

INVESTIGATOR'S REPORT E12-0623

- b) Respondent is a quasi-municipal, nonprofit corporation owned and operated by the residents of six [REDACTED] and is governed by a board of directors.
 - c) The chief executive of the District is the General Manager. The chief operating officer is the Operations Manager. The head of the employee's collective bargaining unit is the Union President who is also a Senior Captain.
 - d) Capt. [REDACTED] alleges that the District subjected him to whistleblower retaliation by threatening him and suspending him for engaging in protected activity. The District denies that the alleged threat constitutes an adverse employment action and alleges that Capt. [REDACTED] was suspended for assaulting Operations Manager, his supervisor.
- 2) The parties provided the following regarding Complainant's alleged protected activity:
- a) (Complainant, or "C") His job is to pilot ferries between Portland and islands in Casco Bay. As a Captain, the buck stops with him in regard to the safety of his vessel, crew, passengers and cargo. One of his responsibilities is to ensure that his crew is physically and mentally capable of performing their duties safely.
 - b) (C) There are federal safety laws enforced by the Coast Guard that apply to crew members of vessels such as those he captains for the District. One of these safety laws limits crew members to working only 12 hours in a 24-hour period "except in an emergency when life or property are endangered."¹ If a crew member of his vessel makes an error from fatigue because of working in violation of the 12-hour rule, that error is his responsibility as a Captain.
 - c) (C) The District assigns the task of scheduling crew members to dock side employees with the title of Operations Agents. Historically, the Operations Agents have not complied with the 12-hour rule and thus for years, Senior Captains have been required to review their individual crew lists and try to determine whether their crew members will be in compliance with the 12-hour rule if they accept them for a trip.
 - d) (C) Because the District was not responsive to concerns that he and other Senior Captains were raising, the Senior Captains approached the regional Coast Guard office responsible for enforcing the 12-hour rule in 2006. As a result, the Coast Guard contacted the District and conducted an inspection. (See file, December 7, 2006 letter from Coast Guard to the District's Operations Manager.)
 - e) (C) Despite the Coast Guard's involvement in 2006, the District's compliance with the 12-hour rule did not improve and crew members continued to be regularly scheduled for greater than 12 hours of work within 24 hour periods. This problem was raised informally at Senior Captain and "Bid Board" (where individuals bid to set schedules) meetings and presented orally to the District on multiple occasions by Capt. [REDACTED] Union President, and other captains.
 - f) (Respondent, or "R") Historically the District construed the 12-hour rule to apply to actual hours worked by crew members on board a vessel and not to break time or work performed on shore. However,

¹ Complainant cited 46 U.S.C. §8104(b) as the applicable law. It reads, "On an oceangoing or coastwise vessel of [a certain size] ... a licensed individual may not be required to work more than 9 of 24 hours when in port, including the date of arrival, or more than 12 of 24 hours at sea, except in an emergency when life or property are endangered."

sometime in 2005 questions were raised about the meaning of the rule, so Operations Manager met with the Coast Guard to explore the issue. Coast Guard guidance was provided in a letter dated December 7, 2006. The Coast Guard praised the District and described its operations as "safe" but also indicated that it did not agree with the District's construction of the 12-hour rule. After receiving the Coast Guard letter, the District has attempted to limit employees to working 12 to 13 hours in a 24 hour period.

