



Maine Human Rights Commission
51 State House Station | Augusta ME 04333-0051

Physical location: 19 Union Street, Augusta ME 04330
Phone (207) 624-6290 ■ Fax (207) 624-8729 ■ TTY: 1-888-557-6690
www.maine.gov/mhrc

Amy M. Sneirson
Executive Director

John P. Gause
Commission Counsel

INVESTIGATOR'S REPORT
E11-0403

April 27, 2012

Lisa Pierce (Hinckley)

v.

Families Matter, Inc. (Hallowell)

I. Complainant's Charge:

Complainant Lisa Pierce alleged that Respondent Families Matter, Inc. discriminated against her in employment because of race, color, national origin and ancestry. She further alleged that she was retaliated against for blowing the whistle on unsafe, illegal conditions in the workplace and harmful treatment, in violation of standards of care, during her employment with Families Matter, Inc.

II. Respondent's Answer:

Respondent Families Matter, Inc. asserted that it at no time engaged in discriminatory conduct or practices or in any way acted in retaliation regarding any whistleblower activity. Families Matter, Inc. stated that it is aware of no circumstance which would raise analysis of whistleblower retaliation or the Whistleblower Act. Families Matter, Inc. states that Ms. Pierce was dismissed for inappropriately disciplining a client by unilaterally taking away recreational activities as a form of discipline. According to Respondent, this type of mistreatment of a client results in dismissal because it is in direct contravention to the sole purpose of the Personal Social Awareness Program, which is to provide Services for special needs adults and not to take them away.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: July 19, 2010 through March 1, 2011.
- 2) Date complaint filed with the Maine Human Rights Commission: June 14, 2011.
- 3) Respondent employs 27 employees and is subject to the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, as amended, and the Whistleblowers' Protection Act, as well as state and federal employment regulations.
- 4) Investigative methods used: a thorough review of the written materials provided by the parties and an Issues and Resolution conference. Based on this review, this complaint has been identified for a brief Investigator's Report, which summarizes the allegations and denials in relationship to the applicable law but does not fully explore the factual issues presented. 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 and issues in this case are as follows:
 - a) Complainant Ms. Pierce is bi-racial (Hispanic and Native American) and her national origin is Puerto Rican. She was hired by Families Matter, Inc. as a Direct Support Professional on November 10, 2008. On July 19, 2010 she was promoted to Assistant Director for a new facility in Skowhegan.
 - b) Families Matter, Inc. (hereinafter "FMI"), a family-owned business, provides support for special needs young adults and their families through education, programming, recreation and social activities, offering resources in Augusta, Gardiner, Waterville, Farmington and Skowhegan. FMI receives state funding to operate its Personal Social Awareness Program which is overseen and regulated by State of Maine Department of Health and Human Services and funded in part by MaineCare. The sole Maine State agency from which FMI received compensation in the last fiscal year was the State of Maine Department of Health and Human Services (including MaineCare).
 - c) Complainant Lisa Pierce alleged that FMI discriminated against her in employment because of race, color, national origin and ancestry. She further alleged that she was retaliated against for blowing the whistle on unsafe, illegal conditions in the workplace and harmful treatment, in violation of standards of care, during her employment with FMI.
 - d) Respondent FMI asserted that it at no time engaged in discriminatory conduct or practices or in any way acted in retaliation regarding any whistleblower activity. FMI stated that it is aware of no circumstance which would raise analysis of whistleblower retaliation or the Whistleblower Act. FMI states that Ms. Pierce was dismissed for inappropriately disciplining a client by unilaterally taking away recreational activities as a form of discipline. According to FMI, this type of mistreatment of a client results in dismissal because it is in direct contravention to the sole purpose of the Personal Social Awareness Program, which is to provide Services for special needs adults and not to take them away.
 - e) The important parties in this matter are: President/Executive Director, EM [husband]; Program Director, KM [wife]; President 2, JM [son]; Bookkeeper, SP; Per Diem DSP, LG; Female Client, CY; Female Client's Guardian, BH; Waterville Assistant Director, KC; Witness 1, Former Program Operations Manager/Personnel Director, RC [husband]; Witness 2, KC [RC's wife]; Witness 3, MT; Witness 4, JC.
- 2) Four issues form the basis for Ms. Pierce's complaint. The first issue is that Ms. Pierce alleged that President/Executive Director was upset at his company's having hired her and called her "the colored girl", and that his discriminatory feeling about her carried over to decisions made by other family members in the company. The second issue is that she alleged that she was retaliated against because of repeated reports of client abuse which she believed put Female Client's health and safety at risk. These reports were allegedly made to Program Director concerning DSP, a per diem employee. Ms. Pierce stated that Program Director finally told her to go ahead and report one of the incidents, "bleeding fingers brought about by chewing" which was triggered by anxiety when Per Diem DSP caused claustrophobia issues in the FMI van. The third issue concerns Ms. Pierce's repeated complaints about potential safety hazards based on the fact that there was no

railing in the stairway at the Skowhegan facility which she prepared for FMI. The fourth issue is that she claimed FMI absolutely refused to pay her for 72 vacation hours which she had earned during her employ.

3) The first issue, discrimination based upon race, color, ancestry, national origin, is examined here:

- a) Ms. Pierce alleged that the first time President/Executive Director met her in person, he objected to FMI Former Program Operations Manager/Personnel Director: "you didn't tell me that you hired a colored girl." Ms. Pierce stressed that throughout her employment by FMI, she was treated differently than other Assistant Directors based upon these protected characteristics. Ms. Pierce believes that she was not receiving notice of management decisions on the same basis as other Assistant Directors. She asserts that she repeatedly had to ask her peers for information that had been provided to them but not to her by FMI managers.
- b) During the Issues and Resolution conference, President/Executive Director stated that he did not recall ever having made a comment which referenced Ms. Pierce's race. He denied ever having called Ms. Pierce "the colored girl." "I do not recall having made this comment."
- c) FMI stated that it has hired a "variety of sex, race, ethnic and national origin in the past" and during Ms. Pierce's time of service and still maintains employees regardless of their sex, race, ethnic and national origin. Furthermore, President/Executive Director insisted that there was no discrimination because Ms. Pierce remained employed for several years receiving pay raises and promotion from DSP to Assistant Program Director with commensurate increase in salary. "Complainant has asserted that a disgruntled former, terminated employee is the sole person to have heard this very distasteful comment. If this statement is in fact made by Former Operations Manager/Personnel Director/Witness 1, it is not credible."
- d) Program Director asserted that although Ms. Pierce believes that she was not receiving notice of management decisions on the same basis as other Assistant Directors, her belief had no merit. Program Director explained that management decisions were made and then a mandatory staff meeting was scheduled. Ms. Pierce "was part of each staff meeting that FMI scheduled. She was made aware along with the rest of FMI employees of any decisions that were made by management."
- e) (Witness 1, Former Program Operations Manager/Personnel Director) I was discussing the Employee Handbook with President/Executive Director and Program Director at their home. In discussing the holidays section, I stated that Martin Luther King Day is generally a holiday. President/Executive Director replied, "over my dead body." I made a comment like, "old school, huh?" Program Director stated, "you have no idea." Thereafter, there was a recognition supper for employees and after the supper, I saw President/Executive Director in the parking lot. He came up to me and said, "I didn't know that you hired a woman of color." He was clearly very disappointed. Ms. Pierce was highly qualified, but I knew right then that her days were numbered. President/Executive Director is of Scottish descent and once revealed that he believed in pure heritage. When it came time for me to hire someone for the Assistant Director position in Skowhegