



Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330

Phone (207) 624-6290 • Fax (207) 624-8729 • TTY: Maine Relay 711

www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT

PA13-0193

February 20, 2015

██████████, Sr. (Holden)

v.

Penobscot ██████████ No. ██████████ (Brewer)

I. Complainant's Complaint:

Complainant ██████████, Sr. alleged that Respondent ██████████, ██████████, ██████████ ("the ██████████") discriminated against him on the basis of his race, color, and national origin because it did not investigate and remedy his complaints about another member making derogatory statements about him. Additionally, Complainant alleged that the ██████████ discriminated against him by holding him to a higher standard than others and by denying him entry to the club for 90 days. ██████████ also alleged that the ██████████ retaliated against him by suspending him as an Elected Trustee because he filed a complaint with the Maine Human Rights Commission ("the Commission").

II. Respondent's Answer:

The ██████████ stated that it did not discriminate against ██████████. It could not substantiate that racial slurs were made against him, and because he was an officer he was held to a higher standard of behavior. ██████████ was not denied entry to the club for 90 days; he was suspended from the social room for 60 days after an incident with another member, who was also suspended from the social room for 60 days. The ██████████ denied retaliating against ██████████ and stated that he was suspended from his position as an officer pursuant to applicable bylaws.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: from February 23, 2013.
- 2) Date complaint filed with the Commission: April 22, 2013. Complainant filed an amended complaint on October 23, 2013.
- 3) The Eagles is an international non-profit organization and is a "public accommodation" under the Maine Human Rights Act ("MHRA").
- 4) Complainant is not represented by counsel. Respondent is represented by ██████████.

- 5) Investigative methods used: A thorough review of the written materials provided by the parties, an Issues and Resolution Conference, and a request for additional information to Respondent. 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 in this case are as follows:

- a) [REDACTED] is a member of the [REDACTED]
- b) The [REDACTED] is a non-profit international organization with a chapter located in Brewer.

- 2) Complainant provides the following in support of his position:

Race, Color, and National Origin Claim

- a) [REDACTED] is Native American.
- b) In May 2012, [REDACTED] was elected Chairman of the Board of Trustees of the [REDACTED].¹ Within days of being elected, he was brought to trial for using the "F" word in the social room.

- i. The trial arose from an incident he had with another member, the president-elect, "Member 1". Member 1 was making "off the cuff" derogatory comments about the character of two other members who were running for office. [REDACTED] spoke up to Member 1, and used profanity regarding his comments about the other members.

A. After this incident Member 1 started acting differently towards [REDACTED] including always making comments to [REDACTED]

- ii. Neither [REDACTED] nor Member 1 had been sworn in to their offices at the time of the incident.²
- iii. While using profanity is against the [REDACTED] House Rules, it is a common occurrence given that the [REDACTED] is a social drinking club for many people. No one has ever gone to trial and faced expulsion and removal from office for using profanity (or breaking a House Rule) in over 50 years except for [REDACTED]
- iv. [REDACTED] felt that the normal procedure for breaking a House Rule would be to write the person up and submit it to the Board for disciplinary action.

- c) During his trial, [REDACTED] complained that been racial comments made at the Club.

¹ The individual [REDACTED] beat in his elected position was chairman of his trial and the trial committee.

² [REDACTED] went to the Board about Member 1's behavior during the incident. As a result, Member 1 was suspended from the Social Room for 60 days.

