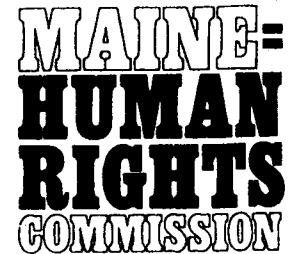


May 27, 2009

Nicolette McGinley (Norway)

v.

Home Depot U.S.A., Inc. (Atlanta, Georgia)



51 STATE HOUSE STATION  
AUGUSTA, ME 04333-0051  
www.maine.gov/mhrc

*Executive Director*  
**PATRICIA E. RYAN**

*Commission Counsel*  
**JOHN P. GAUSE**

**I. COMPLAINANT'S CHARGE:**

Complainant, Nicolette McGinley alleged that she was treated differently and in a hostile manner due to her sexual orientation and that she was fired in retaliation for complaining about same-sex sexual harassment by a female co-worker. She alleges that the disparity in the terms and conditions of her employment was directly related to her sexual orientation.

**II. RESPONDENT'S ANSWER:**

Respondent, Home Depot U.S.A., Inc. ( hereinafter, "Company" ), denied that Complainant was subjected to discrimination of any kind by Company, but, rather that she resigned during Company's investigation into an anonymous complaint that she violated Company policy.

**III. JURISDICTIONAL DATA:**

- 1) Date of alleged discrimination: July 17, 2007.
- 2) Date complaint filed with the Maine Human Rights Commission: January 17, 2008.
- 3) Company employs more than 297,000 people and is subject to the Maine Human Rights Act as well as state and federal employment regulations.
- 4) Complainant is represented by David Webbert, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and a fact finding conference.

**IV. DEVELOPMENT OF FACTS:**

- 1) The parties and issues in this case are as follows:

The Complainant, Nicolette McGinley, was hired by Company on or about November 27, 2000 and worked for company until July 17, 2007. Ms. McGinley identifies as lesbian.

- a) Respondent, Company, is a home improvement retailer.
- b) Expeditor, KA; South Portland Store Manager, TH; Former Biddeford Store Human Resources Manager, RH; Special Services Associate, BK; District Human Resources

Manager, FC; Assistant Store Manager, South Portland, GM; Key Carrier 1, South Portland Store, J M; Female Department Head, TR; Key Carrier 2, South Portland Store, MF; Female Manager, KN; Female Store Manager, DM; Cross Merchandiser, TN; Contractor, BT;

- c) Complainant, Nicolette McGinley alleged that she was treated differently and in a hostile manner due to her sexual orientation and that she was fired in retaliation for complaining about sexual harassment by a female co-worker. She alleges that the disparity in the terms and conditions of her employment was directly related to her sexual orientation.
  - d) Respondent denied that Complainant was subjected to discrimination of any kind by Company, but, rather that she resigned during Company's investigation into an anonymous complaint that she violated Company policy.
- 2) Ms. McGinley offers the following background information:
- a) "I was employed by Company from November 2000 until July 17, 2007. In approximately May, 2001, I received a cash prize because I was Sales Associate of the Month. In about March, 2002, I was promoted to Department Supervisor. In October, 2002, I was recognized as the Department Head of the Month for the month of September, 2002. In October, 2003, I was promoted to the Key Carrier position, in which you serve as a substitute Assistant Store Manager if the Assistant Store Manager is not available and which is often a transition position to becoming an Assistant Store Manager."
  - b) "In November, 2003, I was promoted to the Assistant Store Manager position by then Female Store Manager. She resigned her position soon after my promotion. In about 2005, South Portland Store Manager became the Store Manager and I continued to report to him until the end of my employment with Company."
  - c) "Because I did not conceal my sexual orientation, it was generally known by the other employees of the store that I was lesbian."
- 3) The issues surrounding Ms. McGinley's sexual orientation seemed to surface, from her view, when she reported to South Portland Store Manager:
- a) "During my first annual performance review by South Portland Store Manager, I received an overall rating of 'performer.' He told me that if he could evaluate me based on my most recent six months' performance, that he would give me a better evaluation, with the higher overall rating of 'achiever.' I then worked extra hard and had a great year during which I hit my metrics better than any other Assistant Store Manager. Based on my objective results, I expected that during my second annual performance evaluation, I would receive an overall rating of 'achiever.' Instead, South Portland Store Manager once again told me that if he could evaluate me based on my most recent six months' performance, that he would give me an overall rating of 'achiever' but he instead gave me the same overall rating as the year before, 'performer.' As a result, I was greatly demoralized, and suspected that he was evaluating me unfavorably because of his dislike for my sexual orientation."
  - b) "In approximately July, 2005, I disclosed to South Portland Store Manager that I was having a romantic relationship with a female associate at the store. South Portland Store Manager's

