace. One of the owners, who also was Complainant's manager and boss ("Co-Owner") is extremely religious, and [REDACTED] generally, is staffed by and frequented by persons who espouse the same Christian beliefs and attend the same church.
 - b) In late October 2012, Complainant began to date Co-Owner's son ("Son"), who was also an employee at the diner. Co-Owner was upset about this relationship, since in his religion, Son's parents should have been a part of the decision. This was the beginning of Co-Owner focusing on how Complainant and Son were "not following Jesus".
 - c) At the [REDACTED] Christmas party, Co-Owner's wife spoke with Complainant's mother about Son's relationship with Complainant, saying that Son was using Complainant and betraying God. She said that she and Co-Owner were not supportive because the couple was not doing things the way their church would desire.
 - d) In January 2013, Co-Owner and a group of his family and friends came to the diner while Complainant was working. They were not in her section, the restaurant was busy, and she did not go say hello. The next day, Co-Owner called her to the office at work and reprimanded her for being rude, saying she needed to be "kind and welcoming". No other employees were spoken to for not going over to his table. At the end of this meeting, Co-Owner invited Complainant to dinner at his home, but told her she could not bring Son, or anyone else.
 - e) The dinner happened a few days later. Co-Owner and his wife used the dinner to talk to Complainant about her religious views. They stated that Son would leave her when he returned to God, and that she needed Jesus in her life. Their opinion was that Son had to choose between Complainant and God, because if he believed in God, he would not be dating her.
 - f) In early June, after hearing other people talk about their sadness that Son was dating her and hearing rumors about her failure to live up to Christian principles, Complainant posted a statement on her Facebook page, saying something like: "Just because you don't think that I hear the hateful things you say about me, doesn't mean that God can't. . . . [W]hile you continue to spread your gossip and hatred I will continue to be the most loving, hard-working, unconditionally loving, and best mother I can be to my girls, because I am a survivor."
 - g) On June 16, 2013, Complainant left work because she had a migraine. Before she got home, she received a call from Co-Owner, asking where she lived. He said he and his wife needed to meet with her, and were going to come to her home. Complainant could hear his wife screaming in the background. Complainant protested that she was sick, but Co-Owner said he did not care. She then said she did not want his wife being confrontational in front of her children, so Co-Owner told her to

come to their home. Complainant continued to say that she could not because she was sick, but Co-Owner kept saying he didn't care. When Complainant got home, Co-Owner called again, and Son answered her cell phone. Co-Owner told Son that if Complainant did not come to his house to talk to him, she would not be allowed to work again. Co-Owner insisted that the issue was a work issue that needed to be addressed immediately, so Complainant drove to see Co-Owner.

- h) Co-Owner started by saying that this was a work situation and that he knew holding it at his house with his wife present was unprofessional. Co-Owner then read her Facebook post, and said that it was about them, made them look bad, and was untrue. Complainant said that it was not about them, but about other community members who said they were upset Son was dating her, but Co-Owner and his wife did not believe her. Complainant said that she would not risk her job by posting about them. Co-Owner screamed and swore at her, and tried to get her to say that the post was about them. After a while, Co-Owner apologized for yelling, and asked to pray with Complainant, who agreed because she was afraid. Complainant left as soon as she was allowed to, but Co-Owner would not let her leave until she showed him that she had taken the post down from her Facebook page.
- i) On July 29, 2013, Co-Owner approached Complainant and asked to meet with her and Son that evening. Son had told Co-Owner a couple of days earlier that he was moving in with Complainant. When Complainant and Son did not wish to meet with Co-Owner, he told them it was about work, and that they were required to meet with him. A meeting date was set for August 2, 2013.
- j) On August 1, 2013, Complainant had a panic attack while at work because Co-Owner was there. She had to take a 30-minute break to calm down enough to finish her shift.
- k) The meeting took place after the diner closed on August 2, 2013. Co-Owner was there, along with his sister/Son's aunt (Former Co-Owner), Son, and Complainant. Complainant recorded the meeting on Son's cell phone. The following are transcripts from the recording:

Co-Owner: You know that the reason I wanted to meet, it does have to do with work. Obviously personal stuff went into this too. I asked [Former Co-owner] to be here because it is related to work stuff. I just like having somebody in here when that happens.

