



# Maine Human Rights Commission

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August 24, 2015

## INVESTIGATOR'S REPORT MHRC No: E14-0252

██████████

v.

██████████

### I. Complainant's Complaint:

Complainant ██████████ ██████████ alleged that Respondent ██████████ discriminated against her based on her sex by subjecting her to a hostile work environment and terminated her employment in retaliation for reporting the harassment.<sup>2</sup>

### II. Respondent's Answer:

Respondent stated that it did not discriminate or retaliate against Complainant. Complainant's employment was terminated because she was unable to perform the job, she exhibited unacceptable behavior while on duty, and she had attendance issues.

### III. Jurisdictional Data:

- 1) Date of alleged discrimination: October 2013 through March 5, 2014.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): May 23, 2014.
- 3) Respondent has between 12 and 15 employees (paid and unpaid) and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964, as amended, as well as state and federal employment regulations.
- 4) Neither Complainant nor Respondent is represented by counsel.

<sup>1</sup> Complainant's complaint listed Respondent's name as ██████████ Respondent provided that its legal name is '██████████' ██████████ Because Complainant has not amended her complaint to use Respondent's legal name, the name used by Complainant has been retained.

<sup>2</sup> Complainant also alleged Maine Whistleblowers' Protection Act ("WPA") retaliation in her Complaint; however, at the Issues and Resolution Conference ("IRC") she clarified that she was alleging only MHRA retaliation, not WPA retaliation. This clarification is supported by the record, and therefore Complainant's retaliation claim is being analyzed solely under the MHRA.

- 5) Investigative methods used: A thorough review of the written materials provided by the parties, requests for information from the parties, a witness interview, and an IRC. This investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

#### **IV. Development of Facts:**

- 1) The parties in this case are as follows:
- a) Complainant worked for Respondent as a bartender from February 28, 2013 until March 5, 2014.
  - b) Respondent is a nonprofit veterans' service organization comprised of eligible veterans and military service members. Respondent runs a canteen (bar) on its premises.
- 2) Complainant provided the following in support of her position:
- a) Complainant is a woman.
  - b) Complainant believed she performed her job satisfactorily.
  - c) During her employment, Complainant did not receive any information on how to report complaints of sexual harassment, other protected class harassment, or retaliation in the workplace.
  - d) Complainant was not trained on the State's gaming laws relating to sealed tickets<sup>3</sup> as part of her employment. Respondent had no materials available related to the State's gaming laws.
  - e) Complainant's immediate supervisor was the head bartender ("Supervisor").<sup>4</sup> Supervisor's superior was the Bar Manager ("Manager").
  - f) Starting on Complainant's first day, Manager expected a hug. This happened at the beginning of every shift. Manager routinely stayed at the bar and drank, sometimes becoming drunk and loud, while Complainant worked. When Manager was drinking he was a patron, yet he critiqued Complainant's work performance.
    - i. Complainant reported the frequent hugging and unwelcome behavior to Supervisor. They spoke every few days, at least a couple of times a week.
    - ii. Manager had a reputation for being grabby with the female bartenders. His behavior was a running joke. Complainant believed that Manager even touched Supervisor at one point. Manager greeted many bartenders by hugging them.

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<sup>3</sup> A "sealed ticket game" is "a game consisting of tickets or cards with preprinted symbols, numbers, or other figures that are hidden by an opaque removable material. Each ticket or card represents a chance to win a specific single prize or specific single set of prizes. A winning ticket or card contains a predetermined winning configuration of symbols, numbers, or other figures." 16 Code of Maine Regulations ("C.M.R.") 222, Ch. 2, § 2.01(B-1).

<sup>4</sup> Supervisor worked for Respondent for the majority of Complainant's employment. Supervisor's employment was terminated on December 11, 2013. Thereafter there was a different head bartender ("Head Bartender").

