



# Maine Human Rights Commission

# 51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330  
Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711  
[www.maine.gov/nhrc](http://www.maine.gov/nhrc)

Amy M. Sneirson  
EXECUTIVE DIRECTOR

John P. Gause  
COMMISSION COUNSEL

## INVESTIGATOR'S REPORT

E12-0507

August 23, 2013

[REDACTED] (Portland)

v.

[REDACTED] Inc. (South Portland) C

### I. Complainant's Complaint:

Complainant [REDACTED] alleged that Respondent [REDACTED] Inc.<sup>1</sup> (hereinafter "[REDACTED]") subjected her to a hostile work environment because of her race, color, national origin and sex when a co-worker touched her in a sexual manner.<sup>2</sup>

### II. Respondent's Answer:

Respondent stated that Ms. [REDACTED] never complained to any member of management about alleged sex harassment or race discrimination and unreasonably failed to utilize [REDACTED] Open Door Communications process or Ethics Helpline.

### III. Jurisdictional Data:

- 1) Date of alleged discrimination: April 15, 2012.
- 2) Date complaint filed with the Maine Human Rights Commission: October 17, 2012.
- 3) Respondent has over 500 employees. Respondent is subject to the Maine Human Rights Act ("MHRA") and Title VII of the Civil Rights Act of 1964 ("Title VII"), as well as state and federal employment regulations.

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<sup>1</sup> The complaint named "[REDACTED] Inc." as Respondent. Respondent asserts that the actual employer was "[REDACTED] Inc." and asked that the Commission change the pleadings accordingly. Complainant asserts that Respondent has failed to provide relevant information on the employer and points to employment documents naming employer as [REDACTED]. Because Complainant has not amended her complaint, we will use the terminology Complainant provided for purposes of this report, making no determination on the relationship(s) between [REDACTED] [REDACTED].

<sup>2</sup> Complainant also alleged that she was discriminated against in the terms and condition of employment because she did not get the hours of work that she requested. Complainant's request for schedule changes occurred in October 2011, and she did not file her complaint of discrimination until October 2012. As such, this claim is untimely and is not analyzed here.

- 4) Complainant is represented by Jeffrey N. Young, Esq. Respondent is represented by Spencer D. Phillips, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, a Fact Finding Conference (hereinafter "FFC"), and a Request for Information for the Respondent. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds."

#### **IV. Development of Facts:**

- 1) The parties and issues in this case are as follows:
  - a) Ms. [REDACTED] worked for [REDACTED] as a greeter from 2006-2008, and was re-hired in August 2011 as a part-time Maintenance Associate.
  - b) Respondent is a retail merchandiser.
  - c) Important third parties: "Assistant Manager" was Ms. [REDACTED] supervisor. "Personnel Training Coordinator" worked in [REDACTED] human resources department. "Co-Worker" was a full-time maintenance employee at [REDACTED] "General Manager" was the general manager at [REDACTED] "Asset Protection Manager" was another manager at [REDACTED]
  - d) Complainant alleged that Respondent subjected her to a hostile work environment due to her sex, race, color or national origin because a co-worker touched her in a sexual manner and [REDACTED] failed to address her complaint.
  - e) [REDACTED] denied discriminating against Ms. [REDACTED] and stated that she voluntarily resigned from her employment. [REDACTED] stated that Ms. [REDACTED] did not make any complaint of alleged harassment or discrimination to anyone in [REDACTED] management.
- 2) Complainant provides the following in support of her position:
  - a) Ms. [REDACTED] is Somalian.
  - b) By way of background, Ms. [REDACTED] worked at [REDACTED] from October 30, 2006 to March 28, 2008 as a door greeter. While Ms. [REDACTED] worked as a door greeter she was verbally harassed by several customers who stated that she should not be in America and talked about her clothing and referred to her as a terrorist. Ms. [REDACTED] talked to her supervisor at the time about the comments. Her supervisor told her that she would discuss it with the front end manager. When Ms. [REDACTED] did not hear back from her supervisor, she spoke with the front end manager herself who told her that if she wanted to work she had to work where they put her. Ms. [REDACTED] ended up leaving her employment with [REDACTED]
  - c) Ms. [REDACTED] returned to work for [REDACTED] as a part-time cleaner in the maintenance department on August 29, 2011.
  - d) Shortly after Ms. [REDACTED] returned to work, Personnel Training Coordinator warned Ms. [REDACTED] that due to her prior complaints when she previously worked at [REDACTED] Ms. [REDACTED] should be sure not to complain this time and just do what her supervisors told her to do.