immediate reaction was to tell me that I needed to leave the store. I then explained that other male managers at the store had romantic relationships with female associates, and they were not required to give up their employment. I was also aware that Female Department Head openly dated a male associate in the same department. The male associate was eventually transferred to a related department but continued to report to Female Department Head for his daily assignments. No disciplinary action was taken against either of these heterosexual employees for their consensual romantic relationship. South Portland Store Manager eventually backed down from his demand that I leave, but it was my strong impression that he wanted me to resign or leave my employment because he had a negative attitude toward my sexual orientation.”

- c) “In about 2006, I recommended to South Portland Store Manager that he re-hire Former Department Head, who had voluntarily resigned on good terms and was now seeking re-employment with the Company. Former Department Head was well known by employees at my store to be lesbian. I reminded him that she had been an above-average performer as a Department Head. He said that he did not re-hire Department Heads who had quit the Company. I reminded him that a month or two earlier, he had re-hired a former male Department Head who resigned on bad terms with the Company and who had a record as a poor performer with a poor attitude. He said that had nothing to do with his decision not to re-hire Former Department Head.”
  - d) “In 2007, Special Services Associate developed a romantic attraction to me that was unwelcome and that I attempted to politely discourage. Despite my repeated statements to Special Services Associate that I was not interested in having a romantic relationship, she continued to aggressively pursue a romantic relationship with me. For example, she began sending me text messages more than 20 times per day, so that I had to turn off the text-messaging function on my personal cell phone. She appeared at my home unannounced and tried to force herself on me. I reported this sexual harassment to the only other female Assistant Store Manager, but I did not report it to South Portland Store Manager because he was on vacation initially when the harassment first became intolerable, because he had previously exhibited a negative attitude toward my sexual orientation and because I knew that he liked the associate who was harassing me.”
  - e) “Soon after my report of unwelcome sexual advances by Special Services Associate, I was retaliated against. Rumors were circulated and anonymous complaints were made that I was having a sexual relationship with the harasser and that I had engaged in improper financial transactions with female customers.”
  - f) “I was aggressively investigated and humiliated in front of my co-workers. In the course of the investigation, I again reported the sexual harassment by Special Services Associate. Again, management ignored my complaints. My employment was unfairly terminated on July 17, 2007 in retaliation for my complaints about same-sex sexual harassment and out of hostility toward my sexual orientation.”
- 4) Former Biddeford Store Human Resources Manager interviewed Ms. McGinley on or about July 9, 2007:

- a) "On about July 9, 2007, I was interviewed by Former Biddeford Human Resources Manager, who explained that he was investigating three alleged complaints against me. I now believe that all three complaints were instigated by Special Services Associate and three of her close friends who also worked at the store. Former Biddeford Store human Resources Manager told me that there had been an anonymous complaint that I was having a romantic relationship with a female co-worker, and that it was having an adverse effect on the team of employees. I told him that I assumed that he was referring to Special Services Associate because there were false rumors circulating at the store about us having a romantic relationship. I then reported to him that in truth there was no consensual romantic relationship at all and that Special Services Associate had been sexually harassing me, despite my requests that she stop pursuing a romantic relationship with me. For example, I explained to Former Biddeford Human Resources Manager that I had repeatedly told Special Services Associate that I was not interested in a romantic relationship with her and that I had to turn off the text messaging on my personal cell phone after she began sending me more than 20 text messages per day."
  - b) "During my interview by Former Biddeford Store Human Resources Manager, he raised two other allegations which involved my interactions with female customers. I believe that I handled both those transactions properly and that complaints were made as part of retaliation against me by Special Services Associate for rejecting her unwelcome sexual advances. Former Biddeford Human Resources Manager asked me during his interview if I had been 'with the purchaser' in one of the transactions in question, and I explained that I had no romantic relationship whatsoever with that female customer."
- 5) Special Services Associate allegedly appeared at Ms. McGinley's home, ostensibly to inquire about the upcoming investigation:
- a) During the week of July, 2007, Special Services Associate contacted me because she said that she was about to be interviewed as part of an investigation into our relationship and wanted to discuss with me what she should say. I repeatedly told her that we were not supposed to discuss the investigation. She then unexpectedly showed up at my home and once again asked me for advice about what to say in response to the investigation. I told her to tell everybody the truth and to get off my property immediately."
- 6) District Human Resources Manager allegedly 'grilled' Ms. McGinley about her relationship with co-worker, Special Services Associate:
- a) "On about Thursday, July 12, 2007, I was grilled about my relationship with co-worker, Special Services Associate, by District Human Resources Manager, during a meeting with South Portland Store Manager, who had returned from his vacation. She assumed that I was guilty of having a secret, consensual romantic relationship with Special Services Associate because I had not disclosed the prior consensual romantic relationship I had with a female co-worker. It was then that I realized that South Portland Store Manager had never disclosed that I told him about my earlier consensual romantic relationship with a female co-worker. Even during this meeting, South Portland Store Manager remained silent even though he knew that I had disclosed to him that prior consensual romantic relationship about two years earlier. District Human Resources Manager told me that I had violated my duty to disclose my romantic relationship with Special Services Associate and that she did

not know where this would go; that I may need to leave the store, or that they may even decide to terminate me. District Human Resources Manager and South Portland Store Manager automatically assumed, when they spoke with me, that I was sleeping with Special Services Associate. When they spoke with her, she was upset and crying. District Human Resources Manager told me that she feared a lawsuit. South Portland Store Manager had the following Friday and Saturday off and I was off on Monday, so the next day we worked together was Tuesday, July 17, 2007.”

- 7) Ms. McGinley alleges that she was advised that her employment was being terminated:
  - a) “Contrary to Company’s assertions, on Tuesday, July 17, 2007, South Portland Store Manager told me to take the rest of the day off and stay in the area, as the Regional Vice President was making a decision about my continued employment. Cross Merchandiser was allowed to leave with me. I called South Portland Store Manager around 4pm to find out if any decision had been made. South Portland Store Manager told me, “It doesn’t look good; I need your keys.” I went to the store at approximately 4:15 pm and gave South Portland Store Manager my keys because I was terminated. I was not given a reason for my termination at that time. South Portland Store Manager told me that he would give my termination papers to Cross Merchandiser or mail them because the Human Resources Manager did not have them fully prepared at that time. Cross merchandiser, a current Company employee witnessed the events of July 17, 2007.
  