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- iii. Patrons asked if there was anything Complainant could do about Manager. They wanted to have some quiet time together; not listen to Manager's whooping.
- g) In October 2013, Complainant was closing the bar and Manager was still present. Complainant went back into the office to work on closing paperwork. While she was in the office, Manager came in and shut the door. He sat down in a rolling chair and Complainant leaned against the desk. Manager pulled himself over between Complainant's legs. He told her what a good job she was doing. He gave her a hug and as he sat back down in the chair he dragged the back of his hands from the top of Complainant's shoulders, down the front of her body over her breasts and to her waist. Manager then waved at the camera in the office and laughingly said, "no sexual harassment here". Manager did not stop for about five or six minutes.
  - i. Complainant was intimidated, confused, and fearful since Manager was drunk. She knew she needed to get away. Manager's girlfriend was in the bar yelling for Manager to come out of the office. When Manager let Complainant out of the office, the bar was empty.
  - ii. Complainant reported the incident to Supervisor the next day. Supervisor told her if they did anything about the incident that Complainant would be fired. Complainant wanted to write a complaint, but Respondent did not have a process to do so. Supervisor never told Complainant she had to make a written report.
- h) Over the next two shifts, Complainant asked two patrons ("Patrons") to remain in the bar while she was closing. She felt unsafe around Manager and she had to fabricate a story to Manager to explain why Patrons were still there after closing when the bar was supposed to be empty.
- i) A week or two later, Complainant was closing and Manager was present and drunk. As she was ready to set the alarm, Manager grabbed her and attempted to kiss her. Complainant pushed him away. Complainant believed that Manager had to be present during closing since he had a key to the back door and she had a key code. She thought both were necessary to close the bar. Complainant did not think there were cameras at the backdoor. Complainant was scared for herself and her job.
  - i. Complainant reported the incident to Supervisor. Complainant believed Supervisor told Manager about the incident instead of reporting him.
- j) Her reports about Manager's behavior were brushed off. Manager's behavior towards her became worse. Supervisor told Complainant that if she went against Manager, there would be retaliation.
- k) In late January 2014, a patron called Complainant an "f\*cking b\*tch" during her shift. When Manager came out of the bathroom, Complainant asked if she could bar him from the canteen, per the Canteen Rules. Manager said no. About two days prior to this instance, a member was barred from the canteen for 90 days for the exact same behavior.
- l) One day after Complainant's request to bar the patron, a different member ("Member," the father of the patron who made the "f\*cking b\*tch" statement to Complainant) wrote a complaint about Complainant.
- m) When Manager was there Complainant felt like he ran the place and she had to ask his permission to remove people from the bar. Complainant did not feel like she could ask Manager to leave.
- n) On January 28, 2014, Manager told Complainant to go into the office when she arrived. Complainant

was given write-ups about her performance. She was told to sign them and she did. Complainant did not agree with the allegations in the write-ups<sup>5</sup>. This process upset Complainant because she had previously asked Manager not to "hit [her]" with these at the beginning of her shift, but he did anyway.

- i. Even though she was upset, Complainant started her shift. Different patrons asked what was wrong and Complainant was unable to speak. Manager talked about Complainant's write-ups with the patrons present, telling those present that the write-ups "were not his fault".
  - ii. Towards the end of the night, Manager was drunk. Complainant went to the office to do her closing paperwork. When she went back towards the bar, Manager blocked her entrance to the bar. He told her they needed to talk. Complainant kept her head down and did not talk to him. She heard him smash the bar. Female patrons screamed. Then she turned her head and saw Manager punch the bar and a wall. Complainant was scared and needed to defuse the situation. She turned to Manager and told him she knew it was not his fault. He forcefully pulled Complainant into a bear hug, cried into her neck, and would not let her go.
- o) During this time, Complainant mentioned she might get a lawyer.
  - p) A pattern emerged where Complainant would arrive for her shift, Manager would approach her about complaints, and then, by the end of the night, Manager would praise Complainant for her work. The next day Complainant would return and Manager would say that she did a horrible job.
  - q) Manager's inconsistent behavior caused ongoing conflict. Complainant asked regular patrons if there were complaints, they told her there were none. Manager's hostility was apparent to the regular patrons. The patrons gave Complainant high-fives at the end of her shifts telling her not to let Manager force her out of there, they saw what was happening. They told her not to let Manager get away with it and that she was doing a great job.
  - r) In late February or early March 2014 on a Friday, Complainant worked a shift for the new Head Bartender. While on shift, a vendor dropped off a delivery. Complainant did not usually have vendor deliveries on her shift. She looked for the vendor payment where it was supposed to be and it was not there. Complainant called Head Bartender and Manager for direction with no response. The regular patrons told her to use the petty cash money and money from the sealed tickets. Complainant did so, and then followed up with Manager about the cash use. Manger told Complaint it was fine and he would take care of it.
  - s) On March 5, 2014, Complainant was discharged. She was told her discharge was for her involvement in a verbal altercation with a fellow bartender. As part of her unemployment appeal, Respondent said the termination decision was, in part, for paying a vendor in cash from the gaming money.
  - t) Complainant was affected by the ongoing harassment. Manager was present during her shifts drinking, sometimes to intoxication. Complainant had a medical diagnosis and the stress from the job aggravated her medical condition.
  - u) From October 2013 through March 2014, Complainant's condition worsened. During her 40-minute

