



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

E18-0392-A & B

August 16, 2019

Taryn Gourdouros (Biddeford)

v.

**Chessie Girl, Inc. d.b.a. Merry Maids of Maine (Scarborough) &
Merry Maids¹ (Memphis, TN)**

I. Summary of Case:

Complainant Taryn Gourdouros, who was a cleaner for Respondent Chessie Girl, Inc. d.b.a. Merry Maids of Maine from May 30, 2017 until December 29, 2017, alleged Respondent retaliated against her for engaging in protected activity under the Maine Whistleblowers' Protection Act ("WPA"). Respondent denied retaliating against Complainant and provided that she was discharged for poor work performance and for displaying an inappropriate and detrimental attitude in the workplace. The Investigator conducted a preliminary investigation which included reviewing all of the documents submitted by the parties, a Fact Finding Conference ("FFC"), and a request for additional information from Respondent. Based on this information, the Investigator recommends that the Commission find that there are reasonable grounds to believe that Respondent retaliated against Complainant for engaging in protected activity.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: December 8, 2017 through December 29, 2017.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): October 11, 2018.
- 3) Respondent has 23 employees and is subject to the Maine Human Rights Act ("MHRA") and the WPA, as well as state employment regulations.
- 4) Complainant is represented by Lisa J. Butler, Esq. Respondent is represented by James G. Spaulding, Esq.

III. Development of Facts:

- 1) Complainant provided the following in support of her claims:

¹ Respondent Merry Maids disputed liability on the grounds that Respondent Chessie Girl d.b.a. Merry Maids of Maine is an independently owned and operated franchise. A review of the records supports this claim as the two businesses do not have interrelated operations or common management; control of labor relations is centralized with Chessie Girl, and Chessie Girl is independently owned. As such, the claim against Merry Maids will not be analyzed further. Merry Maids will be referred to in this report as "Franchisor".

Complainant was employed by Respondent as a cleaner. Respondent offered a bonus of up to \$750.00² with information on how to obtain an additional \$500.00 good performance bonus. One of the requirements for receiving the bonus was that the employee could not have more than three unexcused absences in the year. Complainant had one unexcused absence and three excused absences, but she was not paid the bonus. Respondent stated she was not paid due to having too many absences. Complainant believed this was illegal and reported this to Respondent and to Franchisor. The day after making the report to Franchisor, Complainant was discharged for alleged poor performance.

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

Complainant did not perform her job satisfactorily. She was given multiple verbal and written warnings for her performance, attitude, and attendance. The decision to discharge Complainant was made prior to her contacting Franchisor. The original decision to not pay Complainant the bonus was based on her attendance. Upon further review, the attendance was not an issue, but she did not meet all of the other bonus requirements. So that Complainant would not feel cheated, she was paid a partial bonus of \$350.00 in her final paycheck.

3) The Investigator made the following findings of fact:

- a) Complainant was employed by Respondent as a Cleaner from May 30, 2017 until she was discharged on December 29, 2017.
- b) Respondent offered a bonus to its employees and posted the terms of the offer in the break room. Employees in Complainant's job class could earn a bonus of \$700.00 in a full year. Since Complainant was employed for approximately six months of the year, she was eligible for a prorated bonus of \$350.00.
- c) In order to obtain the bonus, an employee had to meet the following criteria: 1) have three or fewer call outs for the year without a medical report; 2) meet a minimum performance standard; and 3) achieve monthly incentives at least four times during the year. In addition, the company needed to achieve at least four percent growth for the year.
- d) Complainant had one unexcused absence on August 4, 2017.
- e) On September 5, 2017, Complainant was injured and required three days off from work. She provided a doctor's note to Respondent.
- f) While some employees were given a bonus in December 2017, Complainant (and others) were not. Complainant believed she was legally-entitled to the bonus because she believed she had met all of the criteria.
- g) After learning she was not being paid the bonus, and after speaking with Respondent, Complainant decided to contact Franchisor. She called three times in early December, and left messages each time, but had no response until the week before Christmas. Complainant contacted Franchisor because she believed Respondent's failure to pay her a bonus was illegal.

