



Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330

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

www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

November 14, 2014

INVESTIGATOR'S REPORT E13-0063

██████████ (Sanford)

v.

██████████ (Moody)

I. Complaint:

The Complainant alleges that due to her race/color and/or national origin, her employment was terminated and she was replaced by an employee whose national origin was the same as the owner of the company.

II. Respondent's Answer:

The Respondent denies that it discriminated against Complainant, and states that her employment was terminated because the company lost several customers and there were not enough hours for all employees.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: 12/9/2012.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 2/15/2013.
- 3) Respondent Tri State Cleaning, Inc. (hereinafter "██████████" employs fewer than 15 individuals and is required to abide by the nondiscrimination provisions of the Maine Human Rights Act ("MHRA") and state employment regulations.
- 4) This preliminary investigation, which included a review of the parties' written submissions, and requests for additional information, in addition to a Fact Finding Conference, is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds".
- 5) Neither party is represented by counsel.

IV. Development of Facts:

- 1) The parties and undisputed issues in this case are as follows:
 - a) ██████████ provided contractual cleaning services to commercial businesses and residences. It was owned by Owner and her husband. Owner is Russian.

b) Complainant is Caucasian, not of Russian ancestry/national origin, and from the United States.

Complainant's MHRC Claims:

- 2) On or about October 2012¹, Complainant was hired as a "maid/cleaning lady" by [REDACTED]. Her employment was terminated on or about 12/9/2012. At all times during her period of employment, Complainant believes that she performed her job duties satisfactorily.
- 3) On Complainant's second day of work, the individual assigned to train her left [REDACTED]. Complainant's mother was then also hired by [REDACTED] as a maid.
- 4) Approximately one month after Complainant was hired, Owner told Complainant and her mother that she had arranged for an individual from Russia² to come to the United States. Complainant's mother's hours were then cut from five days per week to only three days, which prompted Complainant's mother to quit. About one week later, Complainant's mother was rehired by Owner and given a raise.
- 5) Shortly after this, Complainant received a call from Owner and was informed that there were not enough hours for all three maids. Owner offered Complainant work in the Spring if she wanted it.
- 6) Complainant then filed for unemployment benefits. After [REDACTED] received paperwork from the Maine Department of Labor, Owner's husband contacted Complainant to inform her that her employment had actually been terminated for "not being detailed enough" and he claimed that she "had been written up". These allegations were not true and Complainant believes that they were fabricated by her employer in order to justify keeping the Russian employee instead of Complainant.

Respondent's Answer to the Complaint

- 7) Respondent is a "mom and pop" cleaning company with fewer than five employees. Employees of the company unfortunately do not stay long because the work is difficult, which results in the company having to hire often and constantly train new employees. After a month or so, Owner usually has a very good idea of whether the employee is a good match for the company or not.
- 8) Complainant was hired as a maid in September 2012. She was trained and did a good job for a few weeks. Then the company began receiving complaints, which was upsetting because some of the clients complaining had been with the company for over nine years, and because [REDACTED] had worked hard to earn a very high reputation in this area.
- 9) Owner gave a few verbal warnings to Complainant, they had a few talks about performance, and Owner showed Complainant a few emails containing client complaints. Owner told Complainant of her concerns, and asked Complainant to pay attention to details. Owner admits that she never gave Complainant any written warnings, nor did she document any of the verbal warnings or discussions.

¹ Respondent submitted an "Employee Contact List" which listed Complainant's actual date of hire as 9/28/2012.

² The individual was actually from Moldova, a now independent country which was formerly a republic in the U.S.S.R.

- 10) [REDACTED] lost four regular customers in just a few months, so it made the decision to let Complainant go because there were not enough hours for everybody. [REDACTED] had hired Complainant's mother just a few weeks before that. Owner was trying to spare Complainant's feelings, and did not tell her she was let go because she was not a good cleaner and that her mother's work was better than hers.
- 11) There was no discrimination in this case. There was never any "Russian" involved, aside from Owner, who would never discriminate against anyone because she knows how it feels.

Complainant's Reply to Respondent's Answer

- 12) Complainant had years of prior experience working as a professional cleaner and denies that she did not pay attention to details. Owner never warned Complainant in any way that she was not doing a good job or was in danger of losing her job. Complainant received many compliments as well as two raises over her approximately 10 weeks of employment.
- 13) Respondent claims that they received five client complaints in a two week period. Complainant has no way of knowing if this is true, because she was never informed of any complaints. One of the written complaints submitted by Respondent refers to a cleaning job done on 10/3/2012, a date when Complainant did not work. This would also have been just days after Complainant began her employment with the company. Another one of the client complaints occurred on Complainant's third day of employment, when she had not received any training. A third alleged written client complaint (dated 12/7/2012) also refers explicitly to prior emails complaining about the cleaning over a period of months, even though Complainant had cleaned the residence on just a single occasion. Respondent also refers to a client cancelling services on 12/20/2012, but this occurred well after Complainant was fired on 12/7/2012, and could not have been a reason for her discharge.
- 14) Although Respondent submitted a list of all employees to the Commission, they left off the name of the Russian employee.³ The Owner asked Complainant to take the new employee with her and to train her, and Complainant's mother was demoted so that this could occur. The Russian employee not only made money cleaning, she was also employed as a nanny.
- 15) The following additional information was provided by the parties and witnesses at the Fact Finding Conference:

a) Complainant:

- i. The only training she received was when Owner told her to clean Owner's home and then critiqued her performance. Complainant also trained one day with another cleaner before that cleaner quit. When Complainant began, she was occasionally reminded not to forget things, maybe once or twice per week. She was only sent back to a residence once to complete something that she had forgotten.

³ During the investigation, Respondent was asked to confirm whether a certain individual named by Complainant (the "Russian employee") was ever an employee [REDACTED] Respondent replied that, while the Russian employee had worked as an au pair nanny for their family from 10/31/2012 through 10/23/2013, she was never an employee [REDACTED]

- ii. Complainant worked with the Russian employee almost every day after the Russian employee began working as a maid on or about 10/31/2012. There were only three maids at the time: Complainant, her mother, and the Russian employee. Complainant believes that both she and her mother were better and faster cleaners than the Russian employee. Complainant received two raises, one after a month or so, and another in late October/early November.
- iii. When Complainant was told she was being let go, she was also told that she would be rehired in the Spring. Complainant's job performance was never mentioned as a factor in her being let go until after she filed for unemployment benefits. It does not make sense that she was told she would be rehired if her job performance was poor.

b) Respondent:

- i. Owner handled the residential side [REDACTED] cleaning business while her husband handled the commercial side.
- ii. Even if Complainant's trainer did quit a day or so after Complainant began, there was no detailed training needed. Maids were supposed to follow an assigned list of tasks for each location.
- iii. Although Complainant did always work with a partner, Owner could identify which maid had failed to perform a certain task by asking them who did what tasks after a customer complained. The complaint rate for Complainant was much higher than for other cleaners. Owner spoke to Complainant about performance issues at least seven to nine times and had to remind her about forgetting things almost every day. Every once in a while, Owner would show Complainant an email about a particular complaint.
- iv. It was unprofessional not to tell Complainant that she needed to improve her job performance or her job might be in jeopardy, but Owner did not want to hurt Complainant's feelings, so when the decision was made to let her go she was told she was just being laid off. Owner agrees that she later told the Department of Labor that Complainant had been fired for performance issues. The Owner agrees that Complainant was given two raises, including one in mid-October, which the owner hoped would encourage Complainant to work harder.
- v. The Owner did ask Complainant to train the Russian employee as a maid. A common friend had mentioned this individual to Owner and noted that she also spoke Russian, which Owner thought would be beneficial to her children. Owner later told Complainant (and her mother) that the Russian employee would be working as a nanny and might help with some cleaning. She did end up working as a cleaner for about two months. No money was ever given to the Russian employee for working as a nanny or as a cleaner.⁴

V. Analysis and Conclusions

- 1) The MHRA requires the Commission in this investigation 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. More particularly, "reasonable grounds" exists when there is enough admissible evidence, or there is reason to believe that formal litigation discovery will lead to enough admissible evidence, so that there is

⁴ Respondent was asked to produce TRC payroll records to verify whether the Russian employee was ever paid wages by the company, but Owner indicated that she no longer had access to these records, which were in the possession of her husband.

at least an even chance of Complainant proving in court that unlawful discrimination occurred. Complainant must prove unlawful discrimination in a civil action by a "fair preponderance of the evidence." 5 M.R.S. § 4631.

- 2) The Complainant has alleged that her race and/or national origin was a factor in the termination of her employment. It is unlawful under the MHRA to discharge an employee because of race or national origin. 5 M.R.S. § 4572 (1)(A).
- 3) 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).
- 4) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) she belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261.
- 5) 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.
- 6) Thus, 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.
- 7) 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.
- 8) Complainant established her prima-facie case by showing that she belonged to a protected class (Caucasian and/or originating from the United States), her employer took an adverse employment action (termination) against her, and her employer apparently had a continuing need for the work to be performed. While the Respondent contests the issue of whether Complainant was performing her job satisfactorily, it is assumed for the purposes of this analysis that Complainant met the minimum standards of performance for her position, especially since she received two raises over her approximately 10 weeks of employment.
- 9) Respondent articulated a legitimate, nondiscriminatory reason for terminating Complainant's employment: she was not detail-oriented in cleaning, which led to many customers complaining and cancelling their long-standing cleaning contracts with ██████ which in turn led to fewer available hours for the three employed cleaners.