- g) (C) On June 26, 2012, Capt. [REDACTED] brought this issue to the attention of the District again in an email to Operations Manager. In the email, Capt. [REDACTED] asked Operations Manager to include language in his next circulated memo ("Notes") reinforcing that every employee was responsible for compliance with the 12-hour rule and that Captains were not to allow crew members aboard if the member was out of compliance with the 12-hour rule. Operations Manager responded with an email that he did not have room in his "Notes" for Capt. [REDACTED]'s proposed language and said that instead he would discuss the issue with the Operations Agents. Operations Manager sent an email to the Operations Agents on June 27, 2012 reminding them of the 12-hour rule but leaving them with no oversight.
 - h) (R) Capt. [REDACTED] replied six days later (July 3, 2012) and reported two recent incidents that he believed also violated the 12-hour rule.
- 3) The major conflict in this case arose one week later, on July 6, 2012. The parties and witnesses describe that conflict differently, and as follows:
- a) Complainant's recollection:
 - i) On July 6, 2012, Capt. [REDACTED] observed that a crew member on his vessel had been assigned to work grossly in excess of the 12-hour rule. At that point, Capt. [REDACTED] was no longer willing to go through Operations Manager to address this issue as he had been reporting his concerns about it to Operations Manager for approximately seven years without improvement.
 - ii) When Capt. [REDACTED] saw Operations Manager at work on July 6, 2012, he told Operations Manager that he was finished discussing 12-hour rule violations with him. Operations Manager asked him to explain. Capt. [REDACTED] told Operations Manager that he was all done discussing the 12-hour rule with him, thanked him for his efforts, and informed him that he was going to pursue alternative avenues.² He was going to take the matter to Operations Manager's supervisor, the General Manager. After speaking to Operations Manager and punching in, Capt. [REDACTED] proceeded to the vessel he was to captain that day.
 - iii) He boarded the vessel and went to the engine room. After completing the engine room start-ups, he climbed up a steep ladder to a small space/landing that is immediately adjacent to a set of steep stairs that leads down to the engine room and the door that opens into the galley. When he climbed out of the engine room to stand on the landing, Operations Manager was standing in the doorway to the galley and confronted him. Because of the tight quarters, Operations Manager had Capt. [REDACTED] blocked into this space and he had nowhere to go. Operations Manager asked Capt. [REDACTED] about the 12-hour rule violation. Capt. [REDACTED] repeated that he was all done discussing the 12-hour rule with Operations Manager and turned to perform the duties needed to get the vessel ready for the trip.

² MG, a crew member who witnessed this initial interaction, and was interviewed by the General Manager when he investigated the incident, stated that she heard Capt. [REDACTED] say "Now I have to call [General Manager] about the 12 hour rule," and "You never do anything ..."

Operations Manager asked Capt. [REDACTED] yet again about the 12-hour rule. Capt. [REDACTED] told Operations Manager, calmly and clearly, that he was not going to get "baited" into his game.

- iv) At that, Capt. [REDACTED] felt Operations Manager bump into him as Operations Manager stepped further into the space. Capt. [REDACTED] turned to the left to regain his footing on the narrow landing. In a rage, Operations Manager raised his voice and said, "If you want to play f**king games, I can play f**king games!" Capt. [REDACTED] was afraid for his safety and told Operations Manager that he was going to leave. Operations Manager took up a more aggressive and imposing position in front of him. As Capt. [REDACTED] attempted to leave, parts of his body and Operations Manager's body touched each other and Operations Manager tripped over a stack of chairs behind him. Operations Manager was able to catch himself as he fell backwards onto a stack of chairs and Capt. [REDACTED] quickly left the gallery and up the rear cabin stairwell. Capt. [REDACTED] realized that Operations Manager was chasing him when he heard Operations Manager say, "You can keep on going 'cause I'm replacing you."
- v) Capt. [REDACTED] proceeded to the back offices in search of the General Manager, who was not present. He asked another employee for the General Manager's cell phone number. He went the back way to the vessel to collect his belongings then proceeded, again through the back way, to his car. He was unable to get a call back from the General Manager but was able to speak to the Union President, who told him that the General Manager was not going to return his calls, and that he was suspended with pay until further notice.
- vi) Capt. [REDACTED] received a letter from Operations Manager, dated July 6, 2012, placing him on administrative leave with pay pending an investigation into the incident that afternoon. Capt. [REDACTED] was banned from District property, including its vessels, until further notice.
- vii) The captain who was called to replace Capt. [REDACTED] when he was suspended on July 6, 2012 had worked well over 15 hours by the end of the shift that night. This was despite the fact that another captain who would have been well within the 12-hour rule was available to fill the shift.

b) Operation Manager's recollection:

- i) At approximately 4 PM on Friday, July 6, 2012, he was standing near the time clock in the Ticket Office talking with an employee. Capt. [REDACTED] approached the Ticket Office through an open door from the Freight Shed. He said, "Hello Capt. [REDACTED] and Capt. [REDACTED] responded with something to the effect of, "I'm done talking to you. I'm talking to [General Manager] in the future." Operations Manager asked Capt. [REDACTED] what he meant but Capt. [REDACTED] stormed off into the Freight Shed.
- ii) As Capt. [REDACTED] had recently raised issues about the number of hours crew members had worked, Operations Manager reviewed the hours by the three deckhands scheduled to work that evening with Capt. [REDACTED] on his trip. No issues were identified.
- iii) Next, Operations Manager walked through the Freight Shed to the Crew Room (employee lounge) to again ask Capt. [REDACTED] what he was talking about. He approached the door at the same time Capt. [REDACTED] was entering the Crew Room. He looked inside and Capt. [REDACTED] wasn't there.
- iv) Next, he walked out to the ferry that Capt. [REDACTED] was assigned to captain, assuming that he had gone out there to get the boat fired up. Operations Manager climbed aboard and looked for Capt. [REDACTED]. He walked toward the engine room, into the galley area, and turned inboard to look down through

the engine room doorway. He observed Capt. [REDACTED] standing near the top of the stairs, turning on circuit breakers in two electrical panels located on the port side bulkhead at the top of the stairwell. He finished up with the switches and was standing in the main deck entryway to the engine room.

- v) Operations Manager asked Capt. [REDACTED] what he was talking about in the Ticket Office. Capt. [REDACTED] said he wasn't talking to Operations Manager anymore, that he was only talking to the General Manager. Operations Manager inquired again as to what he was talking about. Capt. [REDACTED] again said he was not talking to Operations Manager anymore. Operations Manager asked one more time what he meant. Capt. [REDACTED] said that Operations Manager had no control over how people were scheduled. Operations Manager asked him to be specific, and Capt. [REDACTED] gave him an example of a crew member who was scheduled for a charter the following night and would be way over the number of hours allowed. Operations Manager thanked Capt. [REDACTED] and told him that he didn't know that the crew member had been added to the crew, and that he would have that addressed. Capt. [REDACTED] stated again that he was not going to talk to Operations Manager about this; he was only going to talk to General Manager.
 - vi) Operations Manager took a small step towards Capt. [REDACTED] and said something to the effect of, "Are you sure you want to start playing these f**king games again?" At that point, he observed a maniacal look in Capt. [REDACTED] eyes as he reached up with both of his hands and pushed forcefully against Operations Manager's chest. This caused him to lose his balance and fall backwards against some chairs that were in the galley area. Operations Manager reached back with both hands in an effort to try to hold himself upright and continued stumbling backwards, landing (he believes) against the edge of the counter.
 - vii) Capt. [REDACTED] took off through the doorway from the galley into the passenger cabin. Operations Manager yelled to him, "You're out of here - you're going home." Operations Manager chased Capt. [REDACTED] up the aft stairwell to the 01 deck stern and observed Capt. [REDACTED] proceeded through the interior passenger waiting area and through the door to the administrative offices.
 - viii) Operations Manager told another manager they needed to find another captain for the vessel as he was sending Capt. [REDACTED] home. The captain called in to replace Capt. [REDACTED] worked 14 hours and 24 minutes during a 24 hour time period. This was necessitated because Capt. [REDACTED] was sent home.
- c) Witnesses who observed Capt. [REDACTED] and Operations Manager in the time period after their initial interaction but before Operations Manager followed Capt. [REDACTED] onto the ship described their reactions as follows:
- i) Operations Manager:
 - (1) (Capt. N) He arrived at work shortly before 4 PM. After punching in, he proceeded to exit the main office and walked to the crew lounge through the freight shed. He noticed the Operations Manager ahead of him making his way to the crew lounge. As Capt. N approached, he noticed that the Operations Manager was having difficulty entering the code into the electronic key pad that opens the crew lounge door. Operations Manager responded to this difficulty in a bizarre manner that was uncharacteristic of him, by kicking the door of the crew lounge in anger. Capt. N asked Operations Manager if everything was alright and he said, "I hate these doors," and asked Capt. N to open it. Operations Manager was so enraged that he could not successfully enter the code in the keypad and open the door.

