



Maine Human Rights Commission
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August 23, 2013

INVESTIGATOR'S REPORT
E11-0544

[REDACTED] (Gray)

v.

[REDACTED] (Silver Spring, Maryland)

I. Complaint:

Complainant [REDACTED] alleged that Respondent [REDACTED] [REDACTED] [REDACTED] ("Comfort Inn") retaliated against her after she engaged in protected activity under the Maine Human Rights Act and the Maine Whistleblowers' Protection Act. Ms. [REDACTED] also alleged that she was discriminated against because of her sex, age, race, national origin and color.¹

II. Respondent's Answer:

Comfort Inn denied that it discriminated or retaliated against Ms. [REDACTED] for any reason.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: July 6, 2011. The period of October 30, 2010 to August 26, 2011 is timely.
- 2) Date complaint filed with the Maine Human Rights Commission: August 26, 2011.
- 3) Respondent employs approximately 100 employees and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964 as amended and the Whistleblowers' Protection Act ("WPA"), as well as state and federal employment regulations.
- 4) Respondent is represented by [REDACTED] Esq. Complainant is represented by [REDACTED] Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties. The Investigator sought an Issues and Resolution Conference, in which Respondent declined to participate. 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 Age and national origin discrimination are not specifically addressed in the charge of discrimination itself, but were raised subsequently and therefore are analyzed in this report.

IV. Development of Facts:

- 1) The parties and issues in this case are as follows:
 - a) Complainant [REDACTED] began her employment at the Comfort Inn in South Portland in 2006 as a housekeeper.
 - b) Respondent [REDACTED] is a subsidiary of [REDACTED] ("[REDACTED]"), a privately-held corporation that, through its subsidiaries, owns and operates hotels throughout the United States.²
 - c) Important third parties: VP, Operations, SW; HR Manager, IM; General Manager, BL; Maintenance Person, RC; Front Desk Manager, JD; Maintenance Assistant, MC; Front Desk Person, RB; Former Employee, BP; Former Employee, MP; Former Employee, GP.
 - d) Complainant [REDACTED] alleged that Respondent [REDACTED] retaliated against her after she engaged in protected activity under the MHRA and WPA. Ms. [REDACTED] also alleged that she was discriminated against because of her age, sex, race, national origin and color. Comfort Inn denied that it has discriminated or retaliated against Ms. [REDACTED] for any reason.
- 2) The following is a summary of Ms. [REDACTED] complaint:
 - a) I was employed by Comfort Inn as a Housekeeper from March 6, 2006 until June 30, 2011, when I was terminated. I believe that I performed my job duties satisfactorily.
 - b) I was subjected to unwelcome, offensive sexual harassment/sexual advances by Maintenance Person. On April 22, 2010, while I was in the break room with my female co-worker, Maintenance Person came in and said, "Hi Nipples" to me. Every day, I heard obscene language and he stared at my body, making disgusting facial gestures. Once, he laid on the floor, pumping his buttocks up and down and told me to perform oral sex on him.
 - c) Two days later, I informed Executive Housekeeper about what had taken place in the break room, adding that Maintenance Person had asked me to lift my shirt so that he could suck my nipples. The female co-worker who witnessed this was also present during this conversation. I was extremely embarrassed about this, but both Executive Housekeeper and co-worker agreed to go with me to report this to General Manager.
 - d) On April 27, 2010, the three of us went to General Manager to report this situation. Later, General Manager would say things to me like it was a "he-said, she-said" kind of situation; that no one would believe it.

² Sunburst does not directly own or operate any of its hotels, and is not the employer of any Comfort Inn employees. Any reference or notation to "[REDACTED]" on documents submitted with this Position Statement reflects the name of [REDACTED] ultimate parent company, which is headquartered in Silver Spring, Maryland.