- i. Member 1 previously referred to [REDACTED] as a "drunken Indian" to another member. Additionally, during the trial another member informed [REDACTED] that Member 1 stated that "the drunken Indian will be gone".³
- d) Also during the trial, witnesses who were called were not allowed to testify to whether they had ever heard others swear in the Club, which held [REDACTED] to a different standard than other members.
- e) The verdict from the trial was that [REDACTED] was suspended from the social room for 60 days. The Trial Committee consisted of Member 1's personal friends who have personally attacked Mr. Panther at the club.
- f) After being brought to trial [REDACTED] was humiliated, as he felt members of the [REDACTED] and the community who had respected him no longer respected him.
- g) Member 1's suspension was later rescinded, and he was allowed to return to the social room before serving the 60 day suspension. [REDACTED] suspension was not rescinded.
- h) While [REDACTED] was Chairman of the Board, he told the [REDACTED] that there were a lot of problems with how things were being handled by other members. [REDACTED] statement caused Member 1 to ask about bringing [REDACTED] back to trial for possible expulsion, but it did not progress to that point.
 - i. Member 1 inquired with the national organization for the [REDACTED] about taking [REDACTED] back to trial for conduct unbecoming of an Eagle because [REDACTED] had a meeting with another supplier and provided the current vendor's pricing list.
 - ii. [REDACTED] was verbally assaulted on a daily basis. [REDACTED] membership and Trustee position with the [REDACTED] was threatened for doing his job as Trustee and seeking competitive pricing for the [REDACTED]
- i) Around February 2013, a member told [REDACTED] that Member 1 referred to him as a "Prairie N**ger" in front of another member at the time. [REDACTED] felt that Member 1 had a problem with Native Americans and/or people of a different race or color.
 - i. During the week of February 17-23, 2013, Member 1 made racial slurs about [REDACTED] on two occasions. He stated, "[t]hem kind of people do not belong here," and "[t]his organization does not need his kind." [REDACTED] did not hear these statements being made.
 - ii. The President also stated that he "should have got the bastard at the first trial."
- j) [REDACTED] complained to the Board of Trustees in writing within 10 days of when Member 1 made the derogatory statements. The [REDACTED] did not address or listen to [REDACTED] complaints of discrimination. [REDACTED] asked the national organization for help with his complaints about discrimination by email, but never received a response. See Exhibit 1.

³ At the IRC, [REDACTED] stated that he believed this occurred in February 2013 and was said in his presence with another member also standing beside [REDACTED]

Retaliation Claim

- k) [REDACTED] was suspended from his role as Trustee because he filed a complaint with the Commission.
 - i. [REDACTED] was told that he would have to turn in his keys due to his pending lawsuit. [REDACTED] explained that he did not file a lawsuit against the [REDACTED] but that he had filed a complaint.
 - ii. After the officers and membership met, [REDACTED] was told that he would be terminated as an Elected Trustee unless he dropped his case against the [REDACTED]

3) Respondent provides the following in response to Complainant's allegations:

Race, Color, and National Origin Claim

- a) On May 2, 2012, [REDACTED] was elected to the Office of Trustee, and Member 1 was elected as President.
- b) On May 21, 2012, [REDACTED] and Member 1 were involved in a verbal altercation at the club. On May 23, 2012, the Board of Trustees issued Member 1 a 60-day suspension from the social room.
- c) On May 28, 2012, Member 1 formally requested and paid the required fee for a trial against [REDACTED]. On May 30, 2012, the new officers were installed into office and [REDACTED] was elected Chairman by the new Board of Trustees. During the process the Board acknowledged that Member 1 had accepted his suspension.
 - i. At the IRC, the [REDACTED] stated that Member 1 asked for his to suspension to be rescinded, and if it was he would drop his trial against [REDACTED]
- d) If any member requests a trial, it must be held unless the person requesting the trial wishes to drop the trial.
- e) The trial was held on June 26, 2014, and Member 1 presented his case. [REDACTED] did not present any witnesses in his defense. The five member Trial Committee ruled that [REDACTED] should also receive a 60 day⁴ suspension from the social room.
- f) In a response to a request for additional information, the [REDACTED] stated that [REDACTED] only complaint about discrimination was to the Commission. The [REDACTED] stated that there was no record of complaints from [REDACTED] about race, color, or national origin discrimination.
 - i. After receiving [REDACTED] complaint, the [REDACTED] conducted an investigation and determined that the racial slurs were unsustainable as the alleged slurs were "someone said it and someone else heard it".

