Maine Human Rights Commission
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October 17, 2014

Investigator's Report
E13-0365

[redacted]

v.

[redacted]

I. The Complaint:

Complainant [redacted] alleged that [redacted] denied her request for reasonable accommodations for her disabilities (depression, anxiety, and adjustment disorder), and that she was harassed and retaliated against because she requested an accommodation for her disability. Ms. [redacted] also alleged that she was retaliated against because she reported, in good faith, what she reasonably believed were violations of workplace laws and regulations relating to overtime pay. She further alleged that she was discriminated against in the terms and conditions of employment because she is female.

II. Respondent's Answer:

Respondent [redacted] ([redacted]) asserted that Ms. [redacted] was not subjected to adverse employment action; [redacted] did not retaliate against her or discriminate against her based on any protected class of which she may be a member.

III. Jurisdictional Data:

1) Dates of alleged discrimination: October 2011 through February 4, 2013.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 29, 2013.

3) Respondent employs 1,750 employees and is required to abide by the Americans with Disabilities Act, the Maine Human Rights Act ("MHRA"), the Maine Whistleblowers' Protection Act, and state and federal employment regulations.

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

5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution Conference. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

1) [redacted] was hired as an on-call Occupational Health Nurse working in the [redacted] WorkMed program on January 24, 2011. She became a full-time WorkMed Occupational Health Nurse on March 30, 2011. She resigned her position on February 4, 2013.

2) Respondent is a regional medical center.

3) Ms. [redacted] offered the following in support of her claim:

   a) At the time of hire, Ms. [redacted] duties were described as follows:

      i. Provides occupational health nursing services to a comprehensive and integrated Occupational Health Program, including patient care and appropriate referral, on-site nursing services, nurse case management, ergonomic assessment and prevention and education programs.

   The job was divided into two primary functions, providing nursing services and case management in a clinic, and providing ergonomic assessment and educational services in the field.

   b) Ms. [redacted] performed her duties well, and she had a strong annual review in January 2012, yet a problem developed when she was expected to perform not only her own duties, but the duties of Medical Assistants. The program was designed to employ two Registered Nurses ("RNs") as well as two (and sometimes three) Medical Assistants. Unfortunately, the program was understaffed for long periods at a time. Sometimes, Ms. [redacted] was the only RN.

   c) Specifically, she was expected to perform her RN duties and the duties of Medical Assistants. Since they were without two Medical Assistants for long periods of time, Ms. [redacted] was required to perform many Medical Assistant duties in addition to her own duties. This fact was acknowledged in her January 2012 performance review.

   d) Throughout her employment, when [redacted] was fully staffed, Ms. [redacted] was able to complete her job duties in a timely, competent manner. When they were short-staffed, she was forced to take on a significant amount of work outside the scope of her duties and was unable to complete her duties in a reasonable amount of time. Accordingly, she found herself working many extra hours into the evening and at home. This situation could last weeks or months at a time. Regardless, she continued to perform all duties asked of her, despite the toll it was taking on her.

   e) Ms. [redacted] took a pre-employment medical exam, which was performed by Nurse Practitioner. Ms. [redacted] informed him about both her anxiety and her depression at that time.

   f) While employed, she missed one month of work in 2011 and two months of work in 2012, and needed additional time in 2013. The time out of work was caused by "extreme stress, work overload, and multiple stressors with work and life." While [redacted] has argued that some of her stress was not caused by work, that does not matter; what matters is that she was undergoing extreme stress which exacerbated her disabilities.

g) In November 2012, Ms. [redacted] doctor sent Family Medical Leave Act ("FMLA") forms to [redacted] stating that Ms. Millett suffered from anxiety, depression, and acute adjustment disorder. (*See file.*)

h) Ms. [redacted] was forced to perform the duties of her own job as an Occupational Health Nurse as well as the duties of a Medical Assistant. [redacted] asserts that it was made clear to her at the time of hire, that she would be expected to "pitch in" with the Medical Assistant workload. Ms. [redacted] was willing to pitch in, but she was unable to perform all of the additional duties of a Medical Assistant for extended periods without risking her health due to her disabilities.

i) Ms. [redacted] believed that she was entitled to overtime pay because she was working more than 40 hours per week on a regular basis with Director of Occupational Health – WorkMed on a number of occasions. Ms. [redacted] alleged that Director of Occupational Health – WorkMed flatly refused her requests to be paid overtime.