² Respondent provided that the bonus that could be earned was \$700.00, not \$750.00 as alleged by Complainant.

- h) On December 15, 2017, at the company Christmas party, Complainant again questioned why she had not received the bonus and was instructed to speak with Respondent during normal business hours.
- i) On December 18, 2017, Complainant spoke with Respondent about the bonus and disputed that she had more than three unexcused absences. Respondent responded that a doctor's note did not make an absence excused and Complainant was not going to be paid the bonus or even a portion thereof. The company handbook clarifies that a call out is excused if accompanied by a doctor's note.
- j) Complainant received an email from Franchisor directing her to contact Franchisor's Business Development Coordinator ("Coordinator"). Complainant left a message for Coordinator.
- k) On December 22, 2017, Complainant was given a written warning for not properly cleaning a bathroom. Her pay was reduced so that Respondent could reimburse the customer, and she was verbally counseled to work more slowly in order to improve her performance.
- l) On December 28, 2017, Complainant called in sick. That same day, Coordinator called Complainant and they discussed the bonus. Coordinator advised Complainant that Franchisor was not in charge of her pay, but stated that he would contact Respondent to try and rectify the situation. Coordinator called Respondent that day to advise Respondent of the call.
- m) On December 29, 2017, Complainant was called into Respondent's office and discharged. During the conversation, Owner advised Complainant that she would receive a \$350.00 bonus in her final paycheck even though she had not met the bonus criteria. During the meeting, Complainant stated she believed she was being discharged in retaliation for calling Franchisor. Manager stated, "I'll say I don't know when you called [Franchisor]" when discussing the reason for Complainant's discharge.
- n) Complainant questioned why she was given a written warning and told to do better in the future just a week earlier, but was now being discharged. Manager responded that the discharge was planned, and it was only due to Complainant not being at work on December 28, 2017 that it happened after her report to Franchisor.

IV. 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 Maine Revised Statutes ("M.R.S.") § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA prohibits retaliation against employees who, pursuant to the WPA, make good faith reports of what they reasonably believe to be a violation of law or a condition jeopardizing the health and safety of the employee or others in the workplace. *See* 5 M.R.S. § 4572(1)(A); 26 M.R.S. § 833(1)(A)&(B).
- 3) To establish a prima-facie case of retaliation in violation of the WPA,³ Complainant must show that she engaged in activity protected by the WPA, she was the subject of adverse employment action, and there was

³ In order to determine whether Complainant has met the reasonable grounds standard, the Commission must determine whether the Complainant has at least an even chance of succeeding *at trial*. Accordingly, *Brady v. Cumberland County*, 2015 ME 143, ¶39 which holds that the burden-shifting analysis used here is unnecessary when a court is deciding a

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; One method of proving the causal link is if the adverse job action happens in “close proximity” to the protected conduct. *Id.* at 1998 ME 227, ¶ 16, 719 A.2d at 514-15.