⁴ [REDACTED] thought he had been suspended from the social room for 90 days, and some of Respondent's documentation stated 90 days, but [REDACTED] confirmed at the IRC that he was suspended for 60 days from the social room.

- ii. Member 1 denied that he made any racial slurs.
 - iii. In a signed statement, Member 1 stated that he brought the trial against [REDACTED] because Member 1 felt that [REDACTED] acted "in complete rage" against Member 1. Member 1 also believed that Mr. Panther felt that he was above the rules of Order.
- g) The [REDACTED] deny that Member 1 attempted to bring [REDACTED] to trial for a second time.
 - h) All Eagle officers are held to a higher standard to give the appearance of impartiality.
 - i) With regard to Member 1's suspension being rescinded, it was rescinded because Member 1 asked to have it rescinded because he was going to be attending a state convention hosted by the [REDACTED]. If Member 1 was under suspension, he could not attend. The Board approved the request by a vote of 5-0. [REDACTED] was the Chairman of the Board at the time, and voted in favor of the request.
 - i. There was no request to reinstate Member 1's suspension. [REDACTED] did not request to have his suspension rescinded.

Retaliation Claim

- j) As an officer of the [REDACTED], [REDACTED] was subject to the Bylaws of the [REDACTED] as approved by the national organization. Bylaw Section 63.11 provides in part that "[a]ny member who is an officer or committee person of the Aerie that brings any civil action against the Aerie shall be suspended from their duties as an officer and/or committee person until the action is dismissed or resolved."
 - k) The Secretary of the [REDACTED] contacted the Grand Secretary of the national organization to get a definition of "civil action", and was informed that it included all types of actions that are not criminal proceedings.
 - l) Based on this interpretation, the national organization legal advisor suspended [REDACTED] as a Trustee until the complaint filed with the Commission was resolved. [REDACTED] was not removed as a Trustee. He was suspended in accordance with the Bylaws.
- 4) The [REDACTED] rescinded Member 1's suspension, but he did not drop his request for trial against [REDACTED]. The [REDACTED] did not reinstate Member 1's suspension after Member 1 decided to continue with his trial against [REDACTED]. [REDACTED]'s suspension was not rescinded.
- a) [REDACTED] voted to rescind Member 1's suspension because he was promised that Member 1 would drop his trial against [REDACTED].

V. Analysis:

- 1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

Race, Color, National Origin Harassment Claim

- 2) The public accommodations provision of the MHRA provides, in relevant part, that it is unlawful to "discriminate against or in any manner . . . deny the full and equal enjoyment to any person, on account of race or color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation. . . ." 5 M.R.S. § 4592(1).
- 3) The MHRA does not explicitly address claims of harassment by a place of public accommodation. In the employment context, the MHRA, following federal law, has been interpreted to include claims involving a "hostile environment." See, e.g., *Bowen v. Department of Human Services*, 606 A.2d 1051, 1053 (Me. 1992). Similarly, "hostile environment" claims have been extended to Title III of the Americans with Disabilities Act, which has similar wording to the public accommodations provision in the MHRA. See *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 314 (D. Mass. 1997). Compare 5 M.R.S. § 4592(1) with 42 U.S.C. § 12182(a). Accordingly, a hostile public accommodations environment claim will be recognized here, and the standards from the employment context will be adopted. Cf. *Guckenberger*, 957 F. Supp. at 314.
- 4) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive [public accommodations] environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile public accommodations 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 [individual's enjoyment of a place of public accommodation]." *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 [place of public accommodations] 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.
- 5) To establish liability on the part of the place of public accommodation for a hostile environment created by one of its employees, Complainant must demonstrate that the place of public accommodation "knew or should have known of the charged [unlawful] harassment and failed to implement prompt and appropriate action." *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002).
- 6) Complainant has not shown that he subject to a hostile environment due to race, color, or national origin by a public accommodation with reasoning as follows:
 - a) While the comments alleged to have been made by Member 1 are offensive, it appears that only one comment was made in Complainant's presence.⁵ The record does not reflect that Complainant was subjected to repeated or intense harassment which created an abusive environment in a public accommodation.