j) On February 16, 2012, Director of Occupational Health – WorkMed sent the following e-mail to Ms. [redacted]

> [Manager, Office Operations] mentioned your request to take some Comp time. I know you've been very flexible with your schedule lately. Thank You!
>
> I think we should sit and review the policy [] and discuss how best to manage your time going forward. The time you've been accruing doesn't always fit the description outlined in the policy, and is more reflective of how salaried persons schedule often works. With that said, I certainly want to compensate you in some fashion for the extra work you do, but we really need to look at how we do that so that we are in compliance with Labor Law. In some cases we should be communicating more regularly about getting you out earlier on days following the ones you work late. Flexing is key. I know it is not always possible to do so, but we need to make a good effort.
>
> We should use [earned time] for Monday the 13th, but will go ahead and plan for Monday the 20th as a Comp day. I'll look at scheduling a time for us to sit down with [Nurse Practitioner] and [Manager, Office Operations] to discuss a process going forward.

k) In October of 2012, Ms. [redacted] met with Director of Occupational Health – WorkMed and Nurse Practitioner and requested that she not be required to perform all of the Medical Assistant functions, which were not essential functions of her position. Complainant explained that she suffered from depression and anxiety, that she had difficulty in the morning and that the stress of being required to constantly perform the extra work was overwhelming her. They said that this was the job and asked her several times if she could do it. Although she was willing and able to perform some of the Medical Assistant duties, the stress of performing her own job as well as the duties of a Medical Assistant was overwhelming. This additional stress was exacerbating her depression to the point that she could not work. Since the job was completely different than what was expected when she was hired, she explained that she would need some accommodation to accomplish all of the additional work that had been added to her duties.

l) Ms. [redacted] asked if she could have the regular morning start time that she had been promised when hired: (8:00 – 8:30 a.m.), or a later start time, because the early and irregular start times were difficult for her. The request was rejected.

m) Complainant explained that she was doing Medical Assistant duties for a significant portion of her day and that she was not able to complete her own work. Director of Occupational Health – WorkMed and Nurse Practitioner responded as if she was exaggerating and told her to "ask for help" and to put her need for administrative time into the official schedule. She again tried to explain that whether she posted her need for administrative time in the schedule or not, if patients in the clinic needed service, she was required to attend to them at the expense of her administrative duties. She also reiterated that since they were short staffed, there was very little other help with the Medical Assistant duties.

n) They told her that there was no accommodation they could give her, and that she needed to give 100% to all the duties, including the extra duties that she was being assigned. After this meeting, Director of Occupational Health – WorkMed told Ms. [redacted] several times that she was "on thin ice and that any mistake, including being late, would result in her termination." She also told Ms. [redacted] that she was concerned that Ms. [redacted] could not keep up with her work. Ms. [redacted] alleged that Director of Occupational Health – WorkMed repeatedly told her that she was expected to do 100%, and that she would continue to be required to perform Medical Assistant and other duties in addition to her own.

o) In early November 2012, Ms. [redacted] was physically and mentally exhausted, and her doctor recommended that she take another medical leave in early November 2012. Her doctor informed WorkMed that she was suffering from depression, anxiety, and acute adjustment disorder. Ms. [redacted] did not begin to recover until mid-December, 2012. She returned to work part-time, working three days per week, six hours per day in early January, 2013. She continued to work the part-time hours until the end of January, 2013. On Wednesday, January 30, she found out that she had been scheduled the following week for full-time work. She told the scheduler that she was still only working part-time hours, and it was awkward to correct the error. Also, Ms. [redacted] was being pressured by the scheduler to work an extra day during the current week – generally pressuring her to work more hours.

p) Respondent has asserted that there was "an attempt at informal or interactive dialogue" to which Ms. Millett failed to respond. This "attempt at informal or interactive dialogue" consisted of Director of Occupational Health – WorkMed e-mailing Ms. [redacted] on January 23, 2013 at 5:27 p.m. to express that Respondent was willing to accommodate her in myriad ways, asking for her response. The e-mail stated in relevant part, "I am certainly willing to talk with you about further short-term accommodations to your work and hours, including additional prep time, travel time and time spent in a separate space in order to do the preparation, however long-term the job expectations will remain the same . . ." [redacted] continually told Ms. [redacted] that she would be doing both her own job and the job of a Medical Assistant whenever the program was short-staffed.