- e) In Fall 2011, Ms. [REDACTED] asked Assistant Manager and Co-Worker, a full-time maintenance employee who scheduled all maintenance employees, for particular days and times off of work so that she could attend adult education classes. Co-Worker ignored Ms. [REDACTED] request.
- f) After she was hired, a new white employee was hired and [REDACTED] changed Ms. [REDACTED] hours and gave Thursday daytime hours to the new employee. Ms. [REDACTED] complained to Personnel Training Coordinator to no avail. Ms. [REDACTED] also complained to Assistant Manager who said he would look into it. Instead of restoring Ms. [REDACTED] Thursday daytime hours, [REDACTED] removed Ms. [REDACTED] from the Thursday schedule.<sup>3</sup>
- g) In late October or early November 2011, Co-Worker approached Ms. [REDACTED] in the produce cooler and told her that his wife was not interested in him any longer. Co-Worker asked Ms. [REDACTED] if she wanted him and put his hand on her breast. Ms. [REDACTED] slapped Co-Worker's hand and told him not to do that.
- h) Ms. [REDACTED] tried to report Co-Worker's conduct to Assistant Manager the day after it happened. Ms. [REDACTED] told Assistant Manager that Co-Worker was a bad man, but before she could provide the details of what happened, Assistant Manager cut her off and said that Co-Worker was a good man. Ms. [REDACTED] did not demonstrate what Co-Worker had done during this brief exchange with Assistant Manager.
- i) Two to three weeks after the first incident, Ms. [REDACTED] was changing water for a mop at the utility room. Co-Worker was exiting the bathroom and deliberately pushed up against Ms. [REDACTED] behind with his pelvis as he was walking away. Ms. [REDACTED] pushed Co-Worker away and told him to stop.
- j) Following this incident, Ms. [REDACTED] approached Asset Protection Manager and told him that Assistant Manager and Co-Worker were abusing her and that Co-Worker was touching her. Ms. [REDACTED] demonstrated what Co-Worker had done to her. Asset Protection Manager stopped Ms. [REDACTED] and told her that she needed to talk to General Manager about her complaints.
  - 1) Ms. [REDACTED] stated that she believed that she pointed to her skin during this conversation and used the word discrimination when speaking with Asset Protection Manager.
- k) Soon after speaking to Asset Protection Manager, Ms. [REDACTED] spoke to the Customer Service Manager and told him that Co-Worker had touched her breast and pushed against her behind and that she had tried to tell Assistant Manager, but he was not willing to listen. The Customer Service Manager told Ms. [REDACTED] that she needed to speak with General Manager.
- l) In December 2011, Ms. [REDACTED] spoke with General Manager about the fact that Co-Worker had abused her and touched her and was following her around. Ms. [REDACTED] was very upset when she spoke to General Manager. Ms. [REDACTED] also complained that Co-Worker was scheduling her on days that she had school. General Manager was on his way out the door, but told Ms. [REDACTED] that

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<sup>3</sup> Information about this adverse employment action is provided as background only. As noted above, this occurred more than 300 days before the complaint of discrimination was filed on October 17, 2012, and is untimely for investigation by the Commission.

she did not need to come in on days that she had school. General Manager also told Ms. [REDACTED] that he would talk to Assistant Manager and get back to her.