⁵ Complainant provided contradictory facts related to whether he overheard one of the comments, but it is assumed for purposes of the hostile environment analysis that he did hear the comment.

- i. Complainant continued to attend the [REDACTED] club as well as serve on the Board for a period of time.
 - b) Complainant alleged that Member 1 made comments to him consistently, but did not specifically allege comments that were motivated by race, color, or national origin, other than the three comments made in or around February 2013 and an additional comment he alleged was made with no specific time frame attached to it.
 - c) While Complainant was understandably humiliated by the circumstances of the trial, the totality of the situation does not show that he was subjected to a hostile environment due to his race, color, or national origin.
- 7) It has not been found that Complainant was subject to a hostile environment by a public accommodation on the basis of his race, color or national origin in violation of the MHRA.

Race, Color and National Origin Terms and Conditions Claim

- 8) The MHRA makes it unlawful:

For any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color..., ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

5 M.R.S. § 4592(1).

- 9) Because this language is similar to that in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a), case law interpreting Title II is helpful in analyzing this claim.
- 10) In order to establish a prima-facie case of public accommodations discrimination, Complainant may show that he "(1) is a member of a protected class, (2) attempted to contract for services and afford himself or herself of the full benefits and enjoyment of a public accommodation, (3) was denied the full benefits or enjoyment of a public accommodation, and (4) such services were available to similarly situated persons outside his or her protected class who received full benefits or were treated better." *Jackson v. Waffle House, Inc.*, 413 F.Supp.2d 1338, 1361 (N.D.Ga. 2006) (Title II).
- 11) With respect to the fourth element, "similarly situated persons" need not be identical, "but there should be a reasonably close resemblance of facts and circumstances. What is key is that they be similar in significant respects." *Id.* at 1358 (citing *Lizardo v. Denny's Inc.*, 270 F.3d 94, 101 (2nd Cir. 2001)).
- 12) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse treatment. *Id.* at 1355-56. See also *Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1262 (Me. 1979). After Respondent has articulated a nondiscriminatory reason,

Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse action. *See id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet his overall burden at this stage by showing that (1) the circumstances underlying the articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.

- 13) In order to prevail, Complainant must show that he would not have suffered the adverse treatment but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.
- 14) Complainant has demonstrated a prima-facie case in his claim of discrimination on the basis of his race, color and/or national origin. He has shown that he is a member of a protected class, he attempted to and did afford himself of the benefits of the [REDACTED] club, was denied the full benefits or enjoyment of the [REDACTED] club because he was held to a higher standard in his trial, and such services were available to similarly situated people outside of his race, color, and national origin (who were treated better) as Member 1 was initially suspended for the same amount of time as Complainant for the same incident, but had his suspension rescinded.
- 15) Respondent has articulated a legitimate, nondiscriminatory reason for holding Complainant to a higher standard and suspending him from the social room, namely, any member can be brought to trial by any other member and Complainant was held to a higher standard because he was an elected official.
- 16) At the final stage of the analysis, Complainant has not shown that he would not have been held to a higher standard or been suspended from the social room but for his race, color and/or national origin with reasoning as follows:
 - a) Complainant argues that Respondent has a history engaging in bias against individuals who are racial minorities. The record shows that Complainant was held to a higher standard because he was an elected official, although at the time of the incident that led to his trial, he had not been officially sworn into his elected position. Additionally, Complainant was suspended for using the social room for 60 days due to his behavior in an incident with Member 1 who was also an elected official who had not been sworn in at the time of the incident as well.
 - i. Complainant went to the Board regarding Member 1's behavior in the incident and in response Member 1 sought to bring Complainant to trial, which he was entitled to do.
 - b) Initially Member 1 was suspended for 60 days from the social room and accepted the suspension. At a later time Member 1 requested that his suspension be rescinded. Complainant who was serving as the Chairman of the Board at the time voted to rescind Member 1's suspension because he was told that Member 1 would drop the trial against him. This did not occur.
 - c) Conceivably, the Board should have also considered rescinding Complainant's suspension as well when it rescinded Member 1's. The record however does not support that Member 1's suspension was rescinded and Complainant's was not due to Complainant's race, color, or national origin. Complainant could have asked for his suspension to be rescinded as well, but did not. It does not