q) When Ms. [redacted] arrived at work on January 31, 2013, Director of Occupational Health – WorkMed told her that the Medical Assistant was complaining that she was not helping enough. Director of Occupational Health – WorkMed told Ms. Millett that she needed to be working at 100% even though she was already working more than the number of hours allowed by her doctor. They also discussed a client presentation which Ms. [redacted] had worked on at home, at which time she realized that she did not have the proper materials, nor were they available at the office. She had to stop at

Staples in the morning and as a result, she was a few minutes late for the presentation. Director of Occupational Health – WorkMed said that she was thinking of writing Ms. [redacted] up for that. Director of Occupational Health – WorkMed told Ms. [redacted] that she needed to decide if she was going to return full-time or take a part-time option, saying "sh*t or get off the pot."

r) After Director of Occupational Health – WorkMed left, Ms. [redacted] spoke with the Medical Assistant, who was upset that Ms. [redacted] was not helping her out enough. Ms. [redacted] then went to Nurse Practitioner's office. Her available Family and Medical Leave Act time was running out (approximately two weeks remained) and the situation at work was worse, not better. Nurse Practitioner said that the pressure was only going to increase. Ms. [redacted] was distraught and crying. She explained to him that she was going back to her doctor and that she might need to be out completely for another period of time. They discussed that she was likely going to transition to another work situation.

s) Ms. [redacted] saw her doctor that day, and was again taken out of work.

t) On February 4, 2013, Ms. [redacted] emailed Director of Occupational Health – WorkMed and resigned. At that point, her options were: a) continue full time; b) part-time salary or hourly; or c) per diem (hourly with no set schedule). Part-time salary would not have resolved the problem. She would have been paid less and had fewer benefits, and would still have had to work more than what her doctor had recommended. Per diem hours would have resulted in a loss of benefits and pay, and she would have had no set schedule.

u) At the time of resignation, Ms. [redacted] was able to perform all of her essential job duties. WorkMed required her to do her job and the duties of other employees. If she had been given a medical accommodation which allowed her to perform the duties of the position for which she had been hired, and helped out periodically with Medical Assistant duties as it had been represented to her upon hire, she would not have resigned her position.

v) The other RN in the WorkMed program was male. He was hired at a higher rate of pay than Ms. [redacted] He was also permitted to arrive and leave work at regular times. Although he sometimes helped and left later than scheduled, he was not required to constantly take on the work of other employees.

4) Respondent provided the following in support of its position:

a) In general, Ms. [redacted] misstates the quality of her performance, which was substandard in several areas. For example, she was not always on time for work, and she was never able to complete her duties in a timely fashion.

b) Director of Occupational Health – WorkMed told Ms. [redacted] that [redacted] would do its best to accommodate her personal scheduling issues, but the first priority for scheduling would always be the needs of the medical clinic.

c) Ms. [redacted] like all occupational health nurses, was required to pitch in where necessary when not directly performing their own patient duties. She cannot pick and choose which duties she "should have" been required to do from those she was asked to accomplish. There is significant overlap between a nurse and a medical assistant in the context of this workplace, and Ms. [redacted] and the other occupational nurses had to perform some medical assistant work.

d) Ms. [redacted] never told [redacted] that her need for fewer or different work duties was because of a disability. Rather, when she spoke with Director of Occupational Health – WorkMed, Ms. [redacted] said only that she was having a "tough time". She said that she disliked some of her work, but blamed her "tough time" on stress from personal issues.

e) Ms. [redacted] central concern appeared to be that she needed more time to accomplish tasks, and that she wished to perform fewer tasks. She also asked for adjustments to her schedule so that she could spend time with her daughter. Director of Occupational Health – WorkMed offered Ms. [redacted] part-time or on call status as a possible solution to her concerns about being able to get her work done, but reiterated that when she was at work, she needed to do her job. Ms. [redacted] job included pitching in when a medical assistant was not there to perform medical assisting duties.