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<sup>5</sup> The write-ups were for going to the bathroom too frequently, putting money in the tip jar, and not washing her hands.

drive to work, her muscles cramped and her joints would inflame and become painful. She never knew what she was walking into at work. One night Complainant left her shift early when she felt heart attack symptoms. Complainant was run down from a lack of sleep. She tried not to cry while working.

v) Complainant felt she could not quit because she needed to support her family.

3) Respondent provided the following in response to Complainant's allegations:

- a) Respondent contracts with an outside provider to ensure that appropriate notices/posters are generated for the workplace. Respondent's discrimination and retaliation policies follow federal and state laws.
- b) Respondent has a sexual harassment policy that is provided annually to Respondent's officers and Manager.<sup>6</sup> See *Exhibit A*. Respondent does not have a specific policy on reporting sexual harassment. The policy stated "if you are a victim of sexual harassing behavior, there are several courses of action available to you; ... indicate to your supervisor that the behavior is unwelcome".
- c) The "Opening Procedures" for the bar included information about the daily sealed tickets. In addition to making out a new slip each day, the procedures stated that "if you need small bills for the cash register, you can make change from this box".<sup>7</sup> Petty cash was available and was rarely used.
- d) Manager and the Quartermaster made the hiring, firing, and disciplinary decisions. Quartermaster did not always have knowledge about the events involved in the disciplinary letters penned by him.
- e) When Manager was present and drinking he was a patron, not a manager. Manager supervised the head bartender. Bartenders were expected to treat Manager similarly to any other patron, cutting him off and asking him to leave if necessary.
- f) The bartender on shift should be the only individual in the bar during closing. Manager was not needed to lock the backdoor. Bartenders did not have keys; they used a key code to lock the bar when they left and could not reenter the building.
- g) Complainant was given several verbal warnings.
- h) On January 28, 2014, Complainant was given a written warning based on patron complaints. Two patrons wrote that Complainant went to the bathroom too much, wiped her nose and did not wash her hands, was sometimes confused about customers, was asleep, did not give back change – it was put in the tip jar, and sometimes charged the wrong price for drinks.<sup>8</sup>

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<sup>6</sup> At the IRC, Respondent indicated that the policy is provided to all workers.

<sup>7</sup> Investigator Note: At the IRC on June 26, 2015 and in a subsequent close of evidence letter, Respondent was asked to provide copies of any policies about the use of gaming money given to Complainant while she was employed and the date(s) the policies were provided. No such policy was provided.

<sup>8</sup> Investigator Note: Respondent provided with its Answer a third complaint dated around the same time as the other two complaints. Since these parties already participated in an unemployment benefits hearing, and Respondent provided only two patron complaints as part of its presentation to the unemployment hearing officer, it is unclear why Respondent did not provide the third complaint before now. The third complaint is similar to that of the complaining patrons. Further, Respondent's Answer indicated there were only two complaints from patrons.

