



Maine Human Rights Commission
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Investigator's Report

May 24, 2013

E11-0487

[REDACTED]

v.

[REDACTED]

I. The complaint:

Complainant [REDACTED] alleged that she was unlawfully discriminated against in employment on the basis of her disability which was a direct result of sexual assault by a [REDACTED] N.A. (" [REDACTED] co-worker/classmate and that she was retaliated against (terminated) for reporting that [REDACTED] unlawfully failed to provide her with a safe workplace to which she was entitled as a victim of violence.

II. Respondent's Answer:

Respondent [REDACTED] asserted that Complainant [REDACTED] allegations are meritless. [REDACTED] emphasized that when Complainant described the incident which occurred between her and another [REDACTED] employee, she was visibly upset; out of concern for her, [REDACTED] told her that she could go home and take any time off she needed. Ms. [REDACTED] was terminated because she did not appear for work after she used all of her sick and vacation time for the year and after Aetna determined that she did not qualify for short-term disability leave. As to the charge of retaliation in violation of the Maine Whistleblowers' Protection Act, Complainant [REDACTED] has failed to state a viable claim.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: On or about October 1, 2010 through February 23, 2011.
- 2) Date complaint filed with the Maine Human Rights Commission: July 26, 2011.
- 3) Respondent employs more than 280,000 employees and is subject to the Americans with Disabilities Act, the Maine Human Rights Act, the Maine Whistleblowers' Protection Act and state and federal regulations.
- 4) Complainant is represented by Rebecca Webber, Esq. Respondent is represented by Siobhan Sweeney, 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.

IV. Development of Facts:

- 1) The parties in this case are as follows:

- a) Complainant [REDACTED] was employed as a part-time Collector 1 in [REDACTED] Orono, Maine call center. She was originally scheduled to work 16 hours per week, which increased to 24 hours. Ms. [REDACTED] was responsible for collecting on customer credit card accounts that had fallen between 5 and 60 days past due. Her job duties included calling customers to help resolve delinquencies on their accounts through payment options and programs.
- b) [REDACTED] is a national banking association headquartered in Charlotte, North Carolina. It is one of the world's largest financial institutions, serving individual consumers, small and middle market businesses and large corporations with a full range of banking, investment, asset management and other financial and risk-management products and services. [REDACTED] has more than 280,000 employees worldwide and has a well-communicated policy prohibiting harassment, discrimination and retaliation.
- c) Important third parties: Classmate/Co-worker/Attacker; [REDACTED] Director of Community Standards; Safe Campus Staff; Risk Operations Team Manager; Risk Operations Unit Manager II; Business Support Lead 1; Administrative Assistant III; Psychiatrist; Physician; Physician 2; U ME Psychologist; Counselor; Counselor 2; Campus Detective; Aetna Appeal Specialist.

- 2) Ms. [REDACTED] complaint is outlined here:

- a) On September 17, 2010, outside of the workplace, a University of Maine classmate, who also was a co-worker at [REDACTED] ("Classmate/Co-worker/Attacker"), sexually assaulted me at a fraternity party in a fraternity house adjacent to the University of Maine campus in Orono. My friend KC was a witness to the attack, which I reported to University of Maine officials immediately.
- b) On Monday, September 20, 2010, I reported to the [REDACTED] call center in Orono (where Classmate/Co-worker/Attacker also worked) and reported the sexual assault, first to Administrative Assistant III and then to my Second -line Supervisor, Risk Operations Unit Manager II. I was sent home on unpaid sick leave.
- c) Early in October of 2010, I asked to be returned to the workplace and shared with [REDACTED] the fact that I had been diagnosed with post-traumatic stress disorder and situational depression arising from the assault by Classmate/Co-worker/Attacker. I requested that I be transferred to a station some distance from him as it was too traumatic for me to continue working just 30 feet from his workstation where we could clearly see one another. [REDACTED] refused this accommodation for my disability.