- (2) (Crewman H) He was in the crew lounge when he heard several "thuds" at the base of the door, followed by the door being unlocked and opened. Operations Manager entered, appearing agitated and disheveled.
- (3) (Operations Manager and General Manager) Operations Manager is well-known as having difficulty using the key pad to open the crew lounge door.
- (4) (Union President) Operations Manager never had trouble using the key pad before. For a while after the July 6 incident, Operations Manager feigned having difficulty opening the door in front of witnesses, including Union President. Operations Manager has since dropped the pretense.
 - ii) Capt. [REDACTED] One witness interviewed by General Manager said that another employee told her that Capt. [REDACTED] was "in a tizzy" that morning and assumed it was about the 12-hour rule.
- 4) General Manager spoke to Operations Manager about the incident shortly after it occurred. Operations Manager told General Manager and others that he had been assaulted by Capt. [REDACTED]. Capt. [REDACTED] called General Manager shortly after the incident occurred, but the General Manager told Union President that he was not going to call Capt. [REDACTED] back.
- 5) Union President spoke to Capt. [REDACTED] about the incident shortly after it occurred. Capt. [REDACTED] told Union President that he had been assaulted by Operations Manager.
- 6) General Manager conducted the investigation of the complaints. He obtained written statements from Operations Manager and Capt. [REDACTED]. He interviewed two employees who had seen either Capt. [REDACTED] or Operations Manager or both of them that day.³
- 7) He concluded that Capt. [REDACTED] assaulted Operations Manager and seriously considered terminating his employment but decided against it in light of Capt. [REDACTED] years of service. He imposed a ten day unpaid suspension.⁴
- 8) General Manager concluded that Operations Manager could have handled the situation better than he did, and issued a letter to be placed in Operations Manager's file.⁵
- 9) Union President provided the following:
 - a) On several (3 to 5) occasions, Operations Manager has asked him, "What do I have to do to fire him?" referring to Capt. [REDACTED]. He recalls a specific instance when Operations Manager said this as Capt. [REDACTED] walked away, after talking about a safety issue.
 - b) Operations Manager has intimidated other captains for speaking up about safety. When another captain posted an email about safety, Operations Manager responded by posting a section of the contract. When

³ General Manager did not interview Capt. N or Crewman H.

⁴ See attached letter dated July 16, 2012 from General Manager to Capt. [REDACTED]

⁵ See attached memo dated July 16, 2012 from General Manager to Operations Manager's file.

Union President asked what that was about, Operations Manager responded by saying, "You guys want to play f**king games, I can play too."

10) Capt. L provided the following:

- a) He is responsible for scheduling in addition to his duties as a captain. There is a 12-hour rule but the District lets people work more than 12 hours.
 - b) About four years ago, the captains were meeting with the Operations Manager and one of the captains objected to violations of the 12-hour rule. Operations Manager responded by slamming both hands down and saying, "If you guys want to play f**king games, I'll play f**king games too."
 - c) Operations Manager ignores and hampers Capt. L's efforts to ensure that enough crew are hired on time when the starts. This problem is ongoing and results in violations of the 12-hour rule.
- 11) It is undisputed that Capt. [REDACTED] has also reported concerns to Operations Manager about violations of the federally mandated drug testing rules (allowing employees who were picked for random drug tests to wait days or weeks before actually taking the scheduled test). According to Respondent, the process was changed in response to Capt. [REDACTED] concerns. According to Complainant, no effective changes have been made. This issue was not fully investigated or developed in this Report because the disagreement over the 12-hour rule violation was clearly what precipitated the July 6, 2012 incident at the heart of this dispute.

