Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330

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

www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT
E14-0046
March 26, 2015

[redacted] (South Portland)

v.

[redacted] LLC (Damariscotta)

I. Complaint:

Complainant [redacted] alleged that Respondent [redacted] LLC ([redacted]) discriminated against him on the basis of race and color by subjecting him to less favorable terms and conditions of employment, (demotion, decrease in wages, significant decrease in hours), subjected him to a hostile work environment, and terminated his employment in retaliation for his complaints about racial discrimination and harassment.

II. Respondent's Answer:

Respondent denied discrimination and denied that Complainant reported the discriminatory behavior which he now alleges. Respondent asserted that Complainant was not retaliated against, as he now claims, but that his separation from employment was simply due to a lack of work.

III. Jurisdictional Data:

1) Date of alleged discrimination: January 29, 2013, through May 13, 2013.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): January 29, 2014.

3) Respondent employed 16 people during the relevant period and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964, as amended, and the Maine Whistleblowers' Protection Act ("WPA"), as well as state and federal employment regulations.

4) Complainant is represented by [redacted] Respondent is represented by [redacted].

5) Investigative methods used: A thorough review of the materials submitted by the parties, an Issues and Resolution Conference, and witness interviews. 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 relevant parties, issues, facts and documents in this case are as follows:

   a) Complainant is Hispanic, and is a native of El Salvador who has been a United States citizen since 2008. He was employed by [redacted] from June 2012 until approximately May 13, 2013.

   b) [redacted], LLC is a service and installation company which provides highly-skilled personnel for installation and reconfiguration projects for businesses.

   c) Third parties: Owner; Project Manager 1; Project Manager 2; Supervisor; Son (Project Manager 2's son); Installer.

2) Complainant provided the following:

   a) Complainant was initially employed as a laborer, but, after training to be certified as a furniture installer in the Fall of 2012, he was promoted to a supervisor position which he held until approximately January 2013. His rate of pay was raised to $18.25 per hour in the Fall of 2012 when he was promoted. He believed that he performed his job well.

   b) Complainant was assigned to a federal[1] contract project on January 29, 2013, working in Pennsylvania with Project Manager 1 and Supervisor. His work lasted until March 29, 2013.

   c) Project Manager 1 joked about Complainant's height. He called Complainant "midget" and said that he was too short to work. Project Manager 1 was hollering at the crew at one point, calling them clods and he called Complainant a "lazy midget" in front of the crew.

   d) On or about the first week of March 2013, Complainant objected to Project Manager 1 that it was inappropriate to speak to the crew in that manner. He asked how Project Manager 1 would feel if Complainant spoke to him in that way. In response, Project Manager 1 stated that if Complainant spoke to him that way, it would be Complainant's last day of work.

   e) In the Spring of 2013, the entire crew was making plans to go to Niagara Falls. Project Manager 1 commented to Complainant that if Complainant went there, he would be "deported". There was laughter among the crew members. During that spring, when Complainant was planning to fly to Maine, Project Manager 1 asked how he would get on the plane without a green card.

   f) In early March 2013, Complainant asked Project Manager 1 how many hours he submitted to payroll for him because Complainant had been underpaid. He showed Project Manager 1 his paystub. Project Manager 1 responded in an angry manner, saying "Mexicans do not deserve to get paid so much." Complainant said that he was not Mexican, and that he earned his wage by working hard.

   g) Complainant telephoned Owner's office that day. In a second phone call, he told Project Manager 2 that Project Manager 1 had stated that Mexicans should not be compensated that much and that

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[1] There is some dispute about whether Respondent's contract was technically a "federal contract", but the issue is not relevant here.