- d) I complained to [REDACTED] that keeping me in such close proximity to him placed my health and safety at risk. I complained that [REDACTED] actions also violated Maine law in that it was depriving me of a benefit of safe workplace for having exercised my right to employment leave as a victim of violence. I protested that [REDACTED] was doing nothing to aid the victim of an attack, other than telling the Classmate/Co-worker/Attacker that he shouldn't speak with me anymore.
 - e) In November 2010, Classmate/Co-worker was convicted of furnishing liquor as well as assault in the Bangor District Court. At no point did [REDACTED] change its position about my return to the workplace at a location distant from that of Classmate/Co-worker/Attacker.
 - f) On February 23, 2011, [REDACTED] terminated my employment. I believe that these actions by [REDACTED] violated the Maine Whistleblowers' Protection Act, the Maine Human Rights Act and the Americans with Disabilities Act.
- 3) Complainant [REDACTED] provided this more detailed summary:
- a) After I was sexually attacked by Classmate/Co-worker/Attacker, I dealt with fear and anxiety about returning to my classes as well as to my place of employment, [REDACTED] I worked with the Director of Community Standards, Rights and Responsibilities for the Division of Student Life at the University [REDACTED]), to create a safety plan so that I could continue with my classes and feel safe on campus. [REDACTED] Director of Community Standards went through the incident with me, made sure I was receiving any support I needed and asked me what I needed in order to feel safe on campus.
 - b) In order to feel safe, I needed assurances that there would be no contact between my attacker and myself. I was terrified of running into him at the university where we were both in school. [REDACTED] Director of Community Standards got copies of both of our class schedules so that he was aware of any times we might run into each other. He was then able to make adjustments to Classmate/Co-worker/Attacker's schedule so that there would be minimal to no overlap of times we would be on campus together. He then issued a Criminal Trespassing Warning that only allowed Classmate/Co-worker/Attacker in two buildings on campus during specified times so that I could have the peace of mind I needed. [REDACTED] Director of Community Standards continued this procedure of coordinating our schedules through May 2011 when Classmate/Co-worker/Attacker graduated from the university. The Criminal Trespass Warning also prohibited Classmate/Co-worker/Attacker from returning to the university campus after his graduation until my expected graduation date, which allowed me peace of mind.
 - c) [REDACTED] Director of Community Standards also worked with Classmate/Co-worker/Attacker individually so that he would understand what the Safety Plan required of him. He simply needed to stay away from me.
 - d) I told my [REDACTED] manager, Risk Operations Unit Manager II, about the university's safety plan and explained that a similar arrangement was all I wanted to have put into place at work so that I could continue to work at [REDACTED] I told Risk Operations Unit Manager II that I felt unsafe and that I was meeting with a counselor on campus as well as seeing a doctor for injuries from the assault. I requested as part of a safety plan for me to return to work that my attacker's cubicle be moved. During this conversation, I discussed my diagnosis of "situational depression" and "considered PTSD" ["considered" because it had not gone on long enough at that time to be referred to as PTSD]. I also shared that I had been injured in the assault and that I was on

medication for these injuries. I was taking a muscle relaxant for deep bruising to my back and arms and strained muscles and bruising on my neck. I told her that I was also on sleep medication. She did not comment on anything that I shared. She did not react at all. She just said okay. She didn't take any action to resolve the problem or accommodate my request. She never called me back in response to my request.

- e) My only directive from Risk Operations Unit Manager II, when I initially reported the sexual attack and it became clear that I would be required to be out for a period of time, was that I phone in every Friday, to touch base with her for an update. [REDACTED] document "BANK0015" is a log of my Friday phone calls which were recorded. I believe that this was only a partial list, because I'm quite certain that I left more than 8 messages. The log details 8 separate contacts – generally, the phone messages I left stated that I was calling for my "weekly check-in." This was what I had been instructed to do. My phone bills substantiate that these calls were made. Risk Operations Unit Manager II never returned a call. I never received a callback either from her or any other [REDACTED] employee. This caused an inordinate amount of frustration and anxiety. I had been seen and treated by my physician, a psychologist, counselors at school, and was taking prescribed medications including Ambien to help with sleep problems. I was struggling with PTSD, fear, anxiety and depression, but I needed to work. [REDACTED] was stonewalling me from my perspective.
- f) I felt extremely vulnerable and the thought of returning to my job at [REDACTED] call center in Orono, where the company had refused to move my Classmate/Co-worker/Attacker's cubicle, was very unsettling. The anticipation and fear of returning caused me to experience panic attacks. Due to the fact that the cubicle partitions were approximately 3'5" to 4' high Classmate/Co-worker/Attacker and I could see one another from where we sat. I couldn't understand [REDACTED] absolute refusal to re-locate him so that we were not in close enough proximity to see one another. We worked in a very large call center which was one large room with up to 100 associates working at the same time. My attacker and I worked on adjacent teams and there was no reasonable explanation for [REDACTED] refusal to move him.
- g) I consistently worked with [REDACTED] insurance company, Aetna, in providing them with whatever they requested of me in terms of medical documentation. Still, there was no apparent progress from my view. I had applied for Short Term Disability benefits. They said that they needed medical records or counseling records stating why I was unable to perform my job. They didn't tell me that I needed to provide an evaluation from a psychiatrist in that conversation so my STD was denied due to insufficient documentation. I appealed and it was denied again. I went and got a psychiatric evaluation and they denied it that time because I hadn't gotten the paperwork done by the correct time. The psychiatric evaluation that went to Aetna, [REDACTED] agent, said that I had PTSD.
- h) On November 19, 2010, I called in for my Friday check-in and didn't get hold of anyone so I left a message saying that Classmate/Co-worker/Attacker had pled guilty to assault and furnishing alcohol to a minor. At this point, [REDACTED] was on notice that he had lied to [REDACTED] when he told them that he did not assault me. [REDACTED] could have moved him to its Orono Bank branch, but did nothing. I continued with the Friday "call-ins." [REDACTED] continued to frustrate me with patent silence.
- i) On December 8, 2010, I received a "Failure to Return from Leave" letter from Risk Operations Team Manager. In part, the letter informed me that my leave of absence ended on November