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- i) In late February/early March 2014, Complainant paid a vendor out of the gaming money. It is a violation of gaming laws to use the sealed ticket money for any other purpose. Complainant did not first contact anyone to find out where the check was for the vendor. Complainant found the vendor check shortly after the vendor left the bar.
  - j) Complainant's employment was terminated for violating State gaming laws and for other performance issues. Quartermaster made the decision. Manager and Head Bartender told Complainant about the discharge. Quartermaster was concerned Complainant's behavioral concerns would continue.
    - i. Respondent never had a problem with an employee using gaming money before and has not discharged anyone else for this reason.
    - ii. Complainant would have been able to keep her job had she worked on some of the behaviors she was warned about on January 28, 2014. She needed to listen and change her behavior.
    - iii. *Investigator's Note:* At the IRC the Quartermaster noted that in the time he has volunteered for Respondent he has twice accidentally paid money out of the gaming money to vendors via check. The problem was noticed a few months later and money was put back in the account. Quartermaster remains in his position.
  - k) On March 19, 2014, Quartermaster characterized Complainant's discharge as based on Complainant's job performance following her January 28, 2014 write-up, her use of gaming funds to pay a vendor, and an incident with a coworker on the same day as the vendor delivery. Respondent's Answer lists Complainant's grounds for dismissal as "unable to perform the job, unacceptable behavior while on duty, not showing up for work without theft [*sic*] notifying the Post".
  - l) Respondent did not receive any complaints from Complainant or any employees about sexual harassment. Since there were no complaints, Respondent did not investigate. Respondent learned of Complainant's allegations of sexual harassment when it received Complainant's Complaint.
  - m) Respondent learned that Complainant reported issues with Manager to Supervisor after Supervisor was terminated. Supervisor told Respondent that she informed Complainant to put her complaint in writing. If there had been a report, Respondent would have looked at the appropriate videotapes to verify Complainant's allegations. The video was not available when Respondent learned of the complaint.
  - n) As part of Respondent's own investigation into Complainant's complaint, it learned that Patrons stayed late to ensure that Complainant would make it to her car safely. They were worried about her car starting and they walked Complainant to her car.
  - o) Quartermaster believed in Manager's strong character.
- 4) During the Investigator's interview with Supervisor, Supervisor provided:
- a) She was responsible for supervising the bartenders and Manager was her superior. Supervisor did not receive any training on sexual harassment in the four years she worked for Respondent.
    - i. There may have been posters behind the door about workers' compensation, but Supervisor did not read them.

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- ii. New employees were not trained on how to report sexual harassment complaints.
- b) Supervisor likely trained Complainant. Complainant was already skilled as a bartender and only needed to learn tasks specific to the bar like the register. All of the bartenders followed the same procedure for paying vendors.
  - i. The person who left checks was usually very good about leaving checks, but if a vendor's check was not there, then the bartender had to take money out of the ticket money to pay the vendor and get a receipt so that they could account for the money at the end of the night. There were several times that ticket money was used to pay vendors if there was no check. Manager or Quartermaster told her to do this.
- c) Supervisor saw Complainant when Complainant came in for her shift.
- d) No one was supposed to be in the bar during closing and the bartender had to close even if people were present. No one else was paid to be present at closing. Manager was sometimes there when Supervisor tried to close. He would hang out and give the bartender a hard time.
- e) Manager thought he was in a supervisory role when he was present in the bar, but the rules said he could do nothing once he had a beer. He overstepped his boundaries by going behind the bar, and changing rules. If Supervisor thought a patron had too much to drink and wanted to shut them off, Manager would tell her to serve the patron. If she would not, Manager would serve the patron. When prior bartenders complained to Supervisor about these kinds of problems they lost their jobs.
- f) Manager was intimidating and made bartenders miserable. If he knew he could intimidate a bartender, he would. He would hoot and holler all night long, having five to six drinks when she worked.
- g) Supervisor saw Manager touch the bartenders on their behinds. She thought it was no big deal. It was common for Manager to act this way.
- h) Manager hugged and kissed her before her shift.<sup>9</sup> Manager touched Supervisor on her behind.
- i) In November 2013, Manger touched a patron's behind. Supervisor told Manager to stop and he did for a while. Once, Supervisor told Manager to leave because of his behavior.
- j) At least three other bartenders, in addition to Complainant, reported to Supervisor that Manager touched them. Manager touched them on their breasts, the front of their bodies, their behinds, and he kissed and hugged them. Supervisor did nothing for fear they would lose their jobs. Bartenders told Supervisor they did not want to be alone with Manager, especially in the office.
- k) Supervisor did not know what to do with the information the bartenders reported, including Complainant's reports. Supervisor and Complainant talked about what would happen if a report was made. They could fill one out but Supervisor did not know what to do with it. Supervisor believed they would both be fired. They decided to do nothing. Supervisor talked Complainant out of filing a report. Supervisor thought she was doing the right thing by doing nothing.