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- e) Staff thought that General Manager was in love with Maintenance Person and I believe that she was trying to get me to drop my complaint. Males appeared to be able to do anything they wanted, but female employees were watched closely. The investigation did not seem fair.
 - f) On June 29, 2011, I interrupted an ongoing staff meeting to politely ask where my room assignment sheet was. I was terminated on July 6, 2011 with insubordinate behavior given as the reason. I believe that the reason given by the employer for my termination is a pretext. I believe that the real reasons are discrimination because of my race, national origin, color, age and sex as well as retaliation for having reported illegal activity in the workplace.
- 3) Ms. [REDACTED] provides the following narrative in an effort to clarify the chronology of events during her employ with Comfort Inn:
- a) My employment with Comfort Inn began in 2006 as a housekeeper and my work history was good until April of 2010, when I reported that Maintenance Person had sexually harassed me. I first made the report of sexual harassment to Executive Housekeeper. Executive Housekeeper and another employee who witnessed what occurred accompanied me to General Manager to discuss Maintenance Person's lewd and sexually offensive behavior. General Manager was very obvious in her displeasure about my having made this report. She tried to convince me that Maintenance Person was simply attempting to make me laugh.
 - b) When I filed the sexual harassment complaint, General Manager told me that it was a long process and that there would be a lot of papers to fill out. General Manager suggested that there was a way to resolve the matter without getting into "legal stuff." General Manager proposed meeting with her and Maintenance Person somewhere off-site where Maintenance Person would apologize. I was uncomfortable with the proposed meeting and asked to have my complaint handled through the company complaint process.
 - c) I believe that, because I insisted on going through the company complaint process, which resulted in a formal investigation by the company, General Manager was looking for a reason to terminate my employment.
 - d) My complaint was investigated and the matter was resolved by the company's formal complaint process in May 2010. After that date, my work performance was more closely scrutinized and I began to receive discipline for issues which had not been problematic before I filed the complaint of sexual harassment.
- 4) Complainant [REDACTED] describes among other events, the issue which led to the termination of her employment on June 29, 2011:
- a) Comfort Inn has stated that I had been late for work on a number of occasions in June, 2011 because I failed to report to work by 8:00 a.m. A review of the times I actually logged in to work illustrates that I never reported to work any later than 8:30 a.m., the time which had been agreed upon. The issue which led to my termination of employment occurred on June 29, 2011. I clocked into work at 8:29 a.m. for my shift. Some time prior to that day, I had met with General Manager and Executive Housekeeper about when my work shift should begin. At that time, it was agreed that my starting time would be between 8:15 a.m. and 8:30 a.m.

The reason for the change in the start of my shift was that my husband worked nights and we had only one car, making it difficult for me to get to work by 8:00 a.m. General Manager was well aware of the agreement about my schedule and knew that I was not late for work on June 29, 2011.

- b) When I arrived at work on June 29, 2011, I checked the cart which I had been using to clean rooms and found that it was empty. After the cart was stocked with supplies, I asked for my log sheet so that I would know which rooms I would be cleaning that day. Another employee told me that the supervisor, who prepares the log sheet, had left for a smoke break. I saw the supervisor go into a room and called her name, but she continued inside the room. I then knocked on the door and was told that a meeting was about to start. I said that I just needed my log sheet and was told where it could be found. I left the room, found the log sheet and then worked for the day.
 - c) I never used offensive or abusive language, including the "f" word, when I went into the meeting room. I was not disrespectful to anyone in the meeting room. I am a native of Brazil and Portuguese is my native language. I speak English with a noticeable accent and have a loud voice. There are many times while I am at work that others do not understand what I am saying because of my accent.
 - d) I had worked for Comfort Inn since 2006 and was considered to be a dependable and reliable employee. It is clear that General Manager wanted me gone from her employment at the Comfort Inn and she made sure that it happened. General Manager was very displeased that a sexual harassment complaint had been filed against Maintenance Person and she retaliated against those who were part of that complaint process. The other three women who had participated in that complaint process, and I, were terminated from employment with the Comfort Inn between February 2011 and July 2011. All four of us were long-term employees at the Comfort Inn and three of the employees were over 60 years of age and I was over 50 years of age. Evidence submitted by Comfort Inn illustrates that during the 2-year period of July 1, 2009 to June 30, 2011, thirty three employees, including the four of us either left or were terminated from their employment and that the four complainants were the longest-tenured employees to be terminated and generally much older than other terminated employees.
 - e) General Manager was eventually able to find a way to terminate the employment of the four of us who were a part of the sexual harassment complaint against Maintenance Person or who she thought were a part of it. She terminated my employment because she was upset with me for having filed a formal sexual harassment complaint against Maintenance Person.
- 5) The following addresses Ms. [REDACTED] claim of that she was terminated because of her age:
- a) Complainant was more than 50 years old at the time of termination.
 - b) Respondent provided the following information about the ages of employees terminated between 2009 and 2011, and the reasons for termination:
 - i) A total of 23 employees were involuntarily terminated.