- 8) Ms. McGinley asserts that Company policy violations were allegedly disregarded when others were involved:
  - a) “In clear violation of Company’s Mutual Attraction Policy, South Portland Store Manager was aware that Assistant Manager 3 dated an associate and they were later married. South Portland Manager in South Portland Store Manager’s store dated a vendor against Company policy, and they also got married. Assistant Manager, Biddeford dated an associate for 4 months. Female Store Manager, Biddeford, dated an associate. District Manager asked Biddeford cashier out and at no time were those managers asked to leave the store. Associates were usually the ones transferred geographically. The Company policy states, ‘. . . Associates in a direct reporting relationship may not become romantically involved under any circumstances. Violation will result in termination of the manager/supervisor and may also result in disciplinary action against the associate. For example, a Store Manager, Assistant Store Manager or Human Resources Manager may not become involved with any hourly associate in the same location; a DS may not become involved with an hourly associate in his or her department. If there is the potential for romantic involvement, the manager/supervisor must bring the issue to his/her manager’s attention prior to any involvement to determine whether a transfer of one or the other is appropriate.”
  
  - b) Company policy states, “An associate who continues to pursue a romantic relationship with another associate when it is not consensual is a violation of this Standard Operating Procedure as well as the Company Respect and Harassment and Non-Discrimination policies. Violation will result in disciplinary action, up to and including termination of employment.”

- c) "When managers/supervisors fail to comply with these requirements they are subject to discipline, up to and including termination. Exceptions to this Standard Operating Procedure must be approved by the Human Resources Vice President, or equivalent, of the business unit."
  - d) "A male associate was caught marking down his own cull lumber. He bought the lumber on his lunch break that evening. Although he was spoken to, no investigation was conducted and he was not even written up. I met him at the door of the store and questioned him about who had approved the lumber. I took the lumber back to the lumber department. I gave the information to South Portland Store Manager, but I believe that the transaction went through, even after I had reported this violation."
  - e) "About a month or two before I was fired, Key Carriers 1 & 2 were caught looking at confidential pay records of employees at the store, but South Portland Store Manager chose not to fire them or even to write them up for this gross violation of company policy."
  - f) "Before I was fired, it was commonly known at the South Portland Home Depot store that Key Carrier 1 was engaged to be married to a female associate. They frequently made out in the parking lot. No disciplinary action was taken against Key carrier 1 or the female associate for their consensual romantic relationship."
  - g) "I was repeatedly scheduled for shifts of 9 days in a row, 11 hours per day. This was my schedule for months and months. My shift was made by Assistant Store Manager, South Portland, my colleague. We were on the same track for tenure. I believe that he disliked me intensely because of my sexual orientation and disapproved of it. I repeatedly complained about my unfair schedule to South Portland Store Manager, but he took no corrective action whatsoever. He simply said that nobody works more than 6 days in a row. He told me that I needed to learn how to get along with the other Assistant Store Manager. For example, the day I was interviewed by Former Biddeford Store Human resources manager, I was working my ninth straight day, and the day before, I had closed the store and left work about 11pm and then had to arrive at work that next morning at 5am to open the store. My commuting travel time was about 1 hour and 15 minutes and South Portland Store Manager knew that. They seemed to believe that if I could no longer tolerate the schedule, I would just quit."
- 9) Ms. McGinley alleges that Company violated her rights after her termination:
- a) "About two weeks after my employment was terminated, I requested a copy of my termination papers, but that was never provided to me."
  - b) "After my employment was terminated by Company, I applied for unemployment with the Maine Department of Labor. I was told by the Maine Department of Labor that Company took the position that I had resigned my job."
- 10) Company presents the following information in support of its position and Ms. McGinley counters with information in support of hers:
- a) "Ms. McGinley resigned her employment during an investigation into her inappropriate conduct on or about July 17, 2007. Ms. McGinley admitted to disobeying her manager's

directive and violating company policy. She admitted that she purchased a discounted door even after she was specifically instructed by South Portland Store Manager that employees could not purchase the doors.”