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<sup>9</sup> Supervisor observed Manager hugging and kissing a bartender beginning her shift in June 2015.

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- l) In the Fall of 2013, Manager knew that someone planned to file sexual harassment charges against him. Manager asked Supervisor about possible sexual harassment charges, inquiring if Supervisor was the one who planned to file charges. Supervisor led him to believe she was the one who planned to file charges. Supervisor thought she was being protective of the bartenders.
- m) Complainant talked to people and told them what Manager was doing. Manager knew Complainant talked about what happened between them.
- n) Supervisor was not typically aware of the reason a bartender was discharged. She did not recall a bartender being discharged or disciplined for using gaming money to pay a vendor. Manager was in charge of disciplining bartenders. Manager would discipline bartenders in front of patrons at the bar.

**V. 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) Complainant alleged that Respondent discriminated against her based on her sex by subjecting her to a hostile work environment and retaliated against her for reporting the harassment when it terminated her employment. Respondent stated that did not discriminate or retaliate against Complainant, and that Complainant's employment was terminated because she was unable to perform the job, she exhibited unacceptable behavior while on duty, and she had attendance issues.

*Sex Discrimination – Harassment/Hostile Work Environment*

- 3) The MHRA provides, in part, as follows: "It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of . . . sex . . . discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S. § 4572(1)(A).
- 4) The Commission's Employment Regulations provide, in part, as follows:

Harassment on the basis of sex is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when: . . .

- c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Me. Hum. Rights Comm'n Reg., 94-348 Code of Maine Regulations ("C.M.R.") Ch. 3, § 3.06(I) (1) (July 17, 1999).

- 5) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile work environment claim exists, it is necessary to view

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“all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.* (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the workplace to become hostile or abusive. *Id.*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996). “The standard requires an objectively hostile or abusive environment - one that a reasonable person would find hostile or abusive--as well as the victim’s subjective perception that the environment is abusive.” *Nadeau*, 675 A.2d at 976.

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

(1) that she is a member of a protected class; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff’s employment and create an abusive work environment; (5) that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

*Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 22, 969 A.2d 897, 902-903.

7) The fact that the conduct complained of is unwelcome must be communicated directly or indirectly to the perpetrator of the conduct. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1<sup>st</sup> Cir. 1988). In some instances, Complainant may have the responsibility for telling the alleged harasser directly that his or her comments or conduct is unwelcome. In other instances, however, Complainant’s consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the conduct is unwelcome. *Id.* Where Complainant never verbally rejects a supervisor’s sexual advances, yet there is no contention or evidence that Complainant ever invited them, evidence that Complainant consistently demonstrated unalterable resistance to all sexual advances is enough to establish their unwelcomeness. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1990).

8) The Commission’s Employment Regulations provide the following standard for determining employer liability for sexual harassment committed by a supervisor:

An employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to physical or mental disability harassment. When the supervisor’s harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor’s harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

- (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Me. Hum. Rights Comm’n Reg. Ch. 3, § 3.06(I) (2) (July 17, 1999).