V. Analysis:

- 1) The Maine Human Rights Act ("MHRA") provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA provides, in part, that it is unlawful employment discrimination to discriminate in the terms, conditions and privileges of employment against an employee because of previous actions protected under the Whistleblower's Protection Act ("WPA"). 5 M.R.S. § 4572(1)(A).
- 3) The WPA provides, in part, that it is unlawful, based on protected activity, to ". . . threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment. . . ." 26 M.R.S. § 833(1).
- 4) One type of protected activity under the WPA is when the employee, acting in good faith, reports orally or in writing to the employer or a public body 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).
- 5) 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"). 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.

- 6) Complainant here alleges that Respondent subjected him to whistleblower retaliation by threatening him and suspending him for engaging in protected activity. Respondent denies that the alleged threat constitutes an adverse employment action and alleges that Complainant was suspended for assaulting his supervisor.
- 7) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that he engaged in activity protected by the WPA, he 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.
- 8) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA protected activity. *See Wyrwal 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 his overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*
- 9) In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant's protected activity, although protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 2013 WL 3155234, *16 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).
- 10) Complainant here has established a prima-facie case of retaliation for engaging in protected activity:
 - a) He made good faith reports to Respondent about what he believed to be an ongoing problem about violations of the 12-hour rule, a federal safety law or regulation.
 - i) Complainant's "good faith" is demonstrated by the fact that the Coast Guard inspected Respondent's operations in 2006 and found that Respondent was not in compliance with the 12-hour rule. Respondent indicated that since 2006, it has "attempted" to limit employees to working 12-13 hours but Complainant and others state that frequent violations of the rule continue to occur. Employees state that this is caused in part by Respondent not hiring enough seasonal employees, which makes it inevitable that other employees work too many hours.
 - ii) Complainant reported and complained about violations of the 12-hour rule on a number of occasions over a seven year period. Most recently, he conveyed that the problem was ongoing by sending an email to the Operations Manager on June 26, 2012, asking Operations Manager to include an item in

his "Notes" (published to employees) that would reinforce that every employee was responsible for compliance with the rule and that Captains should not allow crew members aboard if the crew member was or would be out of compliance. The Operations Manager told Complainant that he did not have room in his "Notes" for a reminder about the 12-hour rule. Instead, Operations Manager sent a reminder to the Operations Agents only. The Operations Manager failed or refused to take steps to provide oversight that would ensure that Operations Agents complied with the rule.

iii) On July 6, 2012, when Complainant observed that another violation of the 12-hour rule was about to occur, he decided to take the issue up the chain of command within the District. When Complainant arrived at work that day, he informed Operations Manager that he was all done discussing the issue with him and was going to "pursue other avenues." Operations Manager may have asked Complainant what he meant, but it is undisputed that Operations Manager knew that Complainant was upset about the 12-hour rule. After speaking to Operations Manager and punching in, Complainant proceeded to the vessel he was assigned to captain that day.

b) Complainant has alleged that Respondent took adverse action against Complainant.

i) Operations Manager was angered by Complainant's refusal to discuss the issue with him and with Complainant's stated intent to take the matter over his head. Witnesses described how Operations Manager was so upset that he could not enter the code into an electronic key pad to open a door. Although Respondent states that Operations Manager always had difficulty with this task, there are credible statements by employees to the contrary.

ii) Operations Manager followed Complainant on to the vessel and confronted him in a small, confined space (galley). Operations Manager asked Complainant what he was talking about earlier. Complainant again said he wasn't talking to Operations Manager anymore, that he was only talking to the General Manager. The same question and answer was given four times and each time he was asked, Complainant informed Operations Manager that he was exercising his right under the WPA to report to his employer what he had reasonable cause to believe was a violation of a federal safety law or rule. Operations Manager responded physically by taking a step towards Complainant in a small, confined space, and by saying something to the effect of, "Are you sure you want to start playing these f**king games again?"⁶

iii) Operations Manager's abusive statement ("Are you sure you want to start playing these f**king games again?") and threatening conduct (taking a step toward Complainant in a small, confined space) constitute an adverse action under the WPA. Operations Manager's purpose was to verbally and physically intimidate Complainant and deter him from engaging in protected activity. Complainant's job as well as his physical safety appeared to be at stake.