f) After Ms. [redacted] complained that she did not have enough time to complete her tasks, [redacted] blocked out time on her schedule to allow her "prep time" of 10 minutes for an hour-long visit with a patient at the travel clinic. Any prep for the visit would have taken less than 10 minutes, leaving Ms. [redacted] with additional time to complete her work tasks. On at least one occasion, [redacted] also blocked out 30 minutes at the end of Ms. [redacted] day for the completion of administrative tasks.

g) When Ms. [redacted] did tell her supervisor about her inability to complete her work, she claimed to be "overwhelmed". She blamed this on her home life, or on the fact that her position was not her "dream job".

h) [redacted] allowed Ms. [redacted] to take a leave of absence, and to return to work part-time. It also discussed other options with her, such as coming in late, leaving early, and allowing "catch up time", as well as ongoing part-time work. [redacted] believed that Ms. [redacted] was more focused on maximizing her income than on her doctor's prescribed work restrictions.

i) Ms. [redacted] wanted only to take on certain job duties, and not others. This sort of picking and choosing among job duties is not a reasonable accommodation.

j) On January 23, 2013, Director of Occupational Health – WorkMed e-mailed Ms. [redacted] offering to make short-term accommodations to her work and hours. Director of Occupational Health – WorkMed told Ms. [redacted] that if she had accommodations requests, she should present them to Director of Occupational Health – WorkMed. The January 23rd e-mail also included a summary of performance deficiencies which had been discussed with Ms. [redacted] earlier that same day.

k) Ms. [redacted] sent an e-mail to Director of Occupational Health – WorkMed on or about February 4, 2013, stating, in relevant part: "I saw my physician and am not able to return to work at this time. I also resign effective immediately." Ms. [redacted] also said that she was "sick in bed with the flu".

l) While the male RN was paid more than Ms. [redacted], this was not due to his gender. The male RN negotiated for a higher starting salary. He had 26 years of nursing experience at the time he was hired, including five years of experience as a certified Occupational Health RN. Ms. [redacted] on the other hand, had 10 years of experience, without the same level of responsibility as the male RN. In addition, while at [redacted] the male RN completed his work on time and without incident, and frequently traveled to off-site locations; Ms. [redacted] did none of these things.

[redacted] became a salaried employee exempt from overtime when she became a full-time employee in March 2011. As a salaried exempt employee, she was expected to work until her job was completed, and was not eligible for overtime. Nonetheless, when she raised the issue of how much extra time she was working, Director of Occupational Health – WorkMed responded via e-mail (*see* Paragraph 3(j), *supra*), discussing the issue of taking compensatory time while complying with applicable labor laws.

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.

Disability Discrimination: Reasonable Accommodation

2) The MHRA provides that it is unlawful to discriminate against an employee because of physical or mental disability. See 5 M.R.S. § 4572(1)(A).

3) Pursuant to the MHRA, unlawful discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity." 5 M.R.S. §§ 4553(2)(E), 4572(2).

4) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complainant must show (1) that she was a "qualified individual with a disability" within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant's physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent's failure to do so affected the terms, conditions, or privileges of Complainant's employment. *See id.*

5) The MHRA defines "physical or mental disability," in relevant part, as a physical or mental impairment that "significantly impairs physical or mental health." 5 M.R.S. § 4553-A(1)(A)(2). The term "significantly impairs physical or mental health" is defined as "having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population." *Id.* at § 4553-A(2)(B).

6) The term "qualified individual with a disability" means "an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." 5 M.R.S. § 4553(8-D). Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . ." 5 M.R.S. § 4553(9-A).

7) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001).
8) Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.

9) Here, Complainant has alleged that she requested the reasonable accommodation of not being required to perform the functions of the medical assistant position, which were not essential functions of her position. Respondent has stated that "pitching in" to do extra work was a requirement of Complainant's position, and that she simply wanted to pick and choose the tasks she had to perform.

10) In this case, Complainant has established that she is a "qualified individual with a disability". She has been diagnosed with depression, anxiety and adjustment disorder, which appear to significantly impair her health in that these diagnoses led to a significant period of time (longer than six months) during which she had difficulty with concentration, focus, insomnia, agitation and attention deficit hyperactivity disorder. Her conditions also led her to miss extended periods of work. It also appears from the record that Complainant was able to perform the essential functions of her position, with or without reasonable accommodation. Her initial performance review (*see* file) was positive, and supports her position that she was able to perform her job well.