9) Complainant has established her claim of unlawful sexual harassment. She has shown that:

- a) She is a member of a protected class as a woman.
- b) She experienced unwelcome conduct related to sex. Manager touched her by kissing her, hugging her, and feeling her breasts and front side of her body.
- c) Complainant found Manager's behavior offensive and reported it to Supervisor, who did nothing helpful. Supervisor led Complainant to believe that if Complainant reported Manager's behavior, she would be discharged.
- d) The harassment was severe and pervasive, altered the conditions of Complainant's employment, and created an abusive work environment. Manager expected a hug at the beginning of each shift, tried to kiss Complainant, and touched Complainant's breasts. The behavior Complainant experienced was objectively offensive; a reasonable person would find Manager's behavior hostile and abusive.
- e) Complainant's ability to perform her job became more difficult after the October 2013 office incident with Manager. Her physical health was affected when her joints became inflamed and painful on the way into work and during work. Complainant began receiving write-ups after October 2013, and ultimately was discharged.
- f) Employer liability attached when Respondent discharged Complainant, because Complainant experienced a tangible employment action. It is worth noting that Respondent would not have been able to take advantage of the affirmative defense in any event, since it did not exercise reasonable care to prevent or correct the harassment: it did not distribute its policy; its policy does not provide a means of reporting harassment; and when Complainant did report harassment to Supervisor, she was counseled not to report it in order to keep her job.

10) It is found that Respondent subjected Complainant to unlawful sexual harassment.

*Sex Discrimination – Termination*

11) Respondent's termination of Complainant's employment also raises a distinct claim of sex discrimination.

12) Because here there is no direct evidence that Complainant was terminated based on her sex, 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).

13) 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 (1<sup>st</sup> Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1<sup>st</sup> Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261.

14) 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.

15) After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate

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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. 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. 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.

- 16) Complainant established a prima-facie claim for sex discrimination. She belonged to a protected class, she performed her job satisfactorily (in that Respondent kept her on with relatively minor concerns for over a year), and she was discharged. It is presumed for the purposes of the prima-facie case that Respondent had a continuing need for the work to be performed.
- 17) Respondent articulated a legitimate, nondiscriminatory reason for Complainant's discharge: she was unable to perform the job, exhibited unacceptable behavior while on duty, and had attendance issues.
- 18) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason was false or irrelevant and that unlawful discrimination was the reason for her discharge, with reasoning as follows:
  - a) Manager's behavior was knowing and deliberate. He looked at the office security camera and said "no sexual harassment here" after touching Complainant's breasts. Respondent acknowledged that Manager was one of the individuals who received the annual sexual harassment policy. Complainant reported Manager's behavior to Supervisor and talked with others about it even though there was no procedure for reporting sexual harassment. Complainant followed Respondent's enumerated sexual harassment policy despite not receiving it.
  - b) It is unreasonable to believe that routine hugging, kissing, and touching of breasts and behinds would be tolerated by a reasonable individual in the workplace. It defies logic that Manager would believe this conduct would not be offensive to bartenders.
  - c) Respondent relied on Complainant's declining job performance and use of gaming money for her discharge. This assertion lacks credibility. Quartermaster has paid vendors out of the gaming money and experienced no adverse job action himself; Supervisor also confirmed that she had paid vendors this way on multiple occasions. This argument also fails to take into account how Manager's behavior when he was present in the bar negatively impacted Complainant's ability to do her job.
  - d) Respondent argued that Manager was not in a supervisory capacity once he had a drink at the bar and that he was just a patron. Manager was, however, responsible for disciplining bartenders, not the head bartender. Manager's behavior of providing write-ups, warnings, and critiques of bartenders during their shifts tends to show that he blurred the lines on his supervisory capacity after imbibing. In addition, Manager interfered with bartenders' ability to perform their jobs when he when prevented bartenders from enforcing Canteen Rules.
  - e) Respondent argued that since it received no reports in writing, it was unaware of the sexual harassment and could not investigate. This illogical, as the evidence shows that Manager was aware of the possibility of a sexual harassment charge, given his comment into the security camera. At least one bar

employee, Supervisor, told Manager to stop his behavior. The bartenders reported Manager's ongoing behavior to Supervisor.

- f) Respondent's failure to implement a policy for reporting sexual harassment in the workplace does not obviate its liability when sexual harassment occurs.

19) Discrimination in the terms and conditions of Complainant's employment on the basis of sex is found.

MHRA Retaliation

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

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

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

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

Me. Hum. Rights Comm'n Reg. Ch. 3, § 3.12 (July 17, 1999).