- m) Several days after speaking with General Manager, Ms. [REDACTED] encountered Assistant Manager while she was cleaning. Assistant Manager pushed her cart aside knocking off some of her supplies.
- n) Around 5:00 p.m. on the same day, Assistant Manager paged Ms. [REDACTED] to come to the office. In a meeting with Assistant Manager, the Cashier Supervisor and Ms. [REDACTED] Assistant Manager began to yell at Ms. [REDACTED] Assistant Manager was upset that Ms. [REDACTED] had complained to Human Resources and told her that her complaint affected his job. Assistant Manager asked her why she complained and also asked her why she was complaining that he was discriminating against her. Assistant Manager told Ms. [REDACTED] that next time she needed to come see him and not General Manager while pounding his hand against the desk. Ms. [REDACTED] told Assistant Manager that she had tried to complain to him before about Co-Worker and that he did not do anything.
- o) After Ms. [REDACTED] complained to General Manager Co-Worker retaliated against her by interfering with her ability to do her work. Co-Worker would follow Ms. [REDACTED] around unnecessarily, dump her water bucket and then pour a bottle of cleaning solution into the bucket even though amounts had to be measured.
- p) In April 2012, Ms. [REDACTED] complained to the Customer Service Manager about Co-Worker's retaliatory conduct, but the Customer Service Manager told Ms. [REDACTED] there was nothing he could do and that she needed to go to General Manager.
- q) Since General Manager had never gotten back to Ms. [REDACTED] about her earlier complaint, Ms. [REDACTED] went to Personnel Training Coordinator and told her about the problems she was having with Assistant Manager and Co-Worker. Personnel Training Coordinator told Ms. [REDACTED] not to complain and that she knew everything and no one was abusing her. Personnel Training Coordinator told Ms. [REDACTED] to go back to work.
- r) The next day, April 15, 2012, Ms. [REDACTED] called Personnel Training Coordinator and resigned her employment with [REDACTED] Personnel Training Coordinator asked Ms. [REDACTED] why she was resigning, and Ms. [REDACTED] told her she was resigning because she had been abused by Assistant Manager and Co-Worker. Personnel Training Coordinator hung up before Ms. [REDACTED] could continue to explain.
  - 1) During the FFC Ms. [REDACTED] stated that she resigned her employment because she felt that none of the managers were supporting her, listening to her needs and complaints. She stated that they kept telling her to go to this manager or that manager, and giving her the run around.
- s) Ms. [REDACTED] believed that when she spoke to the different managers that even though her English was not great, they understood what she was trying to say.
- t) Co-Worker subjected Ms. [REDACTED] to severe sexual harassment on multiple occasions. Despite her repeated complaints to five different managers, [REDACTED] took no effective action to prevent or

protect Ms. [REDACTED] from harassment. This sexual harassment and disparate treatment based on race/color/national origin was so oppressive and severe that Ms. [REDACTED] had to resign.

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

- a) Ms. [REDACTED] claims that Co-Worker touched her breast once and later pushed up against her behind.<sup>4</sup> Ms. [REDACTED] never complained to any member of management about alleged harassment or retaliation.
- b) Ms. [REDACTED] frequently complained about her work schedule, specifically needing days off to accommodate her second job and in every instance [REDACTED] allowed Ms. [REDACTED] to work her preferred schedule without penalty.
- c) During her employment with [REDACTED] Ms. [REDACTED] received information, documentation and training on [REDACTED] policies and procedures including [REDACTED] zero tolerance policy which strictly prohibits discrimination or harassment by or directed at any associate. The policy also prohibits retaliation for making internal complaints of perceived harassment or discrimination. The policy instructs associates to report any conduct that may violate the policy to a member of management or utilize [REDACTED] ethics helpline.
- d) [REDACTED] also has an open door communications policy encouraging associates to bring any problems or concerns to the attention of any supervisor or member of management. Ms. [REDACTED] unreasonably failed to utilize [REDACTED] Open Door Communication process, Ethics Helpline or any other avenue available to complain about the alleged sexual harassment.
- e) Before her first day of work in 2011, Ms. [REDACTED] submitted a schedule availability sheet indicating full availability for every day of the week. Shortly after she was hired, Ms. [REDACTED] told Assistant Manager that she wanted Tuesdays off so that she could attend school classes. Assistant Manager approved Ms. [REDACTED] request and began taking her off the Tuesday schedule.
- f) In October 2011, Ms. [REDACTED] told Assistant Manager that she also wanted Thursdays off because she had a new babysitting job. Assistant Manager approved Ms. [REDACTED] request and began taking her off the Thursday schedule.
- g) A short time after this occurred Ms. [REDACTED] complained to Assistant Manager that she wanted more hours and demanded to be put on the schedule for Thursday mornings. Assistant Manager told Ms. [REDACTED] that he could not accommodate that request because he already had two maintenance associates scheduled for Thursday mornings, and he did not need a third person on the shift.
- 1) Assistant Manager stated that every time he spoke with Ms. [REDACTED] it was about her schedule. Assistant Manager stated that Ms. [REDACTED] was always very emotional and started to cry. Assistant Manager tried to accommodate her schedule because Ms. [REDACTED] wanted more

