



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT E13-0027

██████████ (Corinth)

v.

██████████ (Bangor)

### **I. Complainant's Complaint:**

Complainant ██████████ alleged that Respondent ██████████ ("Day Care") reduced her hours, denied her holiday pay, and terminated her employment after she complained about abusive behavior at Day Care.

### **II. Respondent's Answer:**

Day Care stated that Ms. ██████████ hours were reduced because she asked to leave early on Fridays and it was easier for Day Care – which granted the request – to give those hours and some additional hours to a new employee who was just starting at Day Care. In addition, Ms. ██████████ employment was terminated after she continued to make disparaging remarks about Day Care and its owner ("Owner") to parents and others after Owner had asked her to stop.

### **III. Jurisdictional Data:**

- 1) Date of alleged discrimination: December 6, 2012.
- 2) Date complaint filed with the Maine Human Rights Commission: January 28, 2013.
- 3) Respondent has seven employees. Respondent is subject to the Maine Human Rights Act ("MHRA") and the Maine Whistleblowers Protection Act ("WPA"), as well as state employment regulations.
- 4) Neither Complainant nor Respondent is represented by counsel.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution Conference ("IRC"). This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

**IV. Development of Facts:**

1) The parties in this case are as follows:

- a) Ms. [REDACTED] was employed by Day Care as a Lead Teacher from June 5, 2001 to November 11, 2004, and again from November 30, 2005 until her employment was terminated on December 6, 2012.
- b) Day Care provides child care services.
- c) Important third parties: "Owner" is the owner of Day Care. "Teacher" is the other teacher who worked in Ms. [REDACTED] room, and is Ms. [REDACTED] daughter.

2) Complainant provides the following in support of her position:

- a) Around October 2012, a parent made a formal complaint to the Department of Health and Human Services ("DHHS") against Day Care. During the DHHS investigation, Ms. [REDACTED] told the DHHS investigator about unsafe and illegal activity at Day Care that Owner had been notified of but never addressed.
  - i. During the IRC, Ms. [REDACTED] stated that the DHHS investigator asked her about the staffing ratios (whether Day Care was understaffed), and if she witnessed any abuse. Ms. [REDACTED] provided the DHHS investigator with the letter that she wrote to Owner on October 10, 2012.
- b) Ms. [REDACTED] believed that the information she provided for the DHHS report was confidential, but after the DHHS report came out, Owner accused Ms. [REDACTED] of providing certain information that appeared in the report.
- c) On October 9, 2012, Ms. [REDACTED] received an evaluation which stated that Ms. [REDACTED] got along well with parents.
- d) On October 10, 2012, Ms. [REDACTED] was pushed from behind by Owner and asked to leave after Ms. [REDACTED] asked Owner not to pull a child by the jacket. That day, she wrote Owner a letter about how she had been treated, and stating that staff was afraid to raise concerns about Owner's "tone of voice with children and [Owner] pulling [their] hair, pulling them around by shirt or jacket."
- e) On October 26, 2012, Ms. [REDACTED] asked to leave at 2:30 p.m. so that she could be at her second job by 3:00 p.m. on Fridays.
- f) On November 20, 2012, Owner reduced Ms. [REDACTED] hours from 40 hours a week to 26 hours a week. Owner told Ms. [REDACTED] that her hours were reduced to give the new hire more hours.
  - i. Owner stated that she did not have to pay the new hire as much as Ms. [REDACTED] and Ms. [REDACTED] had a second job and did not need the hours as much.
  - ii. Ms. [REDACTED] did not ask for her schedule to be changed so that she could spend time at home with her children, which is one of the excuses Owner gave. Ms. [REDACTED] did not believe that the new hire received all of the hours Owner removed from her schedule.