18, 2010 and that my return to work date was November 19, 2010. "You have not reported to work and have not provided additional medical documentation to Aetna since your leave of absence ended on November 18, 2010. Aetna has made several attempts to contact you but you have failed to respond. Your continued absence from work is no longer authorized." The thrust of the letter was that they needed more medical information to justify continued leave. On December 9, 2010, I called my doctor's office and asked them to fax [REDACTED] more documentation to substantiate my leave. On December 10, 2010, I called Aetna. This 9-minute phone call is substantiated on my phone bill. I explained that I had gotten a letter stating that more medical documentation was needed and that I had sent medical information – Aetna had received it and I inquired as to what else they needed. Aetna said that they needed documentation on why more leave was needed. I explained that I had spoken to my doctor, and that she was sending more documentation. I specifically requested that Aetna let me know if it was adequate. I did not get a call back.

- j) This pattern continued. My frustration continued to accumulate.
 - k) On February 8, 2011, [REDACTED] sent me a "Failure to Return to Work letter" stating in part "your leave of absence ended on January 24, 2011 and your return to work date was January 25, 2011. You have not reported to work and have not provided additional medical documentation to Aetna since your leave of absence ended on January 24, 2011. Aetna has made several attempts to contact you, but you have failed to respond. Your continued absence from work is no longer authorized." It also said: "If you fail to submit medical documentation to substantiate your continued absence from work and you do not return to the workplace by February 18, 2011, the Bank will assume that you have voluntarily resigned. Your employment will end on February 18, 2011 and you will be ineligible for re-hire." I received this letter but still no one returned my calls. Risk Operations Unit Manager II did not call back to discuss what the Safety Plan for my mental health would be when I returned and we had agreed to discuss that before my return. I didn't call back because they hadn't returned my calls for months and were refusing to discuss moving my attacker's location to allow me to come back. I needed that accommodation for my PTSD. There was nothing in Risk Operations Team Manager's letter that suggested any willingness to talk about my need for an accommodation.
 - l) On February 23, 2011, my employment was terminated by [REDACTED]
- 4) In response to Complainant [REDACTED] summary, [REDACTED] offered the following:
- a) All [REDACTED] needed from Complainant [REDACTED] was a return-to-work note from her health care provider and, if accommodations were required, instructions about what accommodations were needed to allow her to return to the workplace and continue to do the job she was hired to do.
 - b) Ms. [REDACTED] attacker's actions did not take place at work at [REDACTED] but rather on the campus, at a party in a fraternity house, at the University of Maine at Orono.
- 5) The content and extent of communication between the parties is disputed:
- a) ([REDACTED] On September 20, 2010 when Ms. [REDACTED] went in to [REDACTED] call center, she informed Administrative Assistant III about the assault. She then spoke with Risk Operations Unit Manager II and said that she had reported the attack to campus police. Ms. [REDACTED] reported

that she was afraid to come to work and did not want to face her attacker. Since Ms. [REDACTED] appeared to be extremely distraught, Risk Operations Unit Manager II told her that she could take any time off she needed and reminded her of [REDACTED] Employee Assistance Program. Ms. [REDACTED] said that she was going to see a counselor on campus. Risk Operations Unit Manager II asked Ms. [REDACTED] to remain in touch with her to communicate any updates or when she would be back at work.