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<sup>4</sup> Co-Worker was terminated from his employment with [REDACTED] on October 21, 2012 for Gross Misconduct-Integrity (theft).

hours. Assistant Manager did not ask Ms. [REDACTED] why she was crying, he thought it was because of her English, but told her that it would be okay.

- h) Ms. [REDACTED] complained to Asset Protection Manager that Assistant Manager was not giving her enough work hours because of her race. Asset Protection Manager advised Ms. [REDACTED] to speak directly with Assistant Manager about her concerns. When Ms. [REDACTED] told Asset Manager that she had already done so, Asset Protection Manager told Ms. [REDACTED] to speak directly with General Manager.
- 1) Ms. [REDACTED] did not make any complaint about alleged sexual harassment to Asset Protection Manager.
- i) After meeting with Ms. [REDACTED] Asset Protection Manager told Assistant Manager about his conversation with Ms. [REDACTED] Assistant Manager and the Front End Supervisor called Ms. [REDACTED] into a meeting to discuss her concerns.
- j) Assistant Manager reviewed each of the schedule changes Ms. [REDACTED] had requested and explained to her again that he could not give her extra hours on Thursday mornings because he already had two other maintenance associates working at that time. Assistant Manager also told Ms. [REDACTED] that her race was absolutely not a consideration in the schedule changes he made or was unable to make on her behalf.
- k) Pursuant to [REDACTED] policy Asset Protection Manager and Assistant Manager should have both filed Red Book investigations regarding Ms. [REDACTED] complaint about racial harassment/discrimination by Assistant Manager. Through investigation of Ms. [REDACTED] Maine Human Rights Complaint it was discovered that neither filed the Red Book investigation and as such both were disciplined for not doing so.
- l) During the FFC Assistant Manager stated that he did not start a Red Book investigation because Complainant was accusing him personally and he told her that. He also stated that knowing the kind of person who he is, he just did not pay attention to it but he should have.
- m) After this meeting Ms. [REDACTED] met with General Manager and complained that she was not getting enough work hours from Assistant Manager. In her meeting with General Manager, Ms. [REDACTED] did not claim that she was being treated unfairly because of her race, and she did not make any claims of alleged sexual harassment or abuse.
- n) General Manager met with Assistant Manager and discussed Ms. [REDACTED] concerns. General Manager confirmed that Assistant Manager was in fact scheduling Ms. [REDACTED] for as many hours as possible in light of her limited availability, part-time status, the schedules of other maintenance associates and the needs of the business.
- o) During the FFC Assistant Manager stated that he never had a conversation with General Manager about Ms. [REDACTED]
- p) General Manager conveyed that information to Ms. [REDACTED] in a follow-up meeting.
- q) Ms. [REDACTED] claim that Assistant Manager retaliated against her by yelling at her in a meeting and slamming his fist on a table refers to a meeting she had in April 2012. During this meeting

Assistant Manager reviewed each of Ms. [REDACTED] requested schedule changes and explained why he could not give her extra hours. Assistant Manager also asked Ms. [REDACTED] about the comment she made to Asset Protection Manager that Assistant Manager was racist. Assistant Manager told Ms. [REDACTED] that she could go to any manager if she had a situation or if she felt someone was being racist against her.