iv) What happened next is in dispute. According to Complainant, Operations Manager bumped into him and when he turned and attempted to leave, their bodies came into contact and Operations Manager stepped back and tripped on a stack of chairs. According to Respondent, Complainant reached up with both of his hands and pushed forcefully against Operations Manager's chest, causing him to lose his balance and fall backwards against some chairs. Neither man was hurt.

⁶ Operations Manager admits that these were his words and actions.

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- v) Complainant fled the galley and up the rear cabin stairwell. Operations Manager chased after him and yelled, "You can keep on going 'cause I'm replacing you" (according to Complainant) or "You're out of here, you're going home" (according to Respondent). Operations Manager immediately suspended Complainant and reported to General Manager that Complainant had assaulted him.
 - c) On the face of things, there appears to be an immediate causal connection between the protected activity and the adverse action.
- 11) Respondent has provided a legitimate non-retaliatory reason for the adverse action, namely that Complainant's actions on July 6, 2012 constituted an assault on Operations Manager. Although that remains hotly disputed, it would be a legitimate reason for the termination if it was the true reason for Respondent's adverse action against Complainant (even if Respondent later found that Operations Manager's characterization of events was not accurate).
- 12) Complainant has met his overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action, with reasoning as follows:
- a) Operations Manager's actions should be viewed in light of his previous statements to Union President, asking "What do I have to do to fire" Complainant for raising concerns about safety issues at work. While the words may have been said in jest, there is many a true word spoken in jest. Operations Manager's remarks to Union President are an example of the aphorism. Operations Manager appears to have provoked a confrontation with Complainant, setting him up to get fired for workplace violence.
 - b) This might not be enough to lead to a finding of retaliation here if General Manager had done an objective evaluation of the situation. However, it appears that General Manager easily accepted Operations Manager's version of events - too easily.
 - i) Before the July 6 incident, General Manager was aware that there were concerns among employees about Operations Manager's management style.
 - ii) Before the July 6 incident, General Manager knew that Complainant was upset about violations of the 12-hour rule and that Complainant had reported to Operations Manager that he was going to go over his head with his concerns.
 - iii) General Manager knew that Operations Manager followed Complainant onto the vessel, confronted him in a small, confined space, and repeatedly demanded that Complainant talk to him about the 12-hour rule even though Complainant did not want to talk about it. General Manager knew that Operations Manager made an abusive statement to Complainant ("Are you sure you want to start playing these f**king games again?") and engaged in threatening conduct (by taking a step toward Complainant in a small, confined space). Given the particular nature of this employment environment (aboard ship, in tight quarters, just before the ship was to leave), General Manager should have held General Manager accountable for his forced intrusion and physical pursuit of a conflict into the ship captain's physical area while Capt. [REDACTED] was in charge of the ship.
 - iv) Nonetheless, General Manager credited Operations Manager as more credible than Complainant about the actual physical contact that occurred between the two. General Manager accepted Operations Manager's account based on factors that included, among other things, that Operations

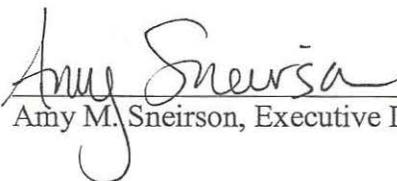
Manager did not need to refer to his notes and reenacted the events as he described them, whereas Complainant simply read from his written statement.