- b) “On or about July 1, 2007, an anonymous call was made to Company’s *Awareline* regarding Ms. McGinley. The anonymous caller alleged, in part, that Ms. McGinley sold a contractor three patio doors at a clearance price and then purchased one of the doors from the contractor, even though South Portland Store Manager previously told her that associates could not purchase the doors. Additionally, the anonymous caller stated that Expeditor had also purchased one of the doors from the contractor.”
- c) “Company investigated the anonymous *Awareline* call. On or about July 4, 2007, Ms. McGinley was interviewed about the patio doors. Ms. McGinley admitted to selling the doors, originally priced at approximately \$300 each, to a contractor, for a discounted price of \$50 each, a price which she had established. Assistant Store Managers have the authority to approve markdowns in the amount of \$0 to \$500. However, the store management member who authorizes the markdown cannot purchase the marked down merchandise.”
- d) “Ms. McGinley also admitted that South Portland Store Manager told her that the doors could not be sold at a discounted price to associates. During the interview on or about July 4, 2007, Ms. McGinley denied that she purchased one of the doors. Her statement dated July 4, 2007 said, ‘On June 25, 2007, 3 patio doors were left over from a reset of which we do not inventory. Key Carrier 1, South Portland brought them to my attention and I said that I would ask South Portland Store Manager what we could do with them. I asked South Portland Store Manager if I could sell the doors. He said yes, but that employees could not purchase them. I said no problem, I have a buyer for all three. He said good, I want them gone. A contractor bought all three doors for \$50 each. Total sale was \$150.’ Company continued its investigation by interviewing several other associates, including Expeditor. These associates confirmed that Ms. McGinley sold the doors to a contractor at a discounted price; drove across the street to the parking lot of a neighboring store; then obtained one of the patio doors from the contractor, along with Expeditor. As a result of Expeditor’s admitted violation of Company policy, he was terminated for failure to act with honesty and integrity effective July 19, 2007.” “On or about July 16, 2007, Ms. McGinley was again interviewed about the patio doors. During this interview, she admitted that she had lied during her first interview and she acknowledged that she and Expeditor each purchased one of the doors that she sold to the contractor at a discounted price. Her July 16, 2007 statement reads: ‘In addition to original statement, . . . Expeditor asked to buy one and contractor asked me if I needed one. We decided to load them at a retail place across the street.”
- e) ( Ms. McGinley ) “Company falsely claimed at the fact finding conference and in its written submission that I inappropriately acquired “discounted” patio doors in a self-dealing transaction. Company’s representations are far from the truth. Patio doors were left by a vendor. This was merchandise which Company does not even inventory and South Portland Store Manager had told her that he wanted them ‘gone.’ On the date in question, South Portland Store Manager directed all store personnel to clear all aisles, clear all merchandise off carts, and get the store in perfect shape for a store inspection by Company corporate officials the following day. One of my departments was Millwork, and the previous night,

there had been a display change in the patio door aisle. Company had changed vendors and the old vendor had come in to remove its display patio doors. Three such display patio doors were left in a cart in the back aisle. I had asked the vendor what to do with the doors and the vendor had said that the store could do whatever it wanted to do with the doors because it did not want them back. I was actually told by the vendor that I could throw the patio doors away because they were worthless. The doors were slightly altered in size to fit a display case, and the sizes were not to industry standard. Such doors may not pass during a house inspection, and so it would have been a liability for the company to sell those doors to the general public.”