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- ii) Eight (8) were in their 20's. They were terminated for attendance problems (5), failed probation (2) and poor job performance (1).
 - iii) Five (5) were in their 30's. They were terminated for attendance problems (3), poor job performance (1), and work rule violations (1).
 - iv) Four (4) were in their 40's. They were terminated for attendance problems (1), failed probation (1), poor job performance (1), and work rule violation (1).
 - v) Three (3) were in their 50's. They were terminated for failed probation (2), and work rule violations (2).
 - vi) Three (3) were in their 60's. They were terminated for attendance problems (1), and work rule violations (2).
- 6) The following addresses Ms. [REDACTED] claim that she was discriminated against because of her race and color:
- a) (Not timely) My hair naturally looks like an afro and that is usually the way I wore it to work at Comfort Inn. One day during the summer of 2010, I styled my hair so that it was not an afro. While I was on break with other employees outside on a patio, Maintenance Person came by and told me that I should be sure to hold onto my wig because the wind might blow it off. I indicated that I did not understand his reference to a wig and he made the comment that I had to be wearing a wig because a person like me could not have hair that looked that good. I received this as a racial comment. I don't recall exactly when this occurred, but it was following the sexual harassment investigation of Maintenance Person's comments in 2010. It was still warm enough to be sitting outside for a break
 - b) (Time uncertain) This second incident occurred sometime after the above incident. I was in the Comfort Inn lobby and my hair was in its natural afro. General Manager came by and asked what was wrong with my hair and asked whether I could "do something about it." I also took this to be a racial comment.
 - c) Other employees heard Maintenance Person's comment and at least one hotel guest heard General Manager's comment.
- 7) The following addresses Ms. [REDACTED] allegation that she was discriminated against because of her sex:
- a) Between the beginning of my employment with Comfort Inn in 2006 and my April 2010 report of sexual harassment by Maintenance Person, my comfort in the workplace began to decline. It seemed obvious that General Manager was upset with me for having advanced these allegations.
 - b) General Manager was immediately defensive and suggested that a formal investigation by the company would result in a "long process with a lot of paperwork" and offered an alternative to

dealing with the matter, without the need for getting into the "legal stuff." General Manager proposed meeting with Maintenance Person offsite to allow for an apology. As a result of having expressed my discomfort with this proposed solution and my insistence that the company's standard process be followed, I believed that General Manager was seeking a reason to terminate my employment, in an attempt to protect Maintenance Person's job security.

- c) After the HR Manager completed his investigation, resulting in discipline for Maintenance Person, I sensed that General Manager was more vigilant and more closely attuned to my adherence to company policy. From my perspective, I began to be issued discipline for minor issues which had not previously been a problem. I had a closely-held belief that there was an understanding between myself, the General Manager and the Executive Housekeeper that I could arrive in the mornings between 8:15 a.m. and 8:30 a.m. because my husband and I shared a vehicle and it was too difficult to arrive at 8:00 a.m. There was no "note to file" documenting this in my personnel file; it seemed to be acceptable behavior.
 - d) On June 29, 2011, I arrived and logged in at 8:29 a.m. as illustrated on the "Comfort Inn time sheet." General Manager was well aware that there was an agreement that I could come in between 8:15 a.m. and 8:30 a.m. Regardless, I was terminated. Comfort Inn states that I had been late for work on a number of occasions in June, 2011 because I failed to report for work by 8:00 a.m. A review of the times I reported to work show that I never reported any later than 8:30 a.m., the time it had been agreed that I could report.
 - e) I find this termination of my employment disproportionate to the manner in which Comfort Inn deals with males. Although not timely, I draw the comparison with the incident in which Maintenance Person simulated masturbation in a public area, with a plunger, and faced no consequences whatsoever.
- 8) Comfort Inn provided the following in support of its position:
- a) On April 27, 2010, Comfort Inn first learned that on or about April 21, 2010, Maintenance Person allegedly made several comments which were offensive to Ms. [REDACTED]. Upon notice, Comfort Inn immediately began an internal investigation. At the request of Comfort Inn, Ms. [REDACTED] immediately submitted a written statement in her native Portuguese which was translated into English by her son on April 30, 2010. On May 4, 2010, HR Manager initiated interviews on-site at the South Portland Comfort Inn and what was eventually revealed was that both Maintenance Person and Ms. [REDACTED] shared "overly friendly" banter since they had begun working together. However, specific instances could not be verified. On May 11, 2010, Maintenance Person was formally reprimanded for his behavior on April 21, 2010 and retrained in Comfort Inn's Anti-Discrimination, Harassment and Retaliation policies.
 - b) Ms. [REDACTED] attorney of record at that time was informed about what had transpired, specifically that Maintenance Person had been disciplined and to Comfort Inn's knowledge, there were no further unwelcome or offensive comments to any other person.