Co-Owner: The two of you together have been incredibly grievous to me and I tried to separate work and personal, I can't do it. I don't know how to do it.

Co-Owner: I've been trying to let go but what I'm going to ask you two now is for you to let go as well, and it is very hard for me to come in here, to see you, to see you, in this work place to know what is going on. It is very grievous to me. And I'm going to ask the two of you to please look for other places of employment because this is way too difficult for me.

Son: So is this a polite way of telling, or is this asking like?

Co-Owner: I am asking.

Son: Should your requests be refused, what's your course of action, are you saying.

Co-Owner: I don't know what my course of action is yet. I'm hoping . . . I'm hoping that the two of you would be honoring of that request.

Son: Do you have any idea how, how like unprofessional this whole situation is, how, how much under the category of harassment and bullying it could be put under, under an objective observer, to say that . . . you're using, you're using your personal relationship with one of your employees as leverage to ask them to leave their place of employment, not to do anything with their work performance but all to do with their personal lives.

...

Son: It's an at-will employer and employee relationship, but you cannot harass and you cannot bully and you cannot throw your weight around.

Co-Owner: I'm not harassing and I am not bullying, I'm being honest with you. . . . If you would like me to use the other things and files to substantiate . . . letting somebody go, I could do that.

Son: Ok, but do you realize like you just said all of this because it compromises your work atmosphere. You don't think that a conversation like this compromises our work atmosphere? Especially [REDACTED]s?

Co-Owner: Of course it does.

Co-Owner: [REDACTED] has never made a profession of faith

Son: You don't even know that, you don't know that. . . .

Co-Owner: Listen to me, listen to me. By her lifestyle –[] and your lifestyle –[] you both display that you don't believe in Christ.

Son: Ok, whatever. Listen, this has ceased to be a work conversation.

Co-Owner: You're right. It can't just be a work conversation.

- l) After the August 2, 2013 meeting with Co-Owner, Son spoke to Co-Owner and asked him to reconsider Complainant's employment. Co-Owner told Son that he would not change his mind but would consider giving Complainant more time to find another job. When Son pressed the issue, Co-Owner said that he was not going to support their lifestyle by continuing to employ them. He told Son that he would do everything in his power to point them back to Jesus, that he loved Son too much to enable his lifestyle. He said that he could not continue to have them work there because of their destructive lifestyle and not taking a path towards Jesus.
- m) Complainant went to work the following day, and shared with some of her co-workers that she had been asked to leave. At the end of the day, Complainant texted Co-Owner and stated that she needed a personal day the next day to process what had happened and get herself together; Co-Owner responded that he understood.
- n) Complainant took a few days off in mid-August because her daughter had surgery. On her first day back, other employees told her that Co-Owner had asked them to check on her customers to see if they could find problems with her work, and to check a few other employees too so that it would not be obvious that there was a focus on Complainant.
- o) Complainant sent Co-Owner an email on August 21, 2013 which stated, in relevant part, that it had been difficult to process what he had written and said in recent meetings. She referred to the fact that he had asked her to leave [REDACTED] and seek other employment. She asserted that although she could not apologize that her religious and moral convictions kept her from living her personal life the way he saw best, she was disheartened that it had affected their work environment so drastically that it had brought about his desire for her to leave. However, she reasoned that she had decided to respectfully decline his request that she find other employment. She asserted that she wanted to keep her job and explained that she hoped to have peace of mind that her religious and moral decisions would not jeopardize the security of her employment. She had earned seniority and personal respect there she explained that she could never take that away with her to another place of employment. She closed by saying that she trusted that they could overcome their different religious beliefs, morals and values in order to redeem a more professional work environment
- p) Co-Owner e-mailed the next day, stating that he accepted her decision to stay, but that there were "performance-related issues that need to be addressed in order for you to maintain a professional

work environment. I will schedule a meeting with you, with [Former Co-Owner] present, to address these issues. Can you please let me know what days and times work best for you.”

- q) Complainant, Co-Owner, and Former Co-Owner met on August 28, 2013. Co-Owner said that he was putting her on a 30-day probation period and that there were four reasons:

Punctuality. He was disciplining her for being late by a few minutes, although she generally was on time and just forgot to punch in when she walked in the door. Former Co-Owner noted that a lot of servers did the same thing, but Co-Owner did not care. Complainant believed she was being singled out for conduct which other servers were not disciplined for if Co-Owner had no religious differences with them.

Dress code. The handbook states that shoes must have rubber soles, cover the toes, and have traction. Complainant was disciplined because her shoes were not supportive enough. She wore a sort of boat shoe for a brief time while she was moving; the shoes complied with the dress code. Other employees wore Crocs – which did not comply with the dress code – and were not disciplined; there existed no religious differences between these employees and Co-Owner.

Customer service. Co-Owner disciplined Complainant for allegedly swearing and complaining while at the register. When she asked for specifics, he would not provide any. This incident supposedly happened at the beginning of the summer – meaning that it was not a problem until their religious views clashed.

Conduct. He expressed that she had not demonstrated a commitment to the success of the business by the negative and untrue things she had been expressing about him.

- r) Co-Owner insisted that Complainant sign the document. She alleged that she said that she did not feel comfortable and asked if she could sign the document the next day before her next shift and that he said no, that she could not do that and that if she did not sign, that she was obviously not willing to follow the handbook. Ultimately, Complainant signed the document, but wrote on it that she did not agree with many things in the “documented discussion” as it was called -- she signed it just because she needed to work and didn't want to lose her job.
- s) Co-Owner told her that if she talked to anyone about the meeting, she would be violating this agreement and would be fired. Complainant asked if she could share it with someone who is not an employee, like Son or her mother. He said if she did, she would be responsible if someone from the diner found out - even from another person. He stressed that the only people to know about the meeting were the three of them. The document itself actually stresses that the content of the meeting was to stay between the three of them.
- t) On September 5, 2013, Complainant was given another warning about punctuality. She was 12 minutes late and clocked in at 8:12 a.m. She was written up because Co-Owner, who was not at the diner at the time, checked on her time card on the following Monday, because of their differences over religion. He never, in all of those years, did this prior to their dispute over religious views.
- u) Since September 5, 2013, Co-Owner has asked other employees to watch what Complainant does and report back to him, and has asked others if they are aware of anything she has done wrong in the past. He has allowed others to come in late multiple times but has actually been looking at Complainant's time cards to check on her time.

- v) On October 4, 2013, Co-Owner made a scene in the parking lot of a soccer game, accusing Complainant of taking action against him for religious harassment and discrimination in the earshot of a number of onlookers. This was just a short time after her attorney had contacted Respondent about the discrimination and harassment she had experienced.
 - w) On October 14, 2013, Complainant had a meeting with Co-Owner, who told her he wanted to cut back her shifts to only four per week, but that he wasn't sure when that might happen.
 - x) After the October 14th meeting, Co-Owner cut Complainant's Thursday shift. Initially, Co-Owner claimed this was because business was slow, but when Complainant said that this had not been the case in the past, he reviewed the records and found that she was correct. He then said that he simply needed to accommodate others. Complainant now has only four shifts, although new people who have just been hired have gotten 4 – 5 shifts per week. [REDACTED] is the only server with her seniority to have lost a regular shift. Complainant is not aware of any other server, in all of her years, who has lost a regular shift who didn't agree to or make a request for the change.
 - y) When Complainant walks into work, which is where she most often is, she is not welcome. The environment is both awkward and uncomfortable. The diner is the pulse of the community following basketball games, etc. and people treat her in a disparate manner. She now feels segregated. People do not speak to her, in contrast with those who share religious beliefs. As an example of similarly-situated employees who are treated differently, Complainant explained that the pastor's son has not purchased slip-proof footwear, as they were supposed to do by January 1, 2014. When she asked him if he was afraid of getting into trouble, he laughed and stated that he'd spent the money on action figures instead, and blew it off because he knows that he has job security based on his position in the religious community. By way of demonstrating the contrast, Complainant was written up for her footwear, which actually complied with the policy.
 - z) She is now being shunned based on her actions when she sought legal help to protect her job after Co-Owner harassed her based on, in his words, her "lifestyle displaying a disbelief in Christ."
 - aa) [REDACTED] is an interactive work environment. Complainant's job is to interact with customers, co-workers, managers, Co-Owner, and the entire family². This is extremely difficult now that the environment has degraded into an environment of negativity and acrimony. Now, Complainant is not faced simply with her religious choices, but with the freedom to live a lifestyle that does not square with Co-Owner's values and the values of others in the Christian community while maintaining her employment.
- 4) Respondent provided the following response:
- a) After having employed [REDACTED] for twelve years, it seems highly unlikely that Respondent would suddenly begin to discriminate against her for her religious beliefs. If Complainant had not been in a romantic relationship with Son, there would be no issue. Courts have held that an employer's actions, when triggered by a personal relationship, do not give rise to a discrimination claim.