- b) ([REDACTED] Risk Operations Unit Manager II contacted Advice and Counsel for Guidance. She was advised to contact [REDACTED] Corporate Security Department to see if they could obtain a copy of the police report and to follow up with Advice and Counsel. Corporate Security informed her that they had not heard back from the University of Maine Police. Corporate Security suggested that management meet with Classmate/Co-worker/Attacker to discuss the behavior expected of him in the workplace. He did not report to work on September 20, 2010.
- c) ([REDACTED] On September 21, 2010, Ms. [REDACTED] called Risk Operations Unit Manager II and asked if anything had been done with her attacker. The manager responded that she had not had an opportunity to speak with him but that she would be doing so that evening. Ms. [REDACTED] stated that she had decided to take a schedule change for the evening and that she would make up the hours. She also mentioned that she was going to see her doctor for injuries.
- d) ([REDACTED] Classmate/Co-worker/Attacker reported to work that evening. Risk Operations Unit Manager II met with him and informed him that she had been told of an incident that had occurred over the weekend between him and another [REDACTED] employee. He indicated that he knew she was referring to Ms. [REDACTED]. He stated that he did not assault her. Risk Operations Unit Manager II directed him to maintain his distance from Ms. [REDACTED] and any contact with her personally or by his fraternity brothers who worked at the Orono call center was unacceptable while at work. He stated that he had been contacted by campus police regarding furnishing liquor to minors the same weekend. He asked if this meant that he was losing his job. Risk Operations Unit Manager II told him that she was currently in contact with Advice and Counsel and that she would speak to them about the incident and would communicate what impact if any, it had on his position. She subsequently informed Ms. [REDACTED] that she had spoken to him and directed him not to have any interaction with her. Ms. [REDACTED] stated that she couldn't understand why he was still employed there. Risk Operations Unit Manager II responded that she could not discuss the specific terms of his employment, but did say that she was working closely with the relevant people to address his situation. She reiterated that he was not to have any contact with Complainant while at work and stated that she would ensure that both of them were on separate teams and seated away from each other.
- e) ([REDACTED] On September 22, 2010, Ms. [REDACTED] called Advice and Counsel while she was in the office of Safe Campus Staff. She was phoning to request a safety plan. Advice and Counsel informed her that she was not allowed to have Safe Campus Staff on the line with her. Ms. [REDACTED] then communicated to Advice and Counsel that Classmate/Co-worker/Attacker had invited her to a party at a fraternity house on September 17, 2010 and that he sexually assaulted her. She did not elaborate on what happened. Ms. [REDACTED] said that she had met with Risk Operations Unit Manager II about the incident. She explained that she had not reported to work since September 20, 2010 and that she was expected to return to work on September 23, 2010. Ms. [REDACTED] was asked if the incident happened at a [REDACTED] event and she said no. She was asked if she filed a restraining order against him. She explained that the police had served him with harassment orders. She was asked if she and Classmate/Co-worker/Attacker worked

on the same team. She said that they worked on different teams but that they sit approximately 30 feet from one another. Ms. [REDACTED] was asked if her manager was present in the office at the same time she is at work and Ms. [REDACTED] replied that she usually was. Advice and Counsel advised Ms. [REDACTED] that management was working with Advice and Counsel to address the situation. Advice and Counsel recommended that Ms. [REDACTED] contact [REDACTED] Employee Assistance Program and to inform management and/or Advice and Counsel if she files a restraining order against him. Advice and Counsel provided Ms. [REDACTED] with Aetna's information in case she felt that she needed to take a leave of absence.