- g) Ms. [REDACTED] was not given holiday pay for November 23, 2012, because she was considered a part-time employee after her hours were reduced. The only employee who received holiday pay for that day was Owner's daughter.
  - h) On December 6, 2012, Ms. [REDACTED] witnessed Owner yelling at a child to sit down. When the child did not listen, Owner pushed the child into the wall face first with an open hand and said "[N]ow you will sit down." When Ms. [REDACTED] was in the kitchen with the child later, the child kept repeating "[Owner] pushed me."
  - i) Owner told Ms. [REDACTED] that she did not push the child, but that child had bumped into her. Owner then terminated Ms. [REDACTED] employment, but Ms. [REDACTED] was allowed to finish working the rest of the day.
- 3) Respondent provides the following in response to Complainant's allegations:
- a) Ms. [REDACTED] never said anything to Owner about unsafe conditions at Day Care.
  - b) Owner began working at Day Care in 1998, and purchased Day Care in 2006.
  - c) Ms. [REDACTED] was the first employee whose employment Owner has had to terminate. Ms. [REDACTED] was terminated due to her attitude with Owner, other staff, and parents.
  - d) DHHS investigated Day Care in October 2012, after a parent made a complaint about Ms. [REDACTED] room.<sup>1</sup> Ms. [REDACTED] told Owner that she was concerned that the investigation was going to ruin Teacher's life and her career as a nurse. Owner tried to reassure Ms. [REDACTED] that they were both doing great and there was nothing for her to worry about, but Ms. [REDACTED] would not listen.
  - e) Ms. [REDACTED] became agitated and upset. She told Owner that she was going to say things about someone else to put the focus on that person. No matter what Owner did, Ms. [REDACTED] tried to cause trouble and would speak rudely to other staff and Owner.
  - f) Owner spoke with Ms. [REDACTED] about her behavior, but Ms. [REDACTED] continued to behave in that manner.
  - g) Ms. [REDACTED] never expressed any concerns prior to the DHHS investigation. Owner considered Ms. [REDACTED] a friend.
  - h) Ms. [REDACTED] asked to leave at 1:00 p.m. on Fridays so that she could have more time at home. Owner agreed to the request, but had to hire someone to cover those hours. Owner had to give the new hire enough hours to make it worth her while, so she ended up giving Ms. [REDACTED] Fridays off.
    - i) During the IRC, Owner stated that she did not always give the new hire the hours that she removed from Ms. [REDACTED] schedule.

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<sup>1</sup> Owner believed the complaint was made by a parent of a child who attended Day Care because the parents were fighting over control of the child and one of them wanted to move the child. There was never an issue about Owner or Teacher in the room in terms of care for the children at Day Care.

- i) Parents of children at Day Care had come to Owner with concerns about Ms. [REDACTED] negative attitude.
  - j) A week prior to the termination of Ms. [REDACTED] employment, Owner was covering Ms. [REDACTED] room so that Ms. [REDACTED] could take a break. Owner took the children down the hall to go to the bathroom before going outside to play. When they were coming back, one child ran for the door to go outside, and Owner asked him to come back so that he could get his coat before going out. Ms. [REDACTED] came into the room and told Owner aggressively that the children might listen to her if she spoke nicely to them. Ms. [REDACTED] was very rude and disrespectful.<sup>2</sup>
  - k) Owner asked Ms. [REDACTED] to leave Day Care, telling her she needed a break. Ms. [REDACTED] refused to leave. Owner placed her hands on Ms. [REDACTED] back and escorted her to the door. Owner told Ms. [REDACTED] that she was not going back into that room again, and that if she insisted on staying at Day Care she was going to work in another room. The whole time Owner escorted Ms. [REDACTED] to the door, Ms. [REDACTED] was yelling that Owner was pushing her, which was not true.
    - i. Ms. [REDACTED] worked in another room for the rest of that day and returned to her room the following week.
  - l) On Ms. [REDACTED] final day of employment, she was in the bathroom area with five of the children, who were washing their hands for lunch. Ms. [REDACTED] yelled to Owner that the sink in one of the bathrooms was plugged. Owner got the plunger out of the other bathroom, and went to the bathroom where Ms. [REDACTED] and one of her children were. The other children were sitting on the floor waiting their turn. The hallway is narrow. Owner had the plunger in her left hand and held her right hand out so that if one of the children jumped up, they could not grab the plunger.
  - m) One child jumped up and ran into Owner's hand. The child tripped over another child's feet and bumped the back of her head on the wall. Ms. [REDACTED] began accusing Owner of pushing the child who had fallen. Owner told Ms. [REDACTED] that this was not what happened, but Ms. [REDACTED] kept saying that Owner had pushed the child.
  - n) Owner asked Ms. [REDACTED] to stop saying things that were untrue, but Ms. [REDACTED] continued accusing her of pushing the child. Owner told Ms. [REDACTED] that it was her last day, and that she was done working at Day Care. Ms. [REDACTED] kept prompting the child who had fallen to say that Owner pushed her.
  - o) The child was taken from Day Care, and Ms. [REDACTED] tried to talk other parents into pulling their children from Day Care.
  - p) Owner believed that Ms. [REDACTED] was under a lot of stress because of the DHHS investigation, working two jobs, and missing her children.
- 4) At least one other employee did not receive holiday pay for November 23, 2012.