² The romantic relationship between Complainant and Son soon failed due to the family strife surrounding the religious tension.

- b) Additionally, Complainant is still employed by [REDACTED] she has failed to show that there has been any adverse employment action.
- c) Conversations which [REDACTED] had with Co-owner were not religious in nature. If conversations about religion between Complainant and Co-Owner may have occurred, they were not severe and pervasive, meaning that they would not rise to the level of creating a hostile work environment.
- d) Complainant has not had her hours cut. Rather, her off-season hours have increased over the past few years, including during the 2012-13 off-season. Complainant averaged three shifts per week in 2011-12, four shifts per week in 2012-13, and five shifts per week in 2013-14.
- e) Complainant did not have a regular Thursday shift. The allegation that this shift was taken away from her is false.
- f) Co-Owner reviews the payroll records of every employee each week as part of the payroll process, and compares the time sheets to the schedules as part of that process. He often makes manual adjustments because an employee forgets to clock in or out. Complainant's payroll records have been adjusted to reflect hours worked when she forgot to punch in, and to record correct start and finish times, as have other employees'.
- g) Complainant does not dispute that she was late to work and failed to punch in when she began working, yet she claims she should not be disciplined. Complainant was properly counseled for violating employment rules. She had been counseled in the past: for example, in 2009 and 2010, she received counseling for dress code issues and tardiness.
- h) Respondent does not discriminate on the basis of religion, and in particular, took no action against Complainant on this basis. All of the conversations which related to Complainant and son were Co-Owner's efforts to parent Son and give him advice about his future, and were personal in nature. The purpose of the meetings was not to intimidate Complainant, but for Co-Owner to share his perspective of what he felt was in Complainant's and Son's best interests. Complainant was a part of those conversations as Son's girlfriend, not as an employee of [REDACTED]
- i) While Co-Owner's religion is important to him, he has never imposed his religion on other employees. His role as a father is separate from his role as an employer, and it was as a father that he attempted to influence Son's relationship with Complainant. He never told Complainant that she had to follow a particular religious practice to keep her job.
- j) For the same reason, Co-Owner's request that Complainant find another job was not discriminatory. He was having difficulty watching Son make poor decisions, but that had nothing to do with the fact that Complainant did not share Co-Owner's religious beliefs.
- k) Co-Owner provided a statement, dated September 18, 2014, which included the following:
 - i. One of the canons of the Presbyterian faith is that a person cannot be forced to believe in God. He would be contradicting his own faith if he were to discriminate against someone because that person did not believe in God.
 - ii. He never told [REDACTED] that she needed to believe in God or follow God in order to remain employed at [REDACTED] or threatened to fire her if she did not believe in God or follow God.

- iii. He did not have "religious discussions" with Complainant at work in the sense that he did not discuss religion, believing in God or practicing a religious faith. He did discuss the topic of lifestyle with Complainant, in the context of dating Son.
- iv. For example, Co-Owner discussed his concern about the two of them living together, saying that he did not think it was a good decision. The only reason he had any non-work-related discussions with Complainant was because of the relationship she had with Son.

l) Son provided the following statement (in relevant part) dated September 18, 2014:

- i. There was nothing his father said that made Son think that his concern had anything to do with whether Complainant "believed in Christ" or whether she "followed God."
- ii. At no time did Son think his job at [REDACTED] was dependent on believing in Christ. On or about June 16, 2013, Complainant posted a statement on Facebook.
- iii. Complainant told me the statement was about my parents.
- iv. At the meeting on August 2, 2013, Co-Owner asked Complainant and Son to look for other places of employment.
- v. Co-Owner stated that having a front seat to their lifestyle was too hard for him. For example, being sexually active, using profanity, and smoking were actions that Co-Owner disapproved of. Co-Owner did not say that Complainant had to believe in Christ in order to stay employed at [REDACTED]
- vi. Co-Owner did not say that Complainant would be fired from [REDACTED] if she did not find employment elsewhere.

V. Analysis:

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) Complainant alleged that she was subjected to a hostile work environment on the basis of religion, that she was discriminated against in the terms and conditions of her employment on the basis of religion, and that she was retaliated against for complaining about the harassment and discrimination she experienced. Respondent denied any unlawful discrimination, harassment, or retaliation, and stated that Complainant had a difficult relationship with Co-Owner because of her personal relationship with Son.

Hostile Work Environment

- 3) The MHRA provides that It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of . . . religion . . . 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) The Commission's Employment Regulations provide, in part, as follows:

Harassment on the basis of religion is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct of a religious nature constitute religious harassment when:

- c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Me. Hum. Rights Comm'n Reg. § 3.10(G) (1) (July 17, 1999).³

- 5) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile work environment claim exists, it is necessary to view "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the workplace to become hostile or abusive. *Id.*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996). "The standard requires an objectively hostile or abusive environment--one that a reasonable person would find hostile or abusive--as well as the victim's subjective perception that the environment is abusive." *Nadeau*, 675 A.2d at 976.

- 6) Accordingly, to succeed on such a claim, Complainant must demonstrate the following:

(1) that she is a member of a protected class; (2) that she was subject to unwelcome [religious] harassment; (3) that the harassment was based upon [religion]; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that [the] objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

Watt v. UniFirst Corp., 2009 ME 47, ¶ 22, 969 A.2d 897, 902-903.

- 7) The fact that the conduct complained of is unwelcome must be communicated directly or indirectly to the perpetrator of the conduct. *See Lipssett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988). In some instances, Complainant may have the responsibility for telling the alleged harasser directly that his comments or conduct is unwelcome. Complainant may also be relieved of the responsibility for directly communicating unwelcomeness when she reasonably perceives that doing so may prompt the termination of her employment, especially when the [harassing behaviors] are made by the owner of the business. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1990)(sexual harassment case).
- 8) The Commission Regulations provide the following standard for determining employer liability for religious harassment committed by a supervisor:

³ The Commission's Employment Regulation was repealed and replaced, effective September 24, 2014. This case is analyzed under the rules in effect at the time the Complainant was filed. The result would be no different under the Commission's new rule.

An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to religious harassment. When the supervisor's harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

- (a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on religion, and
- (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Me. Hum. Rights Comm'n Reg. § 3.10(G) (2) (July 17, 1999).