- f) ([REDACTED] Ms. [REDACTED] applied for short-term disability leave. On October 18, 2010, Business Support Lead I was notified by Aetna that Ms. [REDACTED] request for short-term disability leave had been denied. Aetna determined that the information provided by Ms. [REDACTED] doctors did not support her being unable to perform the essential elements of her occupation as a Collector. That same day, Aetna sent Business Support Lead I an email notifying her that Ms. [REDACTED] had been approved for an unpaid medical leave from September 20, 2010 through November 18, 2010. Ms. [REDACTED] did not return to work on November 19, 2010 and according to Aetna, had not provided them any updated medical documentation to support her continued absence from work beyond November 18, 2010. On November 21, 2010, Aetna left Ms. [REDACTED] a voice mail message inquiring about her return to work status.
- g) (E-mails, letters and voicemails) For many weeks, Complainant [REDACTED] was following instructions which she had initially been given by Risk Operations Unit Manager II when she reported the sexual attack and it became clear that she would require some time away from work. She had been told to call in on Fridays to provide updates on her status. As described above, she did that and never heard from [REDACTED]. During this time, [REDACTED] continued to process this situation without apparent knowledge of the plan for weekly call-ins established by Risk Operations Unit Manager II. Ms. [REDACTED] was requesting the reasonable accommodation that she be transferred to a station some distance from her attacker as it was too traumatic for her to continue working just 30 or so feet from him where, however far away, she could see him and he could see her. If [REDACTED] did not want to move her for some reason, she had also suggested that he be moved. They were not on the same team. They were on adjacent teams.
- h) (IRC) [REDACTED] stated at the IRC that Complainant [REDACTED] chose not to get in touch with [REDACTED] after receiving their letters. Phone records do not support this contention, as Ms. [REDACTED] phone records demonstrate that (as she has alleged) she continued to call [REDACTED] but never received return calls. In the timeline provided to the Commission, Complainant [REDACTED] notes indicate that she called at 6:24pm on Friday, December 24, 2010 and "mentioned that I was waiting for a call back. I asked that, after the holidays, someone give me a call to discuss my return to work." Her AT&T phone record detail documents this one-minute call. Respondent asserts that the letters were clear instructions that she needed to send completed documentation regarding her return to work or contact [REDACTED] or she would be terminated. The fact remains that she continued to call [REDACTED] simply would not return her calls. If there were specific instructions she needed to follow, [REDACTED] should have spoken with her and told her what was expected of her so that she could comply and return to work.
- i) (IRC) [REDACTED] explained at the conference that it did call Ms. [REDACTED] back, when Risk Operations Unit Manager II called her. [REDACTED] stated that Risk Operations Unit Manager II's plan was not to actually converse with Ms. [REDACTED] instead, the intent was for Ms. [REDACTED] to simply leave voicemails for Ms. [REDACTED]. This was an odd plan between employer and employee,

particularly in light of the fact that other [REDACTED] officials were sending concurrent threatening emails regarding Ms. [REDACTED] job security.

j) Complainant [REDACTED] submitted her phone records into evidence:

Sun, Nov 21, 2010 - [REDACTED] says Aetna called Complainant [REDACTED]. The phone record does not support that.

Nov 23, 2010 - [REDACTED] says that Aetna called Complainant [REDACTED] a second time. The phone record does not support that.

Nov 24, 2010 - [REDACTED] says that Aetna called Complainant [REDACTED] a third time, but the phone records do not support that. This pattern continues.

k) Then, on February 10, 2011, Complainant [REDACTED] received a letter dated February 8, 2011 stating that her employment would be separated on February 18, 2011 if she did not return to work or provide more medical documentation.

l) Risk Operations Unit Manager II did not call back to discuss what the safety plan for her mental health would be. This is the central issue around which the entire charge was filed. They had agreed to discuss that before her return to work and Complainant [REDACTED] felt unable to return without a safety plan in place. Ms. [REDACTED] would call Aetna and [REDACTED] but [REDACTED] would only call and leave messages for her, not converse with her. She could not return to work because [REDACTED] absolutely refused to have a conversation with her about the safety plan she needed to return to work.

6) Certain answers to this investigator's questions at the IRC bear mentioning here:

a) Question to Ms. [REDACTED]

Q. Ms. [REDACTED] when you spoke with Risk Operations Unit Manager II on September 21, 2010, did she tell you that she would "ensure that you and Classmate/Co-worker/Attacker would be on separate teams and seated away from one another? A. "No." "What I was told was that she would tell him that he couldn't have contact with me or speak to me." "I could see him from where I was seated when I worked. We were both students at Orono.

b) Questions to [REDACTED]

Q. Why was [REDACTED] not willing to move Classmate/Co-worker/Attacker after Ms. [REDACTED] report of assault initially? A. [REDACTED] attempted to contact the campus security people – an investigation had to first be conducted.

Q. After he pled guilty to two counts, was he moved? A. By that time, Ms. [REDACTED] was not in the workplace.¹

¹ As has been noted in this case, this became a "which comes first, the chicken or the egg" scenario. Ms. [REDACTED] was not in the workplace because Classmate/Co-worker/Attacker had not been moved, nor had she been informed that she would be transferred to another team, another schedule, a bank branch in town or any other accommodation which would have quelled her fear.