- c) (Not timely) On June 28, 2010, Ms. [REDACTED] was formally issued an oral reprimand for being No Call/No Show for her scheduled 8:00 a.m. to 4:00 p.m. shift on Sunday, June 20, 2010. The related Personal Discussion Record ("PDR") dated June 21, 2010 cites Ms. [REDACTED] for failing to call in her anticipated absence. On July 16, 2010, Ms. [REDACTED] was issued a written warning for the minor offense of unexcused tardiness. The PDR dated July 14, 2010 documents this occurrence. The PDR also says:

DESCRIBE CONSEQUENCES OF CONTINUED INAPPROPRIATE BEHAVIOR:

Important Note: in cases where progressive discipline is being initiated, future incidents could lead to further disciplinary action up to and including termination.

Further incidents or violations of company policy will lead to additional disciplinary action up to and including termination of employment. Further incidents need not be related as per [REDACTED] Progressive/Corrective Discipline Policy.

- d) (Not timely) On July 16, 2010, Ms. [REDACTED] was formally issued a written warning for being one hour late to arrive for her shift. The related PDR dated July 14, 2010 cites Ms. [REDACTED] for failing to notify her supervisor that she would be late. The PDR also says:

DESCRIBE CONSEQUENCES OF CONTINUED INAPPROPRIATE BEHAVIOR:

Important Note: in cases where progressive discipline is being initiated, future incidents could lead to further disciplinary action up to and including termination.

Further incidents or violations of company policy will lead to additional disciplinary action up to and including termination of employment. Further incidents need not be related as per [REDACTED] Progressive/Corrective Discipline Policy.

- e) (Timely) On December 30, 2010, Ms. [REDACTED] was issued an oral reprimand for the minor offense of failing to comply with written or oral instructions. Ms. [REDACTED] failed to come to work even though snowy weather did not impede safe travel. She also failed to take advantage of Comfort Inn's Storm Night Policy which allows an employee to stay overnight at the hotel when bad weather is imminent. This written reprimand was presented by Assistant Executive Housekeeper and General Manager. She was given a copy for her records even though she refused to sign the PDR, which also says:

DESCRIBE CONSEQUENCES OF CONTINUED INAPPROPRIATE BEHAVIOR:

Important Note: in cases where progressive discipline is being initiated, future incidents could lead to further disciplinary action up to and including termination.

Further incidents or violations of company policy will lead to additional disciplinary action up to and including termination of employment. Further incidents need not be related as per [REDACTED] Progressive/Corrective Discipline Policy.

- f) (June 30, 2011 Performance Discussion Record which resulted in Ms. [REDACTED] termination)
The Event Causing Action: Violation of company policy states: Critical offense – Insubordinate acts or statements or willful failure to carry out orders. In part, the document describes the inappropriate behavior as: On Wednesday June 29, 2011 Assistant Executive Housekeeper, Maintenance Person and General Manager were in the morning staff meeting in a guest room when Ms. [REDACTED] knocked on the door. Maintenance Person answered the door and told Ms. [REDACTED] that there was a meeting in progress. Ms. [REDACTED] stated "I don't care; I need my paper (room assignment sheet) in a loud and demanding way. Assistant Executive

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Housekeeper told Ms. [REDACTED] that it was on the shelf in the Housekeeping Office area and Ms. [REDACTED] walked off. Ms. [REDACTED] started that day by clocking in for her 8:00 a.m. shift at 8:29 a.m. without calling in to state that she would be late. Ms. [REDACTED] also complained that morning about being out of rags by saying "I'm not going to deal with this. I'm going home." Assistant Executive Housekeeper proceeded to gather rags from other carts in order to get Ms. [REDACTED] on her way.