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<sup>2</sup> This Investigator believes this may be a reference to the event Ms. [REDACTED] described as occurring in early October 2012.

5) The Staff Orientation and Employee Policies state:

- “If disciplinary measures need to be taken involving staff, they will receive two verbal warnings and then a written notice before they are dismissed.”
- “In an extreme case of disciplinary action where abuse is involved, staff will not be given verbal or written warnings.”

6) Owner filed a police report on January 22, 2013, which states that Owner was concerned because Ms. [REDACTED] her former employee, was making statements about Owner on her Facebook page and to DHHS after her employment was terminated. The statements on the Facebook page referenced Owner abusing the children at Day Care and running a corrupt establishment. Owner expressed concern to the police that Ms. [REDACTED] would make false statements and get her in trouble.

a) Owner had made a police report two months earlier, but the officer who took the January 22, 2013, report could not locate the prior report.

7) The DHHS report stated that the investigation did not substantiate that there had been abuse or neglect of any of the children attending Day Care. DHHS did find multiple other violations, including that Owner “does not demonstrate an understanding of the rights of children when she blatantly handles children roughly and utilizes isolation for misbehavior. [Owner] has continued to do so even after concerns were brought to her attention by others.”

**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 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, based on protected-class status, to terminate an individual’s employment or to “discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . .” because of previous actions that are protected under the WPA. *See* 5 M.R.S. § 4572(1)(A).

3) The WPA protects an employee who “acting in good faith . . . reports orally or in writing to the employer . . . what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States.” 26 M.R.S. § 833(1)(A).

4) 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). “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”).

- 5) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991).
- 6) 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.
- 7) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA-protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> Cir. 1995). Respondent must then “produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action.” *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry her overall burden of proving that “there was, in fact, a causal connection between the protected activity and the adverse action.” *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 Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).
- 8) Complainant has met her prima-facie case here, establishing that she complained about unsafe conditions in the work place (protected activity) in October 2012, and thereafter her hours were reduced, her holiday pay was denied in November 2012, and her employment was terminated in December 2012 (materially adverse action). The timing of events supports an inference of retaliation.
- 9) Respondent has stated a non-discriminatory reason for each of these actions. Respondent states that Complainant's hours were reduced because she asked to leave early on Fridays and it was easier for Owner to give her Fridays off and give additional hours to the employee she hired to cover those hours. Complainant was not working full time at the time of the holiday in November, and was not the only employee who did not receive holiday pay. Finally, Complainant's employment was terminated because she continued to make disparaging remarks about Owner and Day Care to parents and others after Owner had asked her to stop.