- 9) The Law Court has held as follows: "The immediate and appropriate corrective action standard does not lend itself to any fixed requirements regarding the quantity or quality of the corrective responses required of an employer in any given case. Accordingly, the rule of reason must prevail and an employer's responses should be evaluated as a whole, from a macro perspective." *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 28, 969 A.2d 897, 905.
- 10) Here, Complainant has established that she was subjected to a hostile work environment on the basis of religion, with reasoning as follows:
 - a. Complainant's religious beliefs (or lack thereof) place her in a protected class.
 - b. Complainant was subjected to unwelcome harassment, and it was based on her religion. She was made unwelcome in the workplace, she was subjected to numerous comments denigrating her beliefs, she was criticized for not believing in Christ and for not being on the path of God, she was forced to attend multiple late-night meetings at which her belief system and her worth was challenged. Complainant was also asked to find other employment because her values offended Co-Owner's religious beliefs, and her job was threatened when she did not wish to attend meetings to discuss religion with Co-Owner.
 - c. The recording of the August 2, 2013, meeting is a critical piece of evidence in this case. While Co-Owner and Son now deny any religious threats or harassment, the recording demonstrates that religious harassment did occur here.
 - d. The harassment was both severe *and* pervasive (although the only legal standard that need be met is "severe *or* pervasive"), and altered the conditions of Complainant's employment, creating an abusive work environment. As just one example, Complainant was told that if she did not drive to Co-Owner's home, late at night and while suffering from a migraine, to discuss "a work issue" – which turned out to be her personal post about religion on her Facebook page – she would not be allowed to work at [REDACTED] anymore.

- e. Complainant attempted to express that this conduct was unwelcome, on her own and through Son. At other times, she simply submitted because she believed – based upon Co-Owner's own statements – that if she did not submit to Co-Owner's mistreatment, she would lose her job. That fear was reasonable, given the fact that Co-Owner admitted that he could not separate personal and work issues and that he had asked her to leave her job.
 - f. Co-Owner's was both objectively and subjectively offensive. Co-Owner attempts to justify his actions as "parenting", using his concern for Son as an excuse for his religious concerns about the relationship between Son and Complainant. While Co-Owner may well have thought that he was "parenting" Son, he was also using his position as employer to harass Complainant, forcing her to join his "parenting" discussions by threatening her employment if she did not attend.
 - g. Complainant also suffered a tangible adverse employment action. Threats of discharge, even if not carried out, may constitute an adverse employment action. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). In addition to the threats she experienced, Complainant was unfairly reprimanded for conduct that other employees routinely engaged in, was asked to leave her job, and had a shift taken away from her.
 - h. There is ample evidence to support employer liability here. The facts of this case show that Respondent made no effort to prevent or correct religious harassment in the workplace. Co-Owner was free to harass Complainant without any repercussions. Respondent also does not appear to have a policy prohibiting religious harassment: its Employee Handbook contained only a provision prohibiting sexual harassment.
- 11) It is found that Respondent is liable for subjecting Complainant to hostile work environment discrimination based on her religion in this case.

Discrimination: Terms and Conditions of Employment

- 12) Complainant has alleged that she was discriminated against in the terms and conditions of her employment on the basis of religion when she was reprimanded and asked to leave her employment.
- 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).⁴

⁴ 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 MHRA, however, and the guidance from the Maine Supreme Court in *Doyle* will continue to be followed.

- 14) In this case, Co-Owner's statements unambiguously demonstrated his discriminatory motivation. Accordingly, Complainant need only prove that religious discrimination was a motivating factor in an adverse employment decision.
- 15) "An employee has suffered an adverse employment action when the employee has been deprived either of 'something of consequence' as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld 'an accouterment of the employment relationship, say, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.'" *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20 (citations omitted). An abusive reprimand may also be actionable. *See King*, 611 A.2d at 82 (telling an employee who had requested a smoke-free environment as a reasonable accommodation that "she should look for another job if she couldn't stand the smoke").
- 16) Here, Co-Owner asked Complainant to leave his employ and instructed her to look for another job at the August 2, 2013, meeting, in which Complainant was denigrated for her religious beliefs. Her religion was a motivating factor in Co-Owner's request that she leave her job. Immediately after Complainant declined Co-Owner's "request" that she leave [REDACTED] Co-Owner issued her a reprimand, which included a period of probation. At the same time (after the August 2 meeting), co-workers reported that they were instructed to look for faults in Complainant's work. Circumstances strongly indicate that Co-Owner issued the discipline and put Complainant on probation because she had refused his invitation to leave her job based on his religious objections to her lifestyle; he wanted to have a reason to fire her because she did not comply with his religious views.
- 17) Respondent has not shown that it would have taken these actions in the absence of religious discrimination. In particular, there is no justification for the request that Complainant leave her job other than the fact that her presence offended Co-Owner's religious views. With regard to the reprimand, while Complainant may have made errors in punching in, the evidence supports the conclusion that other employees engaged in similar conduct, but were not reprimanded.
- 18) It is found that Respondent subjected Complainant to religious discrimination in the terms and conditions of employment.