- r) Shortly after the meeting, Ms. [REDACTED] called Personnel Training Coordinator and told her that she was not coming in anymore because she does not like the managers. Personnel Training Coordinator offered Ms. [REDACTED] the opportunity to talk with management about her concerns, but Ms. [REDACTED] told her no. Personnel Training Coordinator confirmed with Ms. [REDACTED] that she was no longer working at [REDACTED] and Ms. [REDACTED] responded yes.
- s) Assistant Manager was not personally involved in Co-Worker's termination, but stated that he did not receive any complaints from Ms. [REDACTED] or other employees about Co-Worker while Co-Worker was employed with [REDACTED]
- t) Personnel Training Coordinator denied that she mentioned any prior complaints to Ms. [REDACTED] when she returned to work for [REDACTED]. Additionally Personnel Training Coordinator stated that she spoke with Ms. Nuur all the time about her schedule, but never about Co-Worker.
- u) Assistant Manager stated that he was able to communicate well with Ms. [REDACTED]. He stated that he had to be patient and listen to her, but that he could understand what she was saying.

#### **V. Analysis:**

- 1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B).
- 2) The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action. "Reasonable grounds" exists when there is enough admissible evidence, or there is reason to believe that formal litigation discovery will lead to enough admissible evidence, so that there is at least an even chance of Complainant proving that unlawful discrimination occurred. Complainant must prove unlawful discrimination in a civil action by a "fair preponderance of the evidence." 5 M.R.S. § 4631.
- 3) Here, Complainant alleged that she was subjected to sexual harassment by Co-Worker and that Respondent failed to do anything about her complaints of discrimination forcing her to quit her job. Complainant also alleged discrimination on the basis of sex, race, color and national origin.
- 4) Respondent denied the allegation of discrimination and stated that Complainant failed to make any complaints about sexual harassment, sexual, racial, color or national original discrimination.

#### **Sexual Harassment Claim**

- 5) The MHRA provides, in part, that it is unlawful employment discrimination for an employer to discriminate with respect to the terms, conditions, or privileges of employment or any other matter directly or indirectly related to employment because of sex. 5 M.R.S. § 4572(1)(A).

- 6) The MHRA provides, in part, as follows:

Harassment on the basis of sex is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when:...

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

Me.Hum.Rights Comm'n Reg. § 3.06(I)(1) (July 17, 1999).

- 7) "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.
- 8) Accordingly, to succeed on a such a claim, Complainant must demonstrate the following:

(1) That she is a member of a protected class; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based upon sex; (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 sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

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

- 9) 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). In some instances, Complainant may have the responsibility for telling the alleged harasser directly that his or her comments or conduct is unwelcome. In other instances, however, Complainant's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the conduct is unwelcome. *Id*. Where the Complainant never verbally rejects a supervisor's sexual advances, yet there is no contention or evidence that Complainant ever invited them, evidence that Complainant consistently demonstrated unalterable resistance to all sexual advances is enough to establish their unwelcomeness. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1990). Complainant may also be relieved of the responsibility for directly communicating unwelcomeness when she reasonable perceives that doing so may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the business. *Id*.



- 10) The MHRC Regulations provide the following standard for determining employer liability for sexual harassment committed by a non-supervisor:

[A]n employer is responsible for acts of sexual 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. § 3.06(I) (3) (July 17, 1999). *See Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 27, 969 A.2d 897, 904.