- 7) Psychiatrist offered, in a letter to Aetna's Appeal Specialist dated March 30, 2011, the following observation:

Complainant [REDACTED] was seen on March 30, 2011 by Psychiatric Consultant at the University of Maine Counseling Center in Orono who spoke about the post-trauma and the terrifying effects of the confinement and physical assault from which she still suffered months later. Ms. [REDACTED] was seen in reference to her claim with Aetna for reimbursement for lost work time.

"This is a young woman who underwent a terrifying confinement and physical assault in early September 2010 by a person who was a co-worker at her employment and whose desk was approximately 15 feet from hers. The reality of that assault is verified by the fact that this young man was convicted in court of assault based on the incident in question. When Ms. [REDACTED] attempted to work, the employer was unwilling to make any accommodations to further separate their desks. The young man was still in employment and returning to employment would have placed her within 15 feet of the person who just recently assaulted her and she found that an intolerable situation.

At this point now, several months post-assault, there is still evidence of post-traumatic stress disorder and the process of healing is on-going. She is still suffering from insomnia and flashbacks to the episode. I think that even a reasonable layman would be able to understand that returning her to within 15 feet of a person who had recently assaulted her makes absolutely no sense at all and is beyond me to understand why her employer made that decision. Even returning to employment at all in the same building with that individual I think would have been more than most people could manage under the circumstances. I think that her absence from work was very clearly related to the assault and I would offer the medical opinion that it was a direct result of her psychological state at the time and that she was suffering from a significant inability, i.e. a disability, to perform her normal employment."

- 8) Physician addressed Complainant [REDACTED] absence in a letter to Aetna dated December 14, 2010:

The above named patient has been under my medical care since September 2010 to current. This is in regards to her leave (# 3185421). She has been diagnosed with situational depression, anxiety and insomnia following an assault in September. This is requiring a multi-faceted approach in treatment to help her maintain her level of functioning. With the appointments she is required to have and the medications she has been started on I had asked her to stay out of work for the time being. This time is important for her healing and development process. She has been out of work since September 20, 2010 and has approved absence through November 18, 2010. I have recommended that she be out from November 19, 2010 through January 24, 2011. This will give us time to continue with any adjustments to the treatment plan that we may need to make sure that she is in a good place to return to work. If you have any further questions, please feel free to contact my office. I do apologize that it was my understanding that lead to her not being approved for the current absence. I was unaware that you needed a letter from me in agreement with the leave; I had thought that it was an internal review on the part of your company.

V. Analysis:

- 1) The Maine Human Rights Act 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.

Disability Discrimination – Failure to Make Reasonable Accommodation

- 2) Ms. [REDACTED] first allegation is that Respondent [REDACTED] discriminated against her based on disability by unlawfully terminating her employment in lieu of providing her with a reasonable accommodation for a disability, in the form of a safety plan. [REDACTED] says that Ms. [REDACTED] failed to request accommodations while out on unpaid leave and then failed to return to work when her leave expired.²
- 3) The Maine Human Rights Act provides that it is unlawful to discriminate against an employee because of physical or mental disability. *See* 5 M.R.S. § 4572(1)(A).
- 4) Unlawful discrimination also 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).
- 5) 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, Complainant must show (1) that she is 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.*
- 6) The term “qualified individual with a disability” means “an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires.” 5 M.R.S. § 4553(8-D). 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, [and] the provision of qualified readers or interpreters. . . .” 5 M.R.S. § 4553(9-A).
- 7) 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

² The MHRA does not prohibit an employer from discharging or refusing to hire an individual with a physical or mental disability when the employer can show that the employee or applicant, “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 health or safety of the individual or others. . . .” 5 M.R.S. § 4573-A(1-B). That defense is not at issue here. [REDACTED] alleged it terminated Ms. [REDACTED] employment because she did not return to work, not that it terminated her because she was unable to perform her work.

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).