Complainant was not comfortable working with Project Manager 1. Project Manager 2 stated that Complainant had to stay in Pennsylvania with Project Manager 1 for a couple more weeks.

h) After Complainant's assignment in Pennsylvania ended in late March 2013, he returned to Maine. At that time, he complained to Project Manager 2 about Project Manager 1's mistreatment of him. He stated that he did not want to work around Project Manager 1. Project Manager 2 stated that Complainant needed to discuss the issue with Owner.

i) Complainant was not assigned any work for the week of March 29 to April 6, 2013. Others on the Pennsylvania crew were back to work by April 1, 2013. Complainant called Project Manager 2 to ask why he was not scheduled to work. Project Manager 2 told Complainant that the company had decided not to schedule him because of what had happened with Project Manager 1.

j) Complainant was contacted by Owner on April 2, 2013. Owner asked to meet with him. When they met, Complainant explained that he felt that he had been mistreated by Project Manager 1 while working in Pennsylvania. He complained that Project Manager 1 screamed at him, and called him names including "Mexican, midget and lazy". Complainant said that if Owner scheduled him to work on another job with Project Manager 1 that he would not go; Owner responded that he would have to go. Owner then told Complainant that he was no longer a supervisor and that the company could no longer afford to pay him his current hourly wage. Owner then offered a significantly reduced wage (almost 25% less). Complainant responded that he hoped that the reduction in pay was not a result of Project Manager 1's comment that Mexicans should not be paid as much as Complainant was.

k) During the week of April 8 – 11, 2013, Complainant was assigned to work with Project Manager 2 and was scheduled for 32 hours of work. He had been promised 40 hours per week when he was hired.

l) Complainant was not assigned any hours for April 15-17, 2013. He spoke to Project Manager 2 in an attempt to determine why he had not been scheduled to work. He was then told that there was not much work and that the company wanted him to start work on April 22, 2013, on a job in Belfast.

m) During the week of April 21 – 25, 2013, Complainant worked 35 hours.

n) During the last week of April 2013, and the first ten days of May 2013, Complainant was not scheduled to work for most days. He phoned and sent messages to Owner and Project Manager 2 asking what was wrong when he saw that his name was not on the schedule for April 27, 2013. After that, he worked on April 29, 2013, and for couple of hours on another day.

o) On May 13, 2013, Mr. [redacted] e-mailed Owner objecting that since he had complained about mistreatment by Project Manager 1 in Pennsylvania that his pay had been cut and he had not been scheduled to work despite Owner's promise to him at hire that he would be given 40 hours of work each week. Complainant had made it clear at the time of hire that he had a family to support.

p) The company's Employee Handbook, which Complainant adhered to, prohibited harassment on the basis of race, color, and national origin. The policy provided that "[a]ny employee who believes that he is being unlawfully harassed should immediately contact their supervisor or the Owner." Mr. [redacted] had done that, precisely as the policy requires.

q) Complainant told Owner at this time that he had applied for unemployment benefits. Owner did not respond, however, Complainant's company e-mail was shut down that day. Complainant called Project Manager 2 to ask what had happened. He received no answer. He sent Project Manager 2 a text message the next day, asking the same question and still received no response.

r) Complainant understood from [redacted] conduct that his employment had been terminated.

3) Respondent provided the following:

a) Complainant was not demoted. He found it difficult to function in a supervisory capacity where it meant reprimanding employees on the crew in Pennsylvania. As an example, crew members were smoking in the hotel rooms, and Complainant was not able to address it properly.

b) When Owner was made aware of the problems Complainant was having, his supervisory functions were taken away. His pay rate was reduced because he no longer functioned in a supervisory role.

c) Respondent has denied the behavior alleged by Complainant. Project Manager 1, the individual who allegedly referred to Complainant's height, is actually the same height as Complainant.

d) Complainant made it known that he did not wish to travel. He was a single parent with two teenage daughters at home. He had periods with no work after returning from Pennsylvania because he requested it, so that he could spend time with his family.

e) Work slowed for everyone. Complainant was instructed to apply for unemployment because of the reduction in work.

4) Project Manager 2 provided the following:

a) He was not on the Pennsylvania project, but got reports from members of the crew, including Son.

b) Son and others told Project Manager 2 about the way that Project Manager 1 treated Complainant. Project Manager 1 treated everyone very poorly. Complainant told him that Project Manager 1 had said that "a f**king Mexican doesn't deserve to be paid that much money." Project Manager 2 told Complainant to talk to Owner about that. Owner took Complainant off the schedule. Owner also opposed Complainant's application for unemployment benefits.

5) Installer provided the following:

a) Installer worked with Complainant in Pennsylvania.

b) Project Manager 1 was degrading, and called Complainant racist names. Installer could not recall the exact words, but he knows that Project Manager 1 called Complainant a Mexican. Project Manager 1 was definitely racist in the names he used to refer to Complainant.