- g) (Performance Discussion Record of the same date, June 30, 2011) . . . Prior Occasions when appropriate behavior was discussed with Employee: Employee Handbook, Annual Performance Reviews, January 29, 2011 Minor offense unintentional failure to comply with written or oral instructions; December 29, 2010 Performance Discussion Record, Oral reprimand-minor offense – unintentional failure to comply with written or oral discussions. July 14, 2010 Written Warning, minor offense – unexcused incident of tardiness. June 21, 2010 Oral.
- 9) Further investigation reveals:
- a) The company's discrimination and sexual harassment policy states:
- Discrimination and sexual harassment are damaging to the work environment: they are illegal. Therefore, the company will treat discrimination and sexual harassment as a serious form of employee misconduct which can result in the discharge of the offender. All employees are responsible for ensuring that the workplace is free from discrimination, harassment and intimidation on the basis of sex, race, religion, national origin, age or disability. [REDACTED] strong disapproval of offensive or inappropriate behavior at work requires that all employees must avoid any action or conduct which could be viewed as discrimination or sexual harassment. This policy requires that all employees must do their best to be sensitive to their own behavior toward others. Keep in mind that what one person considers common, appropriate behavior may be considered offensive and out of line by a co-worker. Violations of this policy will be handled under the Corrective Discipline Procedure. Any employee who has a complaint of discrimination or sexual harassment at work by anyone including supervisors, co-workers, vendors or visitors should bring the problem to the attention of company officials and may do so without fear of reprisal.
- b) (Ms. [REDACTED] General Manager stopped me once and said that HR Manager asked her to ask me if I was still going forward with the harassment case. I told General Manager that I couldn't talk to her about the matter. About three months later, we were having a barbeque at work. General Manager stopped me and again said that HR Manager wanted her to ask me if I was still going through with the harassment charge. I told her for the third time that I could not discuss the matter with her. At another time, I was walking down the hallway and General Manager asked me to come to her office. She said, "I know that I have already asked about this, but HR Manager wants me to ask you if you are still going through with the harassment case. I told her yet another time that I was not at liberty to discuss the matter with her. When I first reported the harassment to General Manager, I told HR Manager that I would not talk to General Manager again because she was on Maintenance Person's side and this kept going on and on.

- c) (Intake paperwork) Intake notes from Ms. [REDACTED] recount that General Manager delayed reporting Ms. [REDACTED] report of sexual harassment for four days, and in the meantime told Ms. [REDACTED] "Let's see if we can keep this right here so we don't have to go to corporate with this." Ms. [REDACTED] intake paperwork states that the General Manager came into rooms Ms. [REDACTED] was cleaning crying, saying "I can't even imagine being here without him." The intake notes further recount that Ms. [REDACTED] asked corporate to take General Manager off of the investigation of her complaint against Maintenance Person because she was too close to him; according to the notes, corporate did remove General Manager from the investigation but General Manager still told Maintenance Person everything that she knew.

V. Analysis:

- 1) The Maine Human Rights Act ("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.
- 2) Complainant alleged that she was subject to discrimination based on age, sex, race, national origin and color and that she was retaliated against for reporting sexual harassment of other employees. Respondent denies any discrimination or retaliation.

Claim of Sex Discrimination

- 3) The MHRA provides, in part, that "[i]t is unlawful employment discrimination, in violation of this Act ... for any employer to ... because of ... sex ... 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) Complainant alleged that Respondent discriminated against her on the basis of her sex by treating her differently than males and giving males "preferential treatment." Respondent denied the claim of sex discrimination and asserted that Ms. [REDACTED] vague comments that "male employees seemed to get preferential treatment" or that "female employees were always held to a higher standard than men" does not specifically mention any instances that Comfort Inn could investigate or verify.
- 5) Here, because there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). See *Maine Human Rights Comm 'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).
- 6) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that she (1) was a member of a protected class, (2) was qualified for the position she held, (3) suffered an adverse employment action, (4) in circumstances giving rise to an inference of discrimination. See *Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). Cf *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1st Cir. 2002).