23) In order to establish a prima-facie case of 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). One method of proving the causal link is if the adverse action happens in "close proximity" to the protected conduct. *Burlington Northern*, 126 S. Ct. 2405.

24) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> Cir. 1995). Respondent must then produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry her overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.* Complainant must show that she would not have suffered the adverse action but for her protected activity, although the protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).

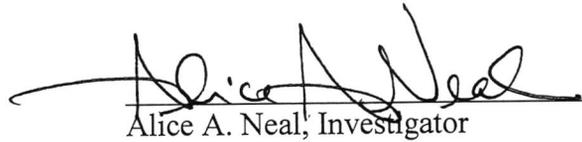
- 25) Complainant has established her prima-facie case of MHRA retaliation. She has shown that she reported Manager's unwelcome behavior to Supervisor, she was discharged, and her discharge occurred within a few months of her ongoing complaints to Supervisor.
- 26) Respondent has articulated a legitimate, nondiscriminatory reason for Complainant's discharge: she was unable to perform the job, exhibited unacceptable behavior while on duty, and had attendance issues.
- 27) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason was false or irrelevant and that unlawful discrimination was the reason for her discharge, with reasoning as follows:
- a) Manager knew that potential sexual harassment charges may be filed. Manager was aware that Complainant may have told other people, including Supervisor and patrons, about that behavior. It was only after Manager engaged in the inappropriate behavior with Complainant that she was written up.
  - b) Manager's own inconsistent behavior in rebuking Complainant at the beginning of her shift and then lauding her with praise by the end of her shift does not show that her job performance was poor.
  - c) Two patrons complained, however, one of those complaints may have been retaliatory based on Complainant's desire to ban that patron's son from the bar because he violated Canteen Rules. The second patron complaint appears to hinge on a personality conflict. Respondent even acknowledged that if Complainant worked more on the issues raised in late January 2014 that she may not have been discharged in March 2014. It is unclear what guidance Respondent gave Complainant to improve her behavior or know if she met Respondent's standards following the January 28, 2014 write-up.
  - d) In late February/early March 2014 on a Friday, Complainant took a delivery and made a payment out of the gaming money when she could not find the vendor's check for payment. Purportedly that same shift she had a verbal disagreement with a coworker. Several shifts went by and then the next week Respondent discharged her. At the time, Complainant was told she was discharged based on the verbal altercation with her coworker. The grounds for Complainant's dismissal provided as part of the unemployment proceeding were different than those originally provided to Complainant, and different than those provided to the Commission in this matter. These inconsistent statements tend to indicate that Respondent's actions are pretextual or irrelevant and ultimately that their actions were retaliatory.
  - e) Respondent relied on Complainant's violation of gaming laws when it paid the vendor as a reason for termination. Despite requests for the policy regarding the use of gaming money, Respondent never produced any policy outlining the uses of the gaming funds or disciplinary action if the gaming funds were used. In addition, Quartermaster engaged in the same behavior and maintained his position. This inconsistent application of Respondent's purported policy could be evidence of pretext for the termination decision.
  - f) The record tends to show that while there may have been some concerns regarding Complainant's performance, Complainant did not start to receive write-ups or negative feedback on her job until after she reported Manager's behavior to Supervisor. The reports to Supervisor began less than six months before Complainant's discharge. This short time period lends itself to correlating Complainant's protected activity to her discharge.
- 28) Retaliation in violation of the MHRA 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 Respondent [REDACTED] subjected Complainant [REDACTED] [REDACTED] to a hostile work environment on the basis of sex in violation of the MHRA;
- 2) There are **Reasonable Grounds** to believe that Respondent [REDACTED] unlawfully discriminated against Complainant [REDACTED] [REDACTED] when it terminated her employment on the basis of sex in violation of the MHRA;
- 3) There are **Reasonable Grounds** to believe that Respondent [REDACTED] retaliated against Complainant [REDACTED] [REDACTED] in violation of the MHRA because she engaged in protected activity; and
- 4) Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).