V. Analysis:

1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

Hostile Work Environment

2) The MHRA provides, in part, that it is "unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of race or color . . . 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).

3) The Commission's Employment 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:
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> 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.
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> Me. Hum. Rights Comm'n Reg. Ch. 3, § 3.09(F) (1) (July 17, 1999).

4) "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.

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

> (1) that or he is a member of a protected class; (2) that he was subject to unwelcome [race or color] harassment; (3) that the harassment was based upon [race or color]; (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.
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> *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 22, 969 A.2d 897, 902-03.

6) The Commission's Regulations provide the following standard for determining employer liability for racial harassment 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. Ch. 3, § 3.09(F) (3) (July 17, 1999). *See Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 27, 969 A.2d 897, 904.

7) 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.

8) Here, Complainant succeeds in his hostile work environment claim, because he can show that he was subjected to harassment severe or pervasive enough to alter the conditions of his employment and create an abusive work environment. Reasoning is as follows:

   a. In this case, statements made by Project Manager 1 constitute harassment based on race/color/national origin/ancestry. They are unwelcome comments about Complainant's race/color/national origin/ancestry which created an environment which is hostile and offensive, both in the objective and the subjective sense.

   b. The comments in this case were sufficiently severe or pervasive to create an abusive working environment. These comments were humiliating and rose to the level of severely altering Complainant's environment. A reasonable person would consider it to be an abusive work environment, given the nature of the comments, which were blatant in their hostility and which epitomize racial stereotypes.

   c. Both Project Manager 2 and Installer corroborated Complainant's allegations.

   d. Furthermore, Respondent was unable to rebut any liability by showing that it took immediate and appropriate corrective action when Complainant brought forward his allegation of harassment. It is undisputed that when Complainant reported the incident to Owner, his rate of pay was reduced and his hours were cut.

9) It is found that Complainant was subjected to a hostile work environment based on race/color/ancestry and/or national origin.

Discrimination - race, color, ancestry and national origin

10) Complainant alleged that Respondent discriminated against him on the basis of race, color, ancestry and national origin by subjecting him to less favorable terms and conditions of employment (demotion, decrease in wages, significant decrease in hours). Respondent denied discrimination, and stated that Complainant lost his supervisory responsibilities because he had trouble performing them, and his wage was reduced as a result. Respondent also stated that hours decreased for everyone.

11) The MHRA provides, in part, that it is unlawful for an employer to "discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." because of race, or color, ancestry or national origin. 5 M.R.S. § 4572(1)(A).

12) The phrase "terms, conditions or privileges of employment" is broad and not limited to discrimination that has an economic or tangible impact. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (interpreting Title VII of the Civil Rights Act of 1964); *King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "An employee has suffered an adverse employment action when the employee has been deprived either of 'something of consequence' as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld 'an accouterment of the employment relationship, say, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.'" *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20 (citations omitted).

13) In this case, the comments made by Project Manager 1 constitute direct evidence of discriminatory animus. A mixed-motive analysis applies in cases involving "direct evidence" of unlawful discrimination. *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination. . . ." *Id.* Where this evidence exists, Complainant "need prove only that the discriminatory action was a motivating factor in an adverse employment decision." *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Doyle*, 2003 ME 61, ¶ 14, n.6, 824 A.2d at 54, n.6. Upon such a showing, in order to avoid liability, Respondent must prove "that it would have taken the same action in the absence of the impermissible motivating factor." *Id.*; *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 276-77, 109 S. Ct. 1775, 1804 (1989) (O'Connor, J., concurring).[2]

14) Complainant has shown that discrimination was a motivating factor in the adverse employment actions he experienced:

a. Owner's decision to reduce Complainant's rate of pay and to reduce the number of hours he worked – ultimately removing him from the schedule - appears to have been caused, at least in part, by Complainant's race/color/ancestry/national origin. In particular, it is notable that Project Manager 1 stated that Complainant should not make so much money because he was a Mexican, and immediately upon returning from the Pennsylvania project, his pay was reduced. Complainant specifically questioned whether the two were connected, and Respondent has not refuted any connection.

b. Owner's explanation for the pay cut does not make sense. If the real concern was Complainant's failure to effectively deal with employees smoking in their rooms, it is not credible that Complainant would bear the responsibility and take a significant pay cut while his supervisor, Project Manager 1, experienced no consequences at all when he was also responsible for the same smoking employees.. It is also illogical for Respondent to argue that Complainant was not demoted when his pay was reduced and he was no longer a supervisor.