- 11) The Law Court has held as follows: "The immediate and appropriate corrective action standard does not lend itself to any fixed requirements regarding the quantity or quality of the corrective responses required of an employer in any given case. Accordingly, the rule of reason must prevail and an employer's responses should be evaluated as a whole, from a macro perspective." *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 28, 969 A.2d 897, 905.
- 12) In this case, Complainant has established that she was subjected to harassment based on sex or a sexually hostile work environment. Reasoning is as follows:
- a) Complainant, in a protected class as a female, alleged that Co-Worker made sexual advances towards her on two occasions. In each instance he made physical contact with her body, once with her breasts and once with her buttocks. These two advances were directed at her due to her sex. Complainant further showed that the harassment was unwelcome: she slapped Co-Worker's hand away after the first incident and pushed him away after the contact of the second incident.
  - b) Based on the fact that Co-Worker made unwelcome physical contact with Complainant's body the harassment is considered to have been sufficiently severe or pervasive as to alter the conditions of her employment and created an abusive work environment. Furthermore the conduct is both objectively and subjectively offensive such that a reasonable person would find it hostile or abusive and Complainant in fact did find it to be hostile or abusive.
  - c) The final part of this analysis includes whether or not there is a basis for employer liability.
    - i) Complainant alleged that Co-Worker sexually harassed her on two occasions. Complainant stated that after the first instance in late October 2011/early November 2011 she tried to speak with Assistant Manager about what happened but that she was rebuffed by him. Complainant did not speak to anyone else about the first incident.
    - ii) Two or three weeks later the second incident occurred and Complainant stated that she spoke with Asset Protection Manager and Customer Service Manager who both told her to speak with General Manager about her concerns. Complainant then spoke with General Manager whom she said would speak with Assistant Manager and get back to her. Both parties stated that while Complainant's English was not great, the parties understood each other, i.e. the Managers she spoke with understood what she was saying and she understood what they were saying. Complainant also stated that she would demonstrate actions to communicate what she was trying to say.

- iii) After this, Co-Worker retaliated against Complainant for rejecting his sexual advances by following her around and putting too much cleaning solution in her mop bucket.
- iv) Respondent stated that Complainant made allegations of racial harassment against Assistant Manager to Asset Protection Manager. Asset Protection Manager then convened those allegations to Assistant Manager.
- v) Respondent's policies required Asset Protection Manager and/or Assistant Manager to initiate a "Red Book" investigation into Complainant's allegations. This did not occur until well over a year later, four to five months after Complainant filed her complaint with the Maine Human Rights Commission. This does not meet the standard of "immediate and appropriate corrective action" sufficient to rebut liability.
- vi) While Managers for Respondent that were interviewed in conjunction with Complainant's complaint have consistently stated that they were not aware of any complaints of sexual, racial, color or national origin harassment by Complainant during her employment, at least two managers were aware of a complaint by Complainant and did not follow Respondent's procedures in investigating her complaint. As such it reasonable to believe that Complainant did make the complaints of sexual harassment, as she alleges, and they were not appropriately investigated.
- vii) There may have been an element of miscommunication or misunderstanding between Complainant and Respondent (the Managers she spoke with). However, Complainant stated that she was visibly upset and crying when she spoke with the Managers. As such, the Managers should have followed up with Complainant or had someone speak to her to make sure any issues she had were being addressed. Assistant Manager even stated that Complainant was always very emotional and started to cry, but did not ask her why she was crying because he thought it was because of her English.
- d) "Reasonable grounds" exists when there is enough admissible evidence, or there is reason to believe that formal litigation discovery will lead to enough admissible evidence, so that there is at least an even chance of Complainant proving that unlawful discrimination occurred. In this case there are questions as to whether Respondent knew or should have known about Co-Worker's conduct towards Complainant, but there is at least a 50-50 chance that Complainant would be able to prove that unlawful discrimination occurred based on the facts of the case as analyzed above.

13) In the final analysis, hostile work environment sexual harassment is found.

#### Race, Color and National Origin Harassment Claim

14) The Maine Human Rights Commission Regulations provide, in part, as follows:<sup>5</sup>

Harassment on the basis of race, color, or national origin 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:

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<sup>5</sup> The same legal framework that was used in the discussion of Complainant's sexual harassment will be used for the discussion of her race, color, and national origin harassment claims.

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

Me. Hum. Rights Comm'n Reg. § 3.09(F) (1) (July 17, 1999).