appear that Respondent has a procedure for automatic rescission of both suspensions in this situation, so it is unfair to assume that the Board had a duty to rescind Complainant's suspension without him asking for his suspension to be rescinded.

- 17) Discrimination on the basis of race, color and/or national origin in the terms and conditions of access and privileges to a public accommodation is not found.

Retaliation Claim

- 18) The MHRA provides that "[a] person may not discriminate against any individual because that individual has opposed any act or practice that is unlawful under this Act or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this Act." 5 M.R.S. § 4633(1).
- 19) In order to establish a prima-facie case of retaliation, Complainant must show that he engaged in statutorily protected activity, he 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 (employment case); *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006) (same). The term "materially adverse action" covers actions that are harmful to the point that they would dissuade a reasonable person from making or supporting a complaint of discrimination. *See 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.*
- 20) 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 his overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.*
- 21) Complainant has met his prima-facie case in his retaliation claim. He has shown that he engaged in statutorily protected activity by filing a complaint of discrimination, he was subjected to a materially adverse action in that he was suspended from his elected position, and that there was a causal link between the protected activity and the adverse action.
- 22) Respondent has stated a non-discriminatory reason for why it suspended Complainant from his elected position; he filed what Respondent considered to be a lawsuit under its bylaws against Respondent which requires Respondent to suspend a member from an elected position.
- 23) In the final stage of the analysis, Complainant has shown that there was a causal connection between his protected activity and suspension from his elected position:
- a) Complainant filed his complaint of discrimination, and soon after, Respondent asked him for his keys and told him that he would be suspended from his position unless he dropped his case against the Eagles. While Respondent argues that the national organization interpreted filing a complaint with the Commission to be a civil action, the Commission's proceeding is an administrative action, and is not in and of itself a lawsuit.


- b) Even if Complainant's filing with the Commission falls within the scope of the bylaws, this does not protect Respondent's actions. The bylaw merely codifies retaliation which is unlawful under the MHRA; it says, in essence, that if an officer files a complaint, he or she will be suspended *because of* that complaint. This is exactly what the MHRA prohibits.
- c) Clearly, Respondent's action in suspending Complainant for filing a complaint of discrimination with the Commission is a materially adverse action as it would dissuade a reasonable person from making or supporting a complainant of discrimination. In this case, Complainant was suspended and ultimately gave up his elected position because he filed a Complainant with the Commission.

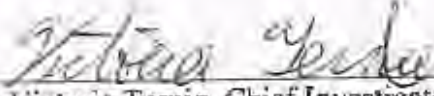
24) Retaliation in violation of the MHRA is found.

VI. Recommendation:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1. There are **No Reasonable Grounds** to believe that Respondent [REDACTED] [REDACTED] [REDACTED] subjected Complainant [REDACTED] to a hostile environment based on his race, color, and national origin in violation of the MHRA;
- 2. There are **No Reasonable Grounds** to believe that Respondent [REDACTED] [REDACTED] [REDACTED] discriminated against Complainant [REDACTED] on the basis of his race, color, and/or national origin in violation of the MHRA; and
- 3. These portions of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).
- 4. There are **Reasonable Grounds** to believe that Respondent [REDACTED] [REDACTED] [REDACTED] [REDACTED] retaliated against Complainant [REDACTED] [REDACTED] [REDACTED] for filing a complaint of discrimination with the Commission in violation of the MHRA, and conciliation of this claim should be attempted in accordance with 5 M.R.S. § 4612(3).


Amy M. Snelson, Executive Director


Victoria Ternig, Chief Investigator