  
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Amy M. Sheirson, Executive Director

  
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Alice A. Neal, Investigator

## SEXUAL HARASSMENT AND THE VA

The Department of Veterans Affairs Sexual Harassment policy is meant to allow people to work in an environment where there is mutual respect and consideration. While the organization can provide definite policies and procedures, individuals must recognize when their joking, teasing, etc., is making others uncomfortable. We must be sensitive to our own behavior and how such behavior is received by others. Prevention is the best policy for the elimination of sexual harassment. Steps must be taken for the elimination of sexual harassment. Steps must be taken to prevent sexual harassment from occurring, such as providing this type of training, affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights under the law and Title VII, and developing strategies with supervisors and all employees in the elimination of sexual harassment in the work place.

### WHAT IS SEXUAL HARASSMENT?

Sexual harassment is defined by the Equal Employment Opportunity Commission (EEOC) as: Any unwelcome sexual advance, request for sexual favors, and other verbal or physical conduct of a sexual nature, when one of the following conditions is met:

Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

Submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting that individual, or

Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment is an expression of power and usually has little to do with sexual attraction.

## SEXUAL HARASSMENT AND VA VOLUNTEERS

The EEOC guidelines give us a definition of sexual harassment in terms of the effect of certain types of conduct upon the individual. We now need to take a look at the specific types of behavior that can be listed under the category of sexual conduct. This is of critical importance in view of the EEOC's definition of sexual harassment as unwelcome conduct of a sexual nature.

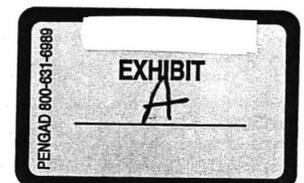
Sexual harassment is usually expressed in one of two ways: offensive conduct or sexual demands. The following represent the three basic forms of offensive conduct and examples:

### Physical:

- Touching
- Patting
- Pinching
- Grabbing
- Hugging

### Verbal:

- Pressure for date
- Propositions
- Sexual jokes
- Obscene language which is gender specific or sexual in nature
- Tell lies or spreading rumors about a person's sex life
- Sexual remarks



### Visual:

- Display of pictures, drawings, and cartoons which are offensive in a sexual context
- Written jokes, verse, etc., which may be offensive in a sexual context
- Staring, ogling, leering
- Sexual gestures

Day-to-day interaction between the sexes where differing perceptions of what is right or wrong, and appropriate or inappropriate, may lead to problems or misunderstandings. Different perceptions and ideas are likely to be determined by factors such as sex roles, background and general beliefs and values.

### IF YOU ARE BEING SEXUALLY HARASSED ...

#### **Tell the Harasser to Stop**

Let the harasser know that his/her conduct is unacceptable. Tell the harasser in as clear, direct and explicit way as possible when addressing unwelcome behavior.

#### **Keep a Journal**

Start keeping records or notes of specific information regarding incident(s) of sexual harassment, such as times, dates, comments, your responses and witnesses.

#### **Tell Someone**

Discuss your experience with a co-worker, EEO counselor, supervisor, or other officials. You may find that you're not the only one that has been sexually harassed; many harassers are repeaters.

#### **Utilize VA Medical Center Resources**

Togus has policies and procedures for dealing with sexual harassment. A

Bedford ORM EEO Counselor, the Federal Women's Program Manager, a Supervisor, a Manager or the EEO Program Manager are sources available to encourage and support a person who suffers from any degree of sexual harassment.

### WHAT CAN YOU DO TO PREVENT SEXUAL HARASSMENT?

#### **Affected Employees**

If you are a victim of sexually harassing behavior, there are several courses of action available to you:

- Indicate to the harasser that the behavior is unwelcome
- Ask co-workers if they observed the behavior or are aware of similar behavior
- Indicate to your supervisor that the behavior is unwelcome
- Keep a record of any instances of harassment and follow-up actions
- Talk to your EEO Officer, EEO Program Manager, the Federal Women's Program Coordinator or EEO Counselor about the behavior and avenues available to you.

#### **Co-Workers**

If you witness questionable behavior:

- Ask the affected employee if it is a problem and mention similar behavior you may have observed
- Mention the situation or incident to your supervisor
- Talk to the harasser about any behavior that bothers you personally

The rule of thumb is .....when in doubt, don't!