- f) (Ms. McGinley) “I explained all of this to South Portland Store Manager, who in turn told me to get rid of the doors by the end of the day. He told me that he did not want to know what I did with them, with the one exception that they were not to be sold to an associate. I contacted Contractor, a local contractor who Company frequently called when it had bargain merchandise which it needed to dispose of. I offered the doors to Contractor, who agreed to pay \$50 each for the 3 doors. I told her that she needed to pick them up the same day. Contractor told me that she would come by at 4:30pm to pick up the doors.”
  - g) (Ms. McGinley) “That afternoon, Contractor purchased the doors at the agreed upon price of \$50 each. The doors were rung in under a clearance sku, reserved for items not in Company’s inventory. The doors were on 3 different carts and Contractor, Expeditor and I each pushed a cart out to Contactor’s truck. It was at this point that Contractor sold one door each to Expeditor and I. I was just leaving my shift and aware that managers who remained on the premises after their shift ended were frequently called back in to assist associates. For this reason, I suggested that we transfer the doors at the discount retail store’s parking lot across the street, to get away from the facility. As I’ve explained in my earlier submissions, I had been subjected to a very unfair schedule by a hostile co-worker. I had been scheduled to open the store at 5am that morning and was understandably eager to leave the premises promptly at the end of my shift.”
  - h) (Ms. McGinley) “I did not violate any policy in the sale and subsequent purchase of the patio doors. I did not purchase the door from Company, as I had been prohibited from doing so by South Portland Store Manager. Once the sale was made to Contractor, the doors were no longer the property of the Company. No agreement was made between Contractor and I to purchase one of the doors prior to Company’s sale of the doors to Contractor.”
- 11) Company asserts that it expects all associates to act with integrity and honesty in all matters related to Company business:
- a) “Associates may not obtain or use any property or services belonging to the Company, fellow associates, customers, visitors or vendors in a manner other than that authorized by Company policy or by federal, state or local laws.”
  - b) “Under Company’s Code of Conduct, ‘participating in or inappropriately influencing a transaction between Company and another individual or organization where self-interest is involved’ is a major work rule violation warranting termination.”



- c) "When Ms. McGinley admitted to purchasing one of the doors from the contractor after being specifically told that employees were not allowed to purchase the discounted doors, South Portland Store Manager sent her home and told her that he would contact her with the results of the investigation. Later the same day, Ms. McGinley called him and told him that she could not wait any longer and that she would drop off her keys."
- d) "The conversation between Ms. McGinley and South Portland Store Manager was witnessed by Cross Merchandiser. Cross Merchandiser's statement, dated August 4, 2008 says, 'when South Portland Store Manager at 2406 Home depot told Nicolette McGinley that she didn't have to stay her shift while the investigation was being wrapped up, I was present. Nicolette was crying and visibly upset. South Portland Store Manager told Nicolette to stay in the area so that when he called with the results, she could come back. South Portland Store Manager did not ask for her keys. I was with Nicolette when she called South Portland Store Manager that afternoon and said that she couldn't wait any longer and was going to drop off her keys and to have South Portland Store Manager give me the termination papers later. I was not present when Nicolette gave South Portland Store Manager her keys.'"

12) Further investigation reveals:

- a) Company admits that Ms. McGinley complained shortly before her termination about unwelcome sexual advances and harassment by another employee of the same sex, but it failed to conduct an investigation of the complaint, made no finding about the validity of the complaint and took no corrective action. It is hard to believe that Ms. McGinley's sexual harassment complaint would have been so completely ignored if she had complained about harassment by a male employee.
- b) The individual who fired Ms. McGinley, South Portland Store Manager, discriminated against her in the past by asking her to leave the store because she was having a consensual romantic relationship with another employee of the same sex at the store, contrary to the normal practice when a manager has a consensual, romantic relationship with another employee of the opposite sex at the store. At the fact finding conference, South Portland Store Manager admitted that he initially told Ms. McGinley that she needed to leave the store. He told this investigator that "it's against store policy for any salaried manager to have a relationship with any employee in the store." At this point, Ms. McGinley gave 5 examples of salaried managers who had relationships with employees in various stores.
- c) ( Fact finding conference ) South Portland Store Manager again falsely claimed that Ms. McGinley resigned at the fact finding conference. As explained in her previous submission, on the day she was fired, she was told to leave the store, and when she called in later in the day to find out about the status of her continued employment, she was told, "It doesn't look good" and asked to turn over her keys. South Portland Store Manager told her that her termination papers would be sent to her. Ms. McGinley was found to be credible in these assertions.
- d) ( Fact finding conference ) Company falsely claimed, prominently and repeatedly, in its written filing with the MHRC, that at the same time Ms. McGinley was terminated, a heterosexual associate was also terminated for the same offense. In fact, South Portland Store Manager knew very well that Expeditor is an openly gay man. At the fact finding

conference, Company's EEO Compliance Manager took responsibility for this error, but it seems that, given the nature of this charge, this is an issue which would have been explored and substantiated long before sending submissions in to the MHRC.