11) Complainant has established that Respondent knew that she had mental/physical limitations and that it failed to accommodate any such limitations, with reasoning as follows:

a. Complainant was hired to work as an Occupational Health Nurse. As she described the position during the Issues and Resolution conference, the work dealt with research, investigative work, report writing, contracts, etc. On the other hand, the Medical Assistant role is far more task-oriented. The individual in that position performs short, quick tasks such as drug tests, immunizations, etc. Complainant accepted a very specific position with the hospital and she soon had unrelated job duties forced upon her. These were not essential elements of her job, but were elements of another job.

b. In October of 2012, Complainant [redacted] met with Director of Occupational Health – Work Med and Nurse Practitioner and requested that she not be required to perform all of the non-essential Medical Assistant functions. Although Complainant was willing and able to perform some of the extra Medical Assistant duties, the stress of performing her own job as well as the duties of a Medical Assistant was overwhelming. Complainant explained that she suffered from depression and anxiety, that she had difficulty in the morning as a result of the stress-induced insomnia, and that the strain of being required to constantly perform the extra work was overwhelming her.

c. Complainant's first request for a reasonable accommodation was that Respondent excuse her from some of the extra Medical Assistant work duties not in her job description. Respondent refused to reallocate any non-essential duties, insisting that Complainant perform whatever duties were needed. Respondent said that this *was* the job (even though it was not the job she actually had been hired to do) and asked her several times if she could do it. Respondent has not established that granting Complainant's request for accommodation would have presented an undue hardship to Respondent.

d. Complainant's second request for a reasonable accommodation was that she be permitted to have the regular morning start time that she had been promised when hired (8:00 a.m. – 8:30 a.m.) because the early and irregular start times were too difficult for her. The request was simply rejected. Respondent has not established that granting Complainant's request for accommodation would have presented an undue hardship to Respondent.

e. Complainant took a medical leave of absence beginning in November 2012, and provided medical documentation to Respondent which included her diagnoses.

f. When she returned to work after her leave, Complainant made a third reasonable accommodation request, asking again that the non-essential functions of the medical assistant position be reallocated. Respondent refused this request repeatedly, up to and including on January 23, 2013, when Director of Occupational Health – Work Med offered "short-term accommodations" such as part-time work or catch up time, while noting that "long-term the job expectations will remain the same, and the expectation of the [] role is that you to perform a variety of tasks, based upon client need". Respondent has not established that granting Complainant's request for accommodation would have presented an undue hardship to Respondent.

12) To prevail, Complainant must demonstrate that Respondent's denial of her requests for reasonable accommodations affected the terms and conditions of her employment. Here, Complainant alleged that Respondent's failure to accommodate her disability left her with no choice but to resign her position, resulting in a constructive discharge. Complainant has established this element of her claim, with reasoning as follows:

a. It is a violation of the MHRA 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).

b. As noted above, Complainant accepted a very specific position with the hospital and she soon had unrelated job accountabilities foisted on her which led to overload, exhaustion and ultimately work-related stress illness. The failure to accommodate Complainant led to her needing leave from work, and to significant physical symptoms, including insomnia. The terms and conditions of her employment were affected.

c. Under the circumstances, Complainant had no choice but to leave her job. She made her requests for accommodation many times, and each time, they were denied. She reached her breaking point when her doctor removed her from work for yet a third time, because the strain of performing non-essential duties due to Respondent's understaffing had exacerbated her depression and anxiety to the point where she was unable to work.

13) Finally, Respondent has not provided any evidence that accommodating Complainant would have been an undue burden. Respondent was unwilling to even explore relieving Complainant from the duties of a medical assistant, and did not provide evidence to show that it could not have done so, even in light of its alleged understaffing.

14) Discrimination based upon failure to accommodate mental/physical disability is found.

Sex/Gender Discrimination

15) The MHRA provides, in part, that it is unlawful to discriminate in the terms, conditions, and privileges of employment on the basis of sex.

16) Complainant here alleged that Respondent discriminated against her on the basis of sex by compensating her at a lower rate of pay than a male who was subsequently hired for the same position,

allowing the male employee a fixed schedule that Complainant was denied, and not requiring the male employee to take on the additional Medical Assistant work forced upon Complainant. Respondent asserted that the male who was hired for the position simply negotiated a higher rate of pay, that he worked different hours because of off-site work, and "performed the same job" as Complainant.