MHRA Retaliation

- 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. § 4553(10)(D).
- 21) The Commission's regulations 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 (July 17, 1999).

- 22) 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 Wyrwal 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*, 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).
- 24) Complainant has established a prima-facie of retaliation. She complained about religious discrimination and harassment by e-mail to Co-Owner on August 21, 2013, when she refused to leave her job, and when her attorney contacted Respondent in late September, 2013. Shortly after these complaints, she was unfairly reprimanded, and she lost a regular shift to a less-senior employee.
- 25) Respondent has provided non-discriminatory reasons for its actions: it stated that the reprimand was justified based on Complainant's performance, and that Complainant did not lose a shift as she claims.
- 26) In the final analysis, Complainant has established that the real reason for these adverse actions is her complaining about religious discrimination and harassment, with reasoning as follows:
 - a. Co-Owner did not raise performance issues until after Complainant rejected his August 2, 2013 "request" that she leave her job because he did not approve of her refusal to accept his religion and her lifestyle with Son for religious reasons. In a late August 2013 exchange of email, she rejected his request to resign and he immediately asked to meet about performance issues. The fact that performance problems were raised in direct response to a complaint of religious harassment strongly suggests that the reprimand was retaliatory.
 - b. The customer service issue dealt with something that had ostensibly occurred many months before, at a time when Co-Owner's and Complainant's religious views did not clash. The decision to raise

the issue long after the fact, while refusing to provide any details, suggests that this issue was raised in retaliation for Complainant's e-mail complaint.

- c. The reprimand also accused Complainant of saying untrue and negative things about Co-Owner. This was a direct reference to the August 2nd meeting, and thus to their religious differences.
- d. Stray, frivolous comments and accusations, like Complainant having worn boat shoes while she was moving, suggests that Co-Owner was looking for issues to use for cause to reprimand Complainant.
- e. It appears that other employees who were late were not reprimanded, while Complainant was. This was confirmed by Former Owner during the meeting to discuss the reprimand, when she stated that many servers do not punch in until recording their first order in the system.
- f. The fact that Complainant was not allowed to discuss the reprimand with anyone, and was pressured to sign it immediately, adds to the tenor of an abusive, retaliatory reprimand. If the reprimand were justified, there would be no reason to attempt to keep it secret.
- g. Finally, Complainant lost a shift, while other, less senior employees were given more shifts than she was. Complainant's shift was reassigned just 10 days after Co-Owner made a public scene accusing her of bringing harassment claims against the family.

27) It is found that Respondent retaliated against [REDACTED] for protected activity in violation of the MHRA.

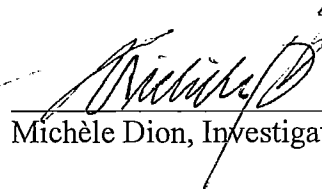
VI. Recommendation:

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

- 1. There are **REASONABLE GROUNDS** to believe that Respondent [REDACTED] Inc., d/b/a [REDACTED] discriminated against Complainant [REDACTED] in employment on the basis of religion by creating a hostile work environment;
- 2. There are **REASONABLE GROUNDS** to believe that Respondent [REDACTED] Inc., d/b/a [REDACTED] discriminated against Complainant [REDACTED] in employment on the basis of religion in the terms and conditions of her employment;
- 3. There are **REASONABLE GROUNDS** to believe that Respondent [REDACTED] Inc., d/b/a [REDACTED] retaliated against Complainant [REDACTED] for asserting her rights under the MHRA; and
- 4. Conciliation should be attempted in accordance with 5 M.R.S. § 4612 (3).



Amy M. Snerson, Executive Director



Michèle Dion, Investigator