- 8) Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. See *Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.
- 9) Complainant Ms. [REDACTED] did establish a prima-facie case of disability discrimination here:
 - a) She set forth evidence that she was a "qualified individual with a disability".
 - i) Ms. [REDACTED] did submit information to support her claim that she had a "physical or mental disability" as defined by the MHRA. Ms. [REDACTED] shared with her employer the fact that she had been diagnosed with post-traumatic stress disorder and situational depression arising from a sexual assault by Classmate/Co-worker/Attacker. For the purposes of this analysis, it is assumed that Ms. [REDACTED] does have a physical or mental disability for Maine Human Rights Act purposes. 5 M.R.S. § 4553-A (1)(A).
 - ii) Complainant could perform the essential functions of the position she held with or without accommodations. Per her physician's orders, she could have returned to the workplace after January 24, 2011 and continued to perform the elements of her position as Collector with the appropriate accommodation.
 - b) She established that she reported her physical or mental limitations to her employer and that [REDACTED] did not reasonably accommodate those limitations. Ms. [REDACTED] requested that [REDACTED] create a safety plan to assist with her diagnosed PTSD and depression about working within 30 feet of her attacker. This is the type of reasonable accommodation which the MHRA seems to require. See, 5 M.R.S. § 4553(9-A) (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, etc.). It also appears that this accommodation was feasible for [REDACTED] as it only involved schedule changes and moving one cubicle in an office of 100 or more cubicles. [REDACTED] failed to do so.
 - c) She established that [REDACTED] failure to reasonably accommodate her limitations affected the terms and conditions of her employment. Ms. [REDACTED] showed that she could not return to work without a safety plan in place, and that [REDACTED] failure to discuss one with her meant that she could not return to work before her leave ran out and she was terminated from employment.
- 10) The burden then shifts to Respondent to show that it could not reasonably provide the accommodation Ms. [REDACTED] sought. Respondent has not met its burden to show that granting Ms. [REDACTED] request that either she or her attacker be re-located would likely have caused an "undue hardship." Other options were also available to [REDACTED] different shifts, staggered arrival times, transfer of one or the other employee to a nearby bank branch. The evidence does not even indicate that [REDACTED] seriously considered any of these options.
- 11) Additionally, the evidence here indicates that [REDACTED] failed to communicate effectively with Ms. [REDACTED] about her accommodation request and a return to work. [REDACTED] tries to lay fault for this upon Ms. [REDACTED] but that is not persuasive.

- a) [REDACTED] has focused on its human resources practices and policies and the [REDACTED] "Associate Handbook" to justify its conduct here. The handbook does cover information regarding medical leaves, of course. As required by the handbook, Complainant [REDACTED] worked closely with [REDACTED] Leave Administrator, Aetna. There were an inordinate number of contacts followed by her need to provide additional medical releases, notes from her physician, counselors, psychologist and finally a psychiatrist. [REDACTED] says that Aetna was in charge of determining whether Ms. [REDACTED] was eligible for additional medical leave and that Ms. [REDACTED] failed to communicate with Aetna regarding when her leave ran out, leading to her termination. The evidence here indicates that Ms. [REDACTED] a college student faced with Aetna's confusing system, did everything that Aetna asked of her by way of documenting her medical diagnoses, condition and limitations.
- b) Even if that were not the case, however, [REDACTED] cannot outsource *responsibility* for its employees' terms and conditions of employment to a third-party agent. [REDACTED] absolutely may choose to contract out the work of managing an employee's insurance benefits, but [REDACTED] remains liable for the impact those third-party agent's actions have on [REDACTED] employee's terms and conditions of employment.
- c) While Aetna was repeatedly denying and then reconsidering Ms. [REDACTED] short-term disability insurance benefits, [REDACTED] failed to consider Ms. [REDACTED] reasonable accommodation request. The entire extent [REDACTED] interactive process was to (i) receive weekly messages from Ms. [REDACTED] about her status and to (ii) make phone calls to Ms. [REDACTED] in which [REDACTED] intent was to not converse but to leave messages for her. This makes no sense. The very nature of an "update" suggests interaction/conversation. Risk Operations Unit Manager II had the responsibility to set realistic expectations when she spoke with Complainant [REDACTED]. If it was her intention to ignore the voice mail messages, she should have made that very clear from the outset. She should have told Complainant [REDACTED] to phone in and leave messages which would simply be logged in and not returned.
- d) Complainant [REDACTED] was a 20-year-old student who came into the workplace in tears to report a sexual attack by a [REDACTED] co-worker. She was navigating in unfamiliar waters and the whole while she wanted one simple accommodation, to be placed away from her attacker. Risk Operations Unit Manager II, a manager, was a seasoned employee who could easily have provided that accommodation.
- e) The idea that [REDACTED] expected Ms. [REDACTED] to come back into the workplace and work while within line of sight of her convicted attacker from her cubicle seems unreasonable, if not callous. [REDACTED] focus on the fact that the sexual attack did not take place on [REDACTED] property is typical of corporate systems, but the fact remains that they were co-workers and that she could see him from her cubicle. She was asking for common sense. [REDACTED] suggested, through counsel, during the Issues and resolution conference that [REDACTED] could not move her attacker until an investigation into the incident had been conducted. The information which would have been gleaned from an investigation into the facts became very clear when the court documents revealed that the male had been found guilty of furnishing alcohol and assault. There was no reason to resist moving one of them so that Complainant [REDACTED] could return to a job which she clearly needed, as she has made very clear.