- e) ( Fact finding conference ) Company falsely claimed at the fact finding conference and in its written submission that Ms. McGinley inappropriately acquired "discounted" patio doors in a self-dealing transaction. Ms. McGinley did not engage in a transaction which caused a loss to Company, as the doors were not "discounted" but were instead to be thrown away as worthless. They were not in inventory, and so to the extent that Ms. McGinley was able to sell them for \$50 each, she actually earned a profit for the company on otherwise worthless clutter.
- f) Ms. McGinley was credible when she stated at the fact finding conference that Assistant Store Manager ( the individual who developed her schedule ) had many associates fill out statements and sign a petition to get her employment terminated.
- g) ( Fact finding conference ) Company argued that after Ms. McGinley was terminated, South Portland Store Manager was involved in the decision to replace Ms. McGinley with an individual of the same sexual orientation, therefore, it is illogical that South Portland Store Manager would discriminate against Ms. McGinley because of her sexual orientation.
- h) ( Fact finding conference ) South Portland Store Manager asserted that he appropriately "counseled" Key Carriers 1 & 2 for inappropriately reviewing performance evaluations of co-workers which were on his desk.
- i) ( Fact finding conference ) South Portland Store Manager, in response to the issue of Key Carrier purchasing cull lumber, said that he "did not recall Ms. McGinley reporting it to him." He stated that anyone can buy cull lumber once it's marked down and cut. He stated that the policy states that an employee can't select it, but once it's been selected, an employee can purchase it.

#### V. ANALYSIS:

- 1) The Maine Human Rights Act requires the Commission in this investigation to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 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.
- 2) The Maine Human Rights Act provides, in part, that it is unlawful employment discrimination to discriminate against an employee because of sexual orientation or because she asserts her right to be free from unlawful discrimination. 5 M.R.S.A. § 4572(1)(A, E).
- 3) Complainant, Nicolette McGinley alleged that she was treated differently and in a hostile manner due to her sexual orientation and that she was fired in retaliation for complaining about sexual harassment by a female co-worker. She alleges that the disparity in the terms and conditions of her employment was directly related to her sexual orientation.

- 4) Respondent denied that Complainant was subjected to discrimination of any kind by Company, but, rather that she resigned during Company's investigation into an anonymous complaint that she violated Company policy.

### Sexual Orientation Discrimination

- 5) The Maine Human Rights Act prohibits an employer from terminating an employee or discriminating with respect to terms and conditions of employment because of her sexual orientation.
- 6) Because 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).
- 7) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that she (1) was a member of a protected class, (2) was qualified for the position she held, (3) suffered an adverse employment action, (4) in circumstances giving rise to an inference of discrimination. See *Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). Cf. *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1<sup>st</sup> Cir. 2002).
- 8) 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 with affirmative evidence of pretext or by the strength of Complainant's evidence of unlawful discriminatory motive. See *City of Auburn*, 408 A.2d at 1262, 1267-68.
- 9) 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.
- 10) Here, Complainant has demonstrated that, shortly before her termination, she had complained about unwelcome sexual advances and harassment by another employee of the same sex, but Company failed to conduct an investigation of that complaint, made absolutely no finding about the validity of the complaint and took no corrective action. It is indeed difficult to imagine that Complainant's sexual harassment complaint would have been so completely ignored if she had complained about harassment by a male employee.
- 11) South Portland Store Manager, upon learning of her romantic relationship with a woman, asked her to leave the store, contrary to the normal practice when a manager has a consensual, romantic relationship with another employee of the opposite sex at the store;
- 12) South Portland Store Manager told Ms. McGinley to leave the store as she was being investigated about the patio door and when she called in later in the day, she was told that,