- 4) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then “produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action.” *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry her overall burden of proving that “there was, in fact, a causal connection between the protected activity and the adverse employment action.” *Id.* In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant’s protected activity, although protected activity need not be the only reason for the decision. *See Maine Human Rights Comm’n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).
- 5) Complainant established a prima-facie case by showing that she reported concerns about what she in good reasonably believed to be unlawful pay practices and was discharged just days later. Respondent, in turn, provided a legitimate, nondiscriminatory reason for Complainant’s discharge by explaining that Complainant was discharged for poor performance and a poor workplace attitude.
- 6) At the final stage of the analysis, Complainant has demonstrated Respondent’s reason was false or irrelevant and that unlawful retaliation was the reason for her discharge, with reasoning as follows:
 - a) Respondent provided that it had originally told Complainant that the reason she was not paid a bonus was based on her attendance. It is unclear if Respondent’s assertion that Complainant did not meet any of the other criteria for the bonus was ever communicated to Complainant. The record supports that Complainant was told that the reason she did not receive the bonus was due to her absences.
 - b) Respondent had disciplined Complainant on December 22, 2017 for poor performance, directing her to “slow down and make sure you are getting all of the areas of the home.” Additionally, the discipline included that “[f]ailure to improve quality could result in suspension or termination.” This language indicates that Respondent planned on continuing to employ Complainant and that as of December 22, 2017, Respondent was not at the point of discharging Complainant. Respondent did not produce any evidence that Complainant committed other infractions between December 22 and December 29, 2017.
 - c) The record supports that Complainant complained about the withheld bonus on multiple occasions prior to being discharged. Complainant alleged that Respondent refused to pay her a bonus based on her having four absences, even though three were excused. After Respondent repeatedly refused to pay the bonus, Complainant contacted Franchisor to report the failure to pay the bonus. The day after becoming aware that Complainant had called Franchisor to make this report, Respondent discharged her for poor performance. Based on the “even chance” standard of prevailing in a civil action, the timing is enough to establish a causal connection between her reporting and her discharge.
 - d) Furthermore, Respondent had shifting explanations about when the decision had been made to discharge Complainant. In their written response, Respondent claimed that the decision had been made on December 22, 2017, but Respondent waited because it was the holiday season. However, during the FFC, Owner first provided that they had decided to allow Complainant to work until the end of the

motion for summary judgment, is inapplicable. *Id.* at ¶ 39, n.9 (expressly not considering applicability of burden-shifting structure at trial).

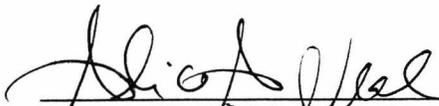
following week, but then decided to discharge Complainant immediately due to the call out on December 28, 2017. When asked about the differing responses, Owner repeated that the decision to discharge Complainant was made on December 28, 2017.

- e) Manager, who was also involved in the discharge decision, contradicted this assertion and stated that the decision to discharge Complainant had been made prior to December 28, 2017, but had been delayed because she and Owner needed to coordinate their schedules.
 - f) During the FFC, Owner acknowledged that he was advised by Franchisor that Complainant had called them on December 28, 2017, but initially stated he was not told why the call was made. However, later in the FFC, he acknowledged that Franchisor had told him that the call was about the bonus issue. Owner provided that he shared this information with Manager on the morning of December 29, 2017, prior to the meeting with Complainant.
 - g) The record further reflects that the discharge was related to the report Complainant made. When Complainant made Respondent aware that she believed she was being discharged in retaliation for calling the corporate office, Manager stated, "I'll say I didn't know when you called [Franchisor]." This strongly indicates Respondent was using a false reason to discharge Complainant and the true motivation was indeed her making the report to Franchisor.
 - h) Additionally, Respondent denied that Manager ever made this statement and provided a signed, sworn affidavit from Manager asserting as much. However, after a recording of the meeting was produced and Manager was heard making the statement, Owner and Manager recanted and said that the statement was made but they had forgotten about it until hearing the recording. This misstatement – whether a deliberate falsehood or not – along with Respondent's additional shifting reasoning impacts Respondent's credibility negatively and supports a finding of pretext here.
- 7) Retaliation for engaging in WPA-protected conduct is found.

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 Chessie Girl d.b.a. Merry Maids of Maine retaliated against Taryn Gourdouros in violation of the WPA when it discharged her from her employment, and this portion of the complaint should be conciliated in accordance with 5 M.R.S. § 4612(3); and
- 2) There are **No Reasonable Grounds** to believe that Merry Maids retaliated against Taryn Gourdouros in violation of the WPA, and that portion of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).



Alice A. Neal, Chief Investigator
Ron Dreher, Extern