- 7) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. 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 employment 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 her overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, 16.
- 8) In order to prevail, Complainant must show that she would not have suffered the adverse job action 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.
- 9) Here, Complainant has established a prima-facie case of unlawful discrimination. She is a woman who performed her job satisfactorily and was terminated, and Respondent presumably continued to require housekeeping work to be completed.
- 10) Respondent articulated a legitimate, nondiscriminatory reason for the termination, namely that Ms. █████ employment was terminated for a "critical offense" – speaking aggressively and rudely to her supervisor and interrupting a meeting to do so.
- 11) Complainant was unable to demonstrate that the reason cited by Respondent was a pretext for sex discrimination, with reasoning as follows:
 - a) Ms. █████ did have three disciplinary actions in her file from 2010 that both explicitly warned "further incidents or violations of company that she could be terminated for further incidents. that led to the warnings may have actually occurred. Ms. █████ did not have explanations that would excuse or disprove the June 2010 No Call/No Show warning, the July 2010 late arrival warning, or the December 2010 no-show due to stormy weather.
 - a) Ms. █████ does argue strenuously that the allegation leading to her termination was false. Ms. █████ knocked on the door of a meeting room to ask for her room assignments. General Manager alleged that Ms. █████ conduct was rude and aggressive, an allegation Ms. █████ flatly denies. Even if it were true, though, Respondent's characterization of this as a "critical violation of the Respondent's work rules and policies" seems to vastly overstate what actually happened. Firing a longtime employee for this (even if it did happen the way Respondent characterizes it) was disproportionate and supports Ms. █████ allegation that General Manager was out to get her.
 - b) Ms. █████ recalled that no action had been taken in 2007 following a report of Maintenance Person's egregious sexual harassment. She believed that General Manager gave unfair preference or latitude to Maintenance Person because he was a male.

- c) Making a troubling sexual harassment report about Maintenance Person's lewd and lascivious conduct in April 2010, Complainant believed again that General Manager would do nothing to discipline Maintenance Person, again because he was male. In fact, General Manager stated that she wanted to work things out privately without the tedious "paperwork" and the "legal stuff." She proposed having Ms. [REDACTED] meet with Maintenance Person so that he could apologize. Ms. [REDACTED] felt that this was inappropriately lenient.
 - d) In contrast, after reporting sexual harassment, Ms. [REDACTED] was held harshly accountable for less serious infractions of company rules, leading to her termination of employment.
 - e) What seemed to Ms. [REDACTED] to be a distinctly different approach to disciplining males than disciplining her (a female) forms the basis for [REDACTED] perception that "males always seemed to get preferential treatment and that females were always held to a higher standard than men." She has presented no objective evidence in support for this contention, however.
- 12) In the final analysis, Ms. [REDACTED] has not demonstrated that males were treated more favorably than females or given preferential treatment. *
- 13) Discrimination based on sex is not found.

Age Discrimination

- 14) The MHRA provides, in part, that "[i]t is unlawful employment discrimination, in violation of this Act ... for any employer to ... because of ... age ... 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).
- 15) Because here there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). See *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).
- 16) First, Complainant establishes a prima-facie case of unlawful age discrimination by showing that: (1) she performed her job satisfactorily, (2) her employer took an adverse employment decision against her, (3) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed, and (4) those who continued to perform Complainant's job duties were a substantially different age than Complainant. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Campiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (federal ADEA).
- 17) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. See *Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. 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 employment 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.