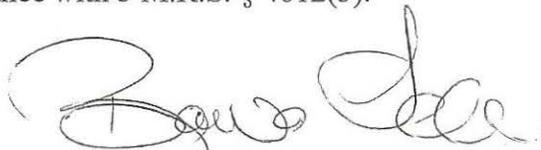
- v) General Manager's credibility determination was subjective and may well have been unfairly biased in favor of Operations Manager, who is a key member of General Manager's management team. General Manager's objectivity appears tainted because he listened to Operations Manager's account of the confrontation shortly after it happened whereas he refused to take a call from Complainant who was trying to report that he had been assaulted by Operations Manager. These factors may have unfairly influenced General Manager to credit Operations Manager's account over Complainant's.
 - vi) It is relevant that although General Manager was fully aware that Operations Manager made an abusive statement and engaged in threatening conduct toward Complainant just prior to the alleged assault, General Manager did not conclude that Operations Manager's acts were "intimidation." His only conclusion was that Operations Manager failed to "deescalate a situation." He noted that "follow[ing] [Complainant] when both of you were obviously upset probably was not the best choice." The only consequence for Operations Manager's actions was a letter to his file.
 - c) Without having done a thorough, unbiased investigation (thorough enough to address a serious allegation like physical assault), General Manager suspended Complainant for 10 calendar days without pay for "intentional physical contact/intimidation." If General Manager had done an objective, thorough evaluation, he likely would have been forced to consider facts that called Operations Manager's account into question and led him to impose different (or no) disciplinary action on Capt. [REDACTED]
- 13) In the final analysis, Complainant has demonstrated that Operations Manager set this chain of events in motion because of Complainant's protected activity. Given the Commission's "reasonable grounds" standard - there is at least an even chance of Complainant prevailing in a civil action - Complainant has established that his suspension would not have occurred but for his protected activity.
- 14) Retaliation for protected whistleblower activity 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] retaliated against Complainant [REDACTED] in employment because of protected whistleblower activity in violation of the Whistleblowers' Protection Act and Maine Human Rights Act; and
2. Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).


Amy M. Sneirson, Executive Director


Barbara Lelli, Chief Investigator



Casco Bay Lines

Serving the Islands of Casco Bay from Portland, Maine

Sr. Captain [REDACTED]
3 Pamela Drive
South Portland, ME 04106

July 16, 2012

Dear [REDACTED]

I am writing to inform you that I have concluded my investigation into the July 6, 2012 incident between you and your supervisor, Operations Manager [REDACTED]. I first became aware of the incident when I received a call from [REDACTED] on Friday, July 6 shortly after the incident. You were immediately put on administrative leave with pay. I was out of town on vacation until Monday at which point I started the investigation.

On Monday, July 9, 2012, I received [REDACTED]'s statement and participated in an interview regarding his version of the events up to, during and after the incident. I also interviewed [REDACTED], [REDACTED], [REDACTED], and [REDACTED] as well as talked with Maine Marine Association's President, Captain [REDACTED], and you. My conversation with you was to arrange a time with you for an interview regarding the incident.

On Tuesday, July 10, 2012, I interviewed [REDACTED] and you. During the interview with you, Captain [REDACTED] was present as was [REDACTED], Assistant Operations Manager. During the interview you submitted a written statement of your version of what transpired on July 6. I gave you the opportunity to verbally walk through your version of the incident. I asked you some questions and allowed you the opportunity to ask some questions.

On Wednesday, July 11, 2012, I reviewed my notes, observations and your and [REDACTED]'s statements. Since your and [REDACTED]'s statements were so completely inconsistent, I decided it would help to have a follow up interview with each of you where the incident took place, so you could walk through what happened from your perspectives. Later in the day I contacted you and we agreed to a follow-up interview aboard the Bay Mist on Thursday.

On Thursday, July 12, 2012, I interviewed [REDACTED] aboard the Bay Mist in the morning followed by an interview with you in my office and aboard the Bay Mist in the afternoon. [REDACTED], a member of the Maine Marine Association, accompanied you. [REDACTED] also joined us. You and [REDACTED] were both allowed the opportunity to review the written statement of the other prior to going aboard the Bay Mist. Each of you was allowed an opportunity to walk through what happened, and show me where it happened in the galley of the vessel. I had some clarification questions for both of you as well as allowed you the opportunity to ask questions. Later in the day I had a follow up interview with [REDACTED].