- 10) Complainant did carry her ultimate burden of proving that she was terminated because of her race and/or national origin, with reasoning as follows:
- a) Respondent was not consistent in the information provided to the Commission regarding some of Complainant's allegations. Owner stated unequivocally in her written answer to Complainant's complaint that there "were never any Russians involved" with [REDACTED] aside from herself. Similarly, during the investigation, Respondent was asked to confirm whether the Russian employee ever worked for [REDACTED]. Owner responded in writing that while that individual had worked as an "au pair nanny" for her family, she "was never an employee [REDACTED]". However, Owner stated just as unequivocally at the FFC that the Russian employee did come to the United States to work both as a nanny for Owner's children, *and as a cleaner* for about two months at [REDACTED].
 - b) Respondent also did not list the Russian employee on the list of individuals who worked at [REDACTED] in 2011 through 2013, even though Owner confirmed at the FFC that this person cleaned for the company for at least two months. Again, while it is possible that Respondent failed to include this employee because she was hired primarily as a nanny for Owner's children, or perhaps because the employee received no actual wages due to some unknown arrangement Owner made with her for serving as both a nanny and a cleaner, it is not essential that the Russian employee actually receive wages in order to be considered an employee of the cleaning company. This impacted Respondent's credibility.
 - c) It is also largely undisputed that Complainant's job duties were assigned to the Russian employee and Complainant's mother after Complainant's employment was terminated. While it may have been true that fewer hours were available after a number of clients allegedly cancelled their services just before Complainant's employment was terminated, there was clearly enough work for at least two employees even after that occurred. Therefore, a primary issue becomes whether Complainant was fired because she was allegedly the poorest performing cleaner, or because Respondent preferred the Russian employee because she was Russian.
 - d) Respondent conceded that Complainant was never presented with any written warnings or told that her job might be in jeopardy due to her perceived poor job performance. Respondent also conceded that at the time Complainant's employment was terminated, Owner lied to her about the fact that she was being terminated, and not just laid off for the season. Lastly, Respondent conceded that Owner had told Complainant that the company would hire her back in the Spring if she still needed work. Although Respondent claims that Complainant was misled about the fact that she was terminated for poor job performance because Owner did not want to "hurt Complainant's feelings", it is well settled that inconsistencies or contradictions in an employer's proffered reasons for terminating an employee may be proof of pretext. The fact that Respondent never claimed that Complainant had performance issues until *after* Complainant had filed for unemployment benefits, for which the company was potentially financially responsible, suggests that the poor performance allegations may have been fabricated to explain away Complainant's discharge.
 - e) Respondent has also offered little if any proof that the client cancellations that allegedly led to Complainant's termination were evidence of Complainant's poor job performance as a cleaner. One of the cancellations referred explicitly to a cleaning that occurred on 10/3/2012, a date when Complainant claims that she called out of work due to an exigent daycare situation. Respondent again claimed that scheduling records that would confirm or deny this assertion are unavailable. Another complaint referred to a cleaning that occurred within Complainant's first few days of employment, a day or so after Complainant's assigned trainer quit. A third complaint refers to a cleaning that occurred on or about 12/7/2012, which was Complainant's first time cleaning at that particular residence. However,

the complaint also specifically noted that "this is not the first email I've written about these issues," suggesting that the cancellation was due to ongoing problems with the quality of cleaning provided by Respondent, only the most recent of which was related to Complainant.

- f) Lastly, Respondent claims that the Russian employee's ability to speak Russian was considered to be beneficial solely in her role as a nanny, but not when she worked as a cleaner. The record suggests that Respondent preferred the Russian employee, perhaps because she could speak Russian to Owner's children. Keeping the Russian employee as a cleaner and discharging Complainant because of the Russian employee's national origin and language (which Respondent admits was irrelevant to the position of cleaner) is evidence of discrimination on the basis of national origin.
- g) Respondent's reason for Complainant's discharge is found to be pretext, and it is found that the real reason for her termination from employment was that Owner wished to keep the Russian employee employed.

11) Discrimination on the basis of race and/or national origin is found in this case.

VI. Recommendations

Based upon the information contained herein, the following recommendations are made to the MHRC:

1. There are **REASONABLE GROUNDS** to believe that Complainant [REDACTED] [REDACTED] was subjected to unlawful race and/or national origin discrimination (terminated) in employment by Respondent [REDACTED] [REDACTED] and;
2. That conciliation should be attempted in keeping with 5 M.R.S. § 4612.



Amy M. Speirson
Executive Director



Robert D. Beauchesne
MHRC Investigator