- 18) Thus, Complainant can meet her overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.
- 19) In order to prevail, Complainant must show that she would not have suffered the adverse job action 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.
- 20) Ms. ██████ did state not state a prima-facie case of age discrimination. She did perform her job satisfactorily, she was terminated and her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed. However, here there is no evidence that those who continued to perform Complainant's job duties were a substantially different age than Complainant.
- 21) Even if Ms. ██████ had set forth a prima-facie case, Respondent provided a non-discriminatory reason for her termination, namely unprofessional behavior on the job.
- 22) In the final analysis, Ms. ██████ did not provide evidence that Respondent's stated reason for terminating her was a pretext for age discrimination, or that she would not have been terminated but for her age:
 - a) A review of the evidence provided by Respondent shows that during the 2-year period of July 1, 2009 to June 30, 2011, 33 employees (including Ms. ██████ either left or were terminated from their employment.
 - b) Although Ms. ██████ was one of the longest tenured employees to be terminated and older than other terminated employees, that – in and of itself – does not evidence age discrimination.³
 - c) Respondent's records show that the majority of employees terminated were under the age of forty (13 out of 23, or 56%).
 - d) Employees of all ages were terminated for the same or similar reasons. For example, employees in their 20's, 30's, 40's and 60's were fired for attendance problems. Employees in their 30's, 40's, 50's and 60's were fired for work rule violations.

³ Three other former Comfort Inn employees also filed Commission complaints, alleging that after Executive Housekeeper brought complaints forward on behalf of people she supervised that the other employees were treated in a discriminatory/retaliatory fashion as well. All four of these complainants either left or were terminated from their employment, and all four complainants were the longest tenured employees to be terminated and generally much older than other terminated employees.

- e) There is no indication that Respondent terminated employees based on age-based prejudice or stereotypes.
- 23) There is no evidence offered or found which substantiates Ms. [REDACTED] allegation that she was discriminated against because of her age.

Race, National Origin,⁴ or Color Harassment

- 24) The Maine Human Rights Act provides, in part, as follows: "It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of race or color... [or] national origin . . . 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). Hum. Rights Comm'n Reg. § 3.09(F) (1) (July 17, 1999).
- 25) The Maine Human Rights Commission Regulations provide, in part, as follows: "Harassment on the basis of race or color is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct of a racial nature constitute racial harassment when: 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. § 3.09(F) (1) (July 17, 1999).
- 26) "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.
- 27) Accordingly, to succeed on such a claim, Complainant must demonstrate the following:

- (1) that she (or he) is a member of a protected class;
- (2) that she was subject to unwelcome harassment;
- (3) that the harassment was based upon protected class status;
- (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 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 (sex discrimination).

⁴ Ms. [REDACTED] specifically requested in January 2012 that national origin discrimination be added to her complaint, but she presented no evidence related to that allegation during the investigation of the case.

- 28) The fact that the conduct complained of is unwelcome must be communicated directly or indirectly to the perpetrator of the conduct. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988).
- 29) The MHRC Regulations provide the following standard for determining employer liability for harassment based on race, color or national origin committed by a non-supervisor: "With respect to persons other than those mentioned in paragraph 2 above, an employer is responsible for acts of racial harassment in the workplace where the employer, or its agents or supervisory employees, knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." Me. Hum. Rights Comm'n Reg. § 3.12(H)(3).
- 30) The MHRC Regulations provide the following standard for determining employer liability for harassment based on race, color or national origin committed by a non-supervisor: "[A]n employer is responsible for acts of racial harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action." Me. Hum. Rights Comm'n Reg. § 3.09(F) (3) (July 17, 1999).
- 31) Here, Ms. ██████ did not meet her burden to prove that Respondent is liable for failing to address a hostile work environment due to racial harassment:
- 32) During the years that they worked together, Maintenance Person and General Manager had made offensive race-based remarks to Ms. ██████ once, arguably during the period of time which could be considered timely.
- 33) Ms. ██████ did not represent that she protested when the remark was made about her hair in the lobby of Comfort Inn. Understandably, she was offended and likely hurt by this callous remark, but because it is Ms. ██████ ultimate burden to prove discrimination, she has not prevailed in proving discrimination based on race or color here. This was a stray remark and cannot be shown to have created an abusive or hostile work environment.
- 34) Discrimination based on race, national origin, and color are not found.

Retaliation

- 35) With respect to Complainant's retaliation claim, the MHRA prohibits termination because of previous actions that are protected under the WPA. *See* 5 M.R.S. § 4572(1)(A). The WPA protects an employee who "acting in good faith . . . reports orally or in writing to the employer . . . what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States." 26 M.R.S. § 833(1)(A).
- 36) In addition, 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 Act] 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).
- 37) The Maine Human Rights Commission regulations further 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.