17) 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).

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 (1st Cir. 2002).

19) 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.

20) 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.

21) 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.

22) Here, Complainant has established a prima-facie case by showing that she is female, she performed her job satisfactorily, and she was provided different terms and conditions of employment than a male colleague who was hired to do the very same job for which she was initially hired (compensated at a lower rate of pay, not provided regular start time, subjected to additional work requirements).

23) Respondent has articulated a legitimate, nondiscriminatory reason for its actions. The male colleague actually was hired into the same position as Complainant and did the same work as her, but had different work experience that allowed him to negotiate a higher rate of pay at the time of his hire. He had a regular start time because he did more off-site work than Complainant.

24) At the final stage of the analysis, Complainant has not demonstrated that Respondent's reasons for the differential treatment were false or pretextual and that unlawful sex discrimination was the reason for differential treatment:

   a) With respect to pay, the male RN had significantly more experience than Complainant. The male RN had been a nurse for 26 years, as compared to Complainant's 10 years of experience. The male

RN also had five years of experience as a certified Occupational Health RN, while Complainant did not have that experience. Complainant was not able to show otherwise.

b) With respect to work hours, the male RN arrived earlier than Complainant and was able to complete work Complainant could not. He also worked more off-site than Complainant did. Complainant was not able to show otherwise.

c) With respect to being assigned additional Medical Assistant job duties, Respondent established that the male RN had the same additional work expectations that Complainant did. Complainant was not able to show otherwise.

25) The claim of unlawful sex/gender discrimination is unfounded.

Retaliation - MHRA and Whistleblower Protection Act

26) 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).

27) The MHRA also prohibits discrimination because of previous actions that are protected under the Whistleblower Protection Act ("WPA"). *See* 5 M.R.S.A. § 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).

28) 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) (interpreting 5 M.R.S.A. § 4572(1)(A)). "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). An abusive reprimand may also be actionable. *See King,* 611 A.2d at 82 (telling an employee who had requested a smoke-free environment as a reasonable accommodation that "she should look for another job if she couldn't stand the smoke").

29) Threats against an employee's status of employment may constitute discriminatory acts regardless of whether the threats are carried out. *LePage*, 2006 ME 130, ¶ 21.

30) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *See DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.

31) 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.

32) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA- or MHRA- protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*

33) 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*, 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).

34) Complainant alleged that she complained that she was entitled to overtime because she was required to work more than 40 hours each week. It is assumed, solely for the purposes of analysis, that even though she was a salaried employee, Complainant reasonably believed that she was not exempt from overtime requirements. Nonetheless, Complainant has failed to establish a prima-facie case, with reasoning as follows:

a. Complainant has not identified any adverse employment action that she suffered because of her complaints about not being paid overtime. While she generally alleged that she was harassed, there is no evidence in the record to support this vague statement.

b. Complainant also has not shown a causal link between any adverse action she may have suffered and her complaints about overtime pay. Complainant was required to do additional tasks, and was reprimanded for not keeping up with her work, but nothing in the record supports an inference that these actions had anything to do with her complaints about overtime.

c. Respondent provided a copy of an e-mail from Director of Occupational Health – Work Med informing Complainant that Respondent wanted to provide some form of compensation for additional work Complainant was performing, but that it needed to do so in conformance with applicable labor law. Any complaints made after this e-mail, dated February 6, 2012, would not have been in good faith, since Complainant was made aware at that time that she was not eligible for overtime pay.

d. Complainant stated that she would provide additional e-mails showing that she made complaints, but she did not do so. There is no evidence, other than Complainant's own assertions, that the complaints were made.

35) Retaliation in violation of the MHRA or WPA is not found in this case.

VI. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following findings:

1. There are **Reasonable Grounds** to believe that [redacted] discriminated against [redacted] based upon failure to accommodate mental/physical disability, and conciliation of this claim should be attempted in accordance with 5 M.R.S. § 4612 (3); and

2. There are **No Reasonable Grounds** to believe that [redacted] discriminated against Complainant [redacted] based upon sex, retaliation or protected whistleblower activity, and these claims should be dismissed in accordance with 5 M.R.S. § 4612 (2).

Amy M. Sneirson, Executive Director

Michèle Dion, Investigator