- f) Complainant [REDACTED] was waiting patiently for the safety plan her doctor requested on her behalf, so that she could return to her job. She was dealing with fear, anxiety, depression, PTSD and struggled with panic attacks by the thought of returning to the workplace where she feared coinciding with her attacker. Instead of honestly addressing her concerns about the workplace, [REDACTED] counted on Aetna to deny her unpaid leave and then, when her unpaid leave ran out, [REDACTED] fired her without ever discussing the requested accommodation.
- 12) It is found that Respondent [REDACTED] unlawfully discriminated against Complainant [REDACTED] based on disability by failing to accommodate her and in terminating her employment instead.

Whistleblowers' Protection Act

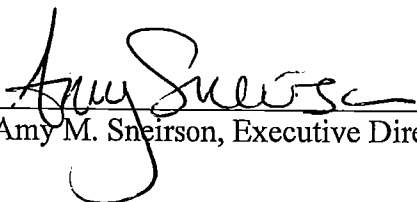
- 13) The Maine Human Rights Act prohibits terminating an employee's employment because of previous actions that are protected under the WPA. 5 M.R.S. § 4572(1)(A).
- 14) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *See DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.
- 15) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA-protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*
- 16) In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant's protected activity, although protected activity need not be the only reason for the decision. *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).
- 17) Here, Complainant [REDACTED] has alleged that Respondent [REDACTED] terminated her position in retaliation for complaining that being forced to work in such proximity to Classmate/Co-worker/Attacker placed her health and safety at risk. Ms. [REDACTED] alleged that she was being deprived of a benefit of a safe workplace for having exercised her right to employment leave as a victim of violence. Ms. [REDACTED] protested that [REDACTED] was doing nothing to aid the victim of an attack other than telling the attacker that he could not speak with her any longer.
- 18) Ms. [REDACTED] demonstrated that she is entitled to the protections of the WPA. Acting in good faith, either Ms. [REDACTED] or a person assisting her reported to [REDACTED] what he/she had reasonable cause to believe was a violation of the law and/or a practice that would put at risk Ms. [REDACTED] health or safety – namely, that [REDACTED] was requiring Ms. [REDACTED] to return to work without a safety plan in place and/or without moving Ms. [REDACTED] attacker from working near her.

- 19) Ms. [REDACTED] showed that she was the subject of adverse employment action, in that [REDACTED] refused to do anything of substance to provide a safe work place for her. As Ms. [REDACTED] waited for [REDACTED] to participate in the interactive process with her about a safety plan, her unpaid leave time ran out and she was terminated. This adverse employment action took place within temporal proximity to her request for a safety plan and the two are causally related.
- 20) With the prima-facie case met, there is a rebuttable presumption that [REDACTED] retaliated against Ms. [REDACTED] for engaging in WPA-protected activity. [REDACTED] provided evidence that its nondiscriminatory reason for terminating Ms. [REDACTED] was that she ran out of unpaid leave time because she failed to communicate with Aetna ([REDACTED] agent) and [REDACTED] itself. This is not persuasive. As noted above, Ms. [REDACTED] did everything Aetna and [REDACTED] asked of her.
- 21) In the final analysis, Ms. [REDACTED] has carried her overall burden of proving that there was, in fact, a causal connection between her repeated, insistent requests for a safety plan and her termination. Rather than seek to engage in an interactive solution, [REDACTED] terminated Ms. [REDACTED] employment on February 23, 2011.
- 22) Complainant [REDACTED] is found to have been retaliated against for engaging in protected activity.

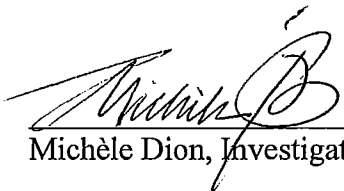
VI. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that Respondent [REDACTED] discriminated against Complainant [REDACTED] by failing to accommodate her disability and, instead, terminating her employment;
- 2) There are **Reasonable Grounds** to believe that Respondent [REDACTED] retaliated against Complainant [REDACTED] by terminating her employment for engaging in Whistleblowers' Protection Activity; and
- 3) Conciliation should be attempted in accordance with 5 M.R.S. § 4612 (3).



Amy M. Sneirson, Executive Director



Michèle Dion, Investigator