- 38) In order to establish a prima-facie case of WPA-protected retaliation, 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.
- 39) In order to establish a prima-facie case of MHRA 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.
- 40) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in MHRA or 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 Respondents make 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.*
- 41) 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 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).
- 42) Here, Complainant has established a prima-facie case that she was terminated for engaging in protected activity under the MHRA and the WPA. Ms. [REDACTED] alleges that Comfort Inn terminated her employment in June 2011 but that it disciplined her more harshly after she reported sexual

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harassment on the part of Maintenance Person in April, 2010. In this case, the time elapsed from report to termination does not raise an inference of retaliation, but Ms. [REDACTED] allegation that she was disciplined disproportionately harshly post-report can establish the causal link here.

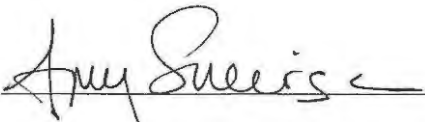
- 43) Respondent provided evidence to demonstrate a nondiscriminatory reason for the termination, namely that Complainant violated a number of company rules and expectations.
- 44) In the final analysis, Ms. [REDACTED] did establish that she was disciplined more – and disproportionately – harshly after her report of sexual harassment than before. This supports her claim of retaliation.
- a) It is true, as noted above, that some of the issues that led to the warnings may have actually occurred. Ms. [REDACTED] did not have explanations that would excuse or disprove the June 2010 No Call/No Show warning, the July 2010 late arrival warning, or the December 2010 no-show due to stormy weather warning. However, it is notable that Ms. [REDACTED] personnel file does not include any reprimands or warnings prior to June 2010, but shows three warnings/disciplinary actions in the 14 months afterward. The only thing that changed was Ms. [REDACTED] April 27, 2010 report of sexual harassment and her insistence that it be handled formally.
 - b) Ms. [REDACTED] does argue strenuously that the allegation leading to her termination was false. Ms. [REDACTED] knocked on the door of a meeting room to ask for her room assignments. General Manager alleged that Ms. [REDACTED] conduct was rude and aggressive, an allegation Ms. [REDACTED] flatly denies. Even if it were true, though, Respondent's characterization of this as a "critical violation of the Respondent's work rules and policies" seems to vastly overstate what actually happened. Firing a longtime employee for this (even if it did happen the way Respondent characterizes it) was disproportionate and supports Ms. [REDACTED] allegation that General Manager was out to get her.
 - c) Evidence does support Ms. [REDACTED] allegation that General Manager disciplined her as punishment for pursuing a complaint about Maintenance Person.
 - i) General Manager was very emotional and upset at the prospect of having to terminate Maintenance Person's employment when Ms. [REDACTED] reported his sexual harassment. Ms. [REDACTED] intake notes support her contention that General Manager tried to derail the formal complaint process and pressured Ms. [REDACTED] to handle it informally, so as to protect Maintenance Person.
 - ii) General Manager's inquiries about whether or not Ms. [REDACTED] planned to "move forward" with the sexual harassment claim illustrate that she felt threatened because Maintenance Person's position with the Comfort Inn might be in peril. General Manager built a disciplinary file against Ms. [REDACTED] through disproportionately harsh disciplinary actions and caused Complainant to be terminated as a result of her complaints of sexual harassment.
 - d) Complainant showed that but for her reports of sexual harassment, Respondent likely would not have terminated her employment.

45) Complainant carried her overall burden of proving that there was, in fact, a causal connection between her reports of sexual harassment and her termination. It is found that Respondent unlawfully retaliated against Complainant for her MHRA- and WPA-protected activity.

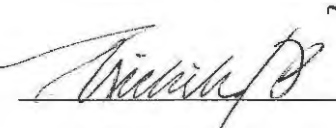
VI. Recommendation:

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] [REDACTED] retaliated against Complainant [REDACTED] for engaging in protected activity under the Maine Human Rights Act and the Whistleblowers' Protection Act by terminating her employment;
2. Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3);
3. There are **No Reasonable Grounds** to believe that Respondent [REDACTED] [REDACTED] discriminated against Complainant [REDACTED] due to age, sex race and color; and
4. The claims should be dismissed in accordance with 5 M.R.S. § 4612(2);



Amy M. Sneirson, Executive Director



Michèle Dion, Investigator