[redacted] Review of five schedules indicates that by the first week in May, Complainant had been taken off the schedule altogether. Project Manager 2 was credible when he stated that Owner took Complainant off the schedule and then opposed his claim for unemployment benefits.

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[2] The continued application of the mixed-motive analysis has been called into question as a result of the U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2348 (2009), in which the Court held that the burden of persuasion does not shift to defendant even with "direct evidence" of unlawful discrimination in a federal Age Discrimination in Employment Act case. That decision did not interpret the MHRA, however, and the guidance from the Maine Supreme Court in *Doyle* will continue to be followed.

15) Respondent did not establish that it would have taken the actions against Complainant even absent the impermissible factor. As noted above, Respondent's explanations are not credible, and appear to be merely pretext for discrimination.

16) The evidence in this case supports a finding that Complainant was discriminated against due to his race/color/ancestry and national origin.

Retaliation

17) The MHRA makes it unlawful for "an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of [the MHRA] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S. § 4572(1)(E).

18) The MHRA further defines unlawful discrimination to include "punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act. . . ." 5 M.R.S. § 4553(10)(D).

19) The Commission's Employment Regulations provide as follows:

> No employer, employment agency or labor organization shall discharge or otherwise discriminate against any employee or applicant because of any action taken by such employee or applicant to exercise their rights under the Maine Human Rights Act or because they assisted in the enforcement of the Act. Such action or assistance includes, but is not limited to: filing a complaint, stating an intent to contact the Commission or to file a complaint, supporting employees who are involved in the complaint process, cooperating with representatives of the Commission during the investigative process, and educating others concerning the coverage of the Maine Human Rights Act.
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> Me. Hum. Rights Comm'n Reg., Ch. 3., § 3.12 (July 17, 1999).

20) In order to establish a prima-facie case of retaliation, Complainant must show that he engaged in statutorily protected activity, he was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56; *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006). The term "materially adverse action" covers only those employer actions "that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 126 S. Ct. 2405. One method of proving the causal link is if the adverse action happens in "close proximity" to the protected conduct. *See id.*

21) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily 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 action. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry his overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.* Complainant must show that he would not have suffered the adverse action but for his protected activity, although the protected

activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).

22) Complainant set forth a prima-facie case of MHRA retaliation by establishing that he was harassed on the basis of his race/color/ancestry/national origin and reported the harassment to Respondent, and he was demoted, his pay was cut, and his hours reduced to zero within a very short time of his reporting.

23) Respondent provided a nondiscriminatory reason for its actions: Complainant had difficulty with his supervisory responsibilities, and work slowed down for everyone.

24) In the final analysis, Complainant showed that Respondent would not have taken these adverse actions against him but for his protected activity, even if the protected activity was not the only reason for the decisions. Reasoning is as follows:

a. After returning from Pennsylvania and complaining about racial harassment, Complainant was taken off the schedule. Project Manager 2 specifically stated that Complainant was taken off the schedule because of what had happened with Project Manager 1.

b. When Complainant spoke with Owner about the harassment he experienced, Owner decreased Complainant's rate of pay, reduced his hours, and finally took him off the schedule altogether. This was corroborated by Project Manager 2.

25) It is more likely than not – the Commission's "reasonable grounds" standard - that Complainant can show in court that Respondent would not have demoted him, reduced his pay and hours, and terminated his employment but for his protected conduct.

26) Retaliation for opposing discrimination under the MHRA is found.

VI. Recommendation:

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

1. There are **Reasonable Grounds** to believe that Respondent [redacted] LLC discriminated against Complainant [redacted] in the terms and conditions of his employment and created a hostile work environment in employment due to race/color/ancestry/national origin;

2. There are **Reasonable Grounds** to believe that Respondent [redacted] LLC retaliated against Complainant [redacted] for opposing conduct that violates the MHRA, and;

3. Conciliation should be attempted in accordance with 5 M.R.S. § 4612 (3).

Amy M. Sneirson, Executive Director

Michèle Dion, Investigator