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

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

16) Complainant has not established that she was subjected to harassment based on race, color or national origin hostile work environment. Reasoning is as follows:

- a) Complainant made a complaint of racial harassment to Asset Production Manager. Respondent stated that Complainant was speaking to Asset Production Manager about not getting requested days off when she called Assistant Manager a racist/said he was discriminating against her.<sup>6</sup> As noted above, the schedule change claim is untimely and cannot be the basis for race/color/national origin discrimination liability here.
- b) Other than the general statement that she was subjected to racial, color, or national original harassment, Complainant has not provided any instances that tend to show that she was discriminated due to her race, color, or national origin.
- c) Of note is the fact that Complainant did not make any allegations in her complainant of discrimination or speak of any complaints of race, color or national origin harassment at the FFC. The statement, provided by Respondent, that she thought Assistant Manager was a racist or that he was discriminating against her without more does not allow for a finding that she was subjected to discrimination or harassment on the basis of her race, color or national origin.<sup>7</sup>

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<sup>6</sup> The facts show that when Complainant had requested a change in her schedule, Respondent worked to accommodate her request, with the exception of not being able to place her back on the schedule for Thursday mornings after she requested to have Thursday off. Complainant's specific allegations in her complaint of discrimination deal with sexual harassment. Asset Production Manager's statement was the one that indicated that Complainant accused Assistant Manager of being racist/discriminating against her, but Complainant has not provided any facts or allegations to support her race, color, or national origin harassment claims.

<sup>7</sup> It is questionable that Respondent did not investigate Complainant's alleged complaint of racial discrimination. However, the facts alleged still do not show that Complainant was subjected to a racial, color, or national origin hostile work environment.

17) In the final analysis, discrimination based on race, color, or national origin is not found.

Constructive Discharge Claim

18) 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 (1<sup>st</sup> Cir. 2002).

19) It is a violation of the Maine Human Rights Act if, although not formally terminated, an employee has no reasonable alternative to resignation because of intolerable working conditions. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "The test is whether a reasonable person facing such unpleasant conditions would feel compelled to resign." *Id.* In addition, "an employee can be constructively discharged only if the underlying working conditions were themselves unlawful (i.e., discriminatory in some fashion)." *Sweeney v. West*, 149 F.3d 550, 557-558 (7th Cir. 1998).

20) In this case, Complainant voluntarily resigned from her position in the maintenance department. The facts do not show that Complainant's working conditions were so intolerable that her only alternative was to resign.

21) Complainant alleged that Personnel Training Coordinator told her not to complain like she had when she worked for [REDACTED] earlier. Additionally, Complainant had made allegations that Co-Worker was sexually harassing her and Complainant believed that Managers were giving her the run around and did nothing to protect her.

22) While not required to, according to her own statements Complainant did not follow up with Assistant Manager or General Manager about her complaints and decided to leave her employment approximately four months after any alleged incidents of harassment occurred. Complainant had other alternatives to resignation, including meeting with management which she was given an opportunity to do when she gave her resignation by phone.

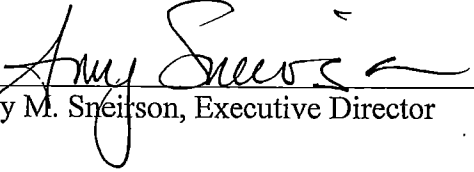
23) Therefore, Complainant is unable to establish that Respondent forced her to leave her employment, and that an adverse action occurred.

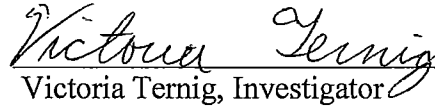
**VI. Recommendation:**

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] subjected Complainant [REDACTED] to discrimination based on sex in violation of the Maine Human Rights Act;
2. Conciliation of that portion of the complaint should be attempted in accordance with 5 M.R.S. § 4612(3);

3. There are **No Reasonable Grounds** to believe that Respondent [REDACTED] subjected Complainant to race/color or national origin harassment or that Respondent is liable for constructive discharge; and that portion of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).

  
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Amy M. Sneilson, Executive Director

  
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Victoria Ternig, Investigator