"It doesn't look good" and asked to return her keys. Company asserts that she "quit" yet she was credible in her statement that she was terminated. After 7 years' service, and an impressive career with the company, not to mention the outrageous schedule, it seems totally disproportionate that one would be fired for purchasing a door which did not impact the Company's bottom line, when other more egregious violations were all but ignored. As an example, Key Holders 1 & 2 went into South Portland Store Manager's office and rifled through his inbox to review the performance evaluations and compensation documents for other employees and were merely "counseled;"

- 13) Company terminated another gay person at approximately the same time and for the same reason. We are asked to believe that Company thought that this man was heterosexual, as he is described prominently and repeatedly in written filings. In fact, South Portland Store Manager knew very well that Expeditor is an openly gay man;
- 14) Company falsely claimed at the fact finding conference and in its written submissions that Ms. McGinley inappropriately acquired "discounted" patio doors in a self-dealing transaction, when, in fact, Company's representations are far from the truth. Yet, Key Carrier acquired cull lumber in what Ms. McGinley characterized as a Company violation and South Portland Store Manager did not recall the incident and the transaction went through.
- 15) Company rushed to explained during the fact finding conference that Ms. McGinley's sexual orientation was in no way related to the manner in which she was ultimately treated. In an effort to substantiate that, and to finally lay the matter to rest, Company boldly exclaimed that she was replaced by another lesbian / gay / homosexual individual. Not wanting to dignify that comment with a response, or an inquiry into the gender, this investigator simply made note of this, which hardly passes the straight face test. Small wonder that another of the same sexual orientation would be placed in the position left vacant when Ms. McGinley was fired.

### Retaliation

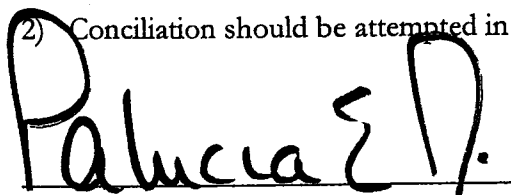
- 16) The MHRA makes it unlawful for "an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of [the MHRA] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S.A. § 4572(1)(E).
- 17) 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.A. § 4553(10)(D).
- 18) The Commission's regulations, which interpret the Act, prohibit coworker harassment on the basis of sex and sexual orientation. *See* Me. Hum. Rights Comm'n Reg. §§ 3.06(I), 3.12(H).

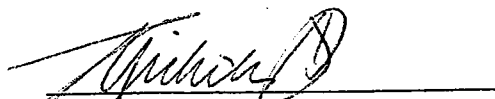
- 19) In order to establish a prima-facie case of retaliation, Complainant must show that she engaged in statutorily protected activity, she was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56; *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006). The term "materially adverse action" covers only those employer actions "that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 126 S. Ct. 2405. One method of proving the causal link is if the adverse action happens in "close proximity" to the protected conduct. *See Id.*
- 20) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wyrwal 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.*
- 21) Complainant has demonstrated that she engaged in statutorily protected activity in that she complained of same-sex sexual harassment. "Soon after my report of unwelcome sexual advances by Special Services Associate, I was retaliated against. Rumors were circulated and anonymous complaints were made that I was having a sexual relationship with the harasser and that I had engaged in improper financial transactions with female customers."
- 22) "I was aggressively investigated and humiliated in front of my co-workers. In the course of the investigation, I again reported the same-sex sexual harassment by Special Services Associate. Again, management ignored my complaints. My employment was unfairly terminated on July 17, 2007 in retaliation for my complaints about same-sex sexual harassment and out of hostility toward my sexual orientation."

## 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 the Respondent, Home Depot, Inc., U.S.A., subjected Complainant, Nicolette McGinley, to unlawful employment discrimination on the basis of sexual orientation and in retaliation for her reporting unlawful harassment.
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).

  
Patricia E. Ryan, Executive Director

  
Michele Dion, Investigator