10) Terms and conditions of employment:

The facts do not support Complainant's retaliation claim regarding the terms and conditions of her employment (reduction of hours, holiday pay) because there is no causal connection between her protected activity and the alleged adverse actions. Reasoning is as follows:

- a) Owner stated that she reduced Complainant's hours because Ms. [REDACTED] had made a previous request to leave early on Fridays and Owner needed someone to fill those hours so that she could grant Complainant's request. Owner felt that it was harder to have someone fill in for part of the day, as opposed to the full day. This is reasonable, and explains the initial decision to decrease Complainant's hours.

- b) Then Owner further reduced Complainant's hours; Complainant credibly stated that she did not ask for her hours to be further reduced. Some of Owner's explanations for this are questionable: Owner stated that she reduced Complainant's hours because Complainant told her that she missed spending time with her children and because of stresses at home, which Complainant denied; Owner also admitted that she did not always give the hours she took from Complainant to the new employee.
- c) In the end, the facts show that there was growing tension between Owner and Ms. [REDACTED] over time. Owner credibly stated that she had a good relationship with Ms. [REDACTED] until around the time of the DHHS investigation, when Complainant began to appear more agitated. It appears that Owner reduced Ms. [REDACTED] hours based in part on this increased agitation she saw from Complainant, as well as Complainant's request for fewer hours, and not solely or primarily because of Complainant's protected activity.
- d) With regard to the holiday pay claim, another employee also did not receive holiday pay for this day. The facts show that Complainant was not treated less favorably than others who did not "blow the whistle." There are no facts to show that this employee made any type of complaint about unsafe conditions which undermines Complainant's argument that she did not receive holiday pay due to her protected activity.

11) Termination:

The facts do support the existence of a causal connection between Complainant's protected activity and her termination. Reasoning is as follows:

Complainant was terminated less than two months after writing Owner a letter expressing displeasure regarding how Owner was treating staff and her tone and behavior in dealing with the children. There is no evidence that Owner took Complainant's concerns seriously, or took any steps to improve the situation. Owner even claimed that Complainant never raised any concerns with her prior to the DHHS investigation; the report contained in Complainant's letter of October 10, 2012 shows otherwise.

- 12) Owner appears to have a policy related to progressive discipline, but did not use it in terminating Complainant's employment. Owner stated that she terminated Complainant's employment because of continued dissension with Complainant after the DHHS investigation, complaints from parents about Complainant, and disparaging remarks Complainant was making about Owner and Day Care. None of these issues involve abuse, which is the only exception to the progressive discipline steps provided by Respondent's policy. In addition, Respondent provided no documentation of the alleged complaints from parents.
  - a) DHHS's findings that Owner "blatantly handles children roughly and utilizes isolation for misbehavior" and that Owner "continued to do so even after concerns were brought to her attention by others" lend credibility to Complainant's reports about Owner, including her final complaint that Owner pushed a child.
  - b) The timing of events indicates that Owner terminated Complainant in response to her latest complaint about Owner pushing a child who fell. This was after Complainant had already complained to Owner about her behavior and how Owner was treating children on several different occasions.

- c) Based on these facts, Complainant has at least an even chance of prevailing in court regarding her retaliation claim.

14) Retaliation in violation of the WPA is found regarding Complainant's termination.

**VI. Recommendation:**

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

1. There are **No Reasonable Grounds** to believe that Respondent [REDACTED] discriminated against Complainant [REDACTED] in the terms and conditions of her employment in violation of the Maine Human Rights Act and Maine Whistleblowers' Protection Act because she engaged in protected activity;
2. Those portions of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2);
3. There are **Reasonable Grounds** to believe that Respondent [REDACTED] terminated Complainant [REDACTED] employment in violation of the Maine Human Rights Act and Maine Whistleblowers' Protection Act because she engaged in protected activity; and
4. Conciliation on that claim should be attempted in accordance with 5 M.R.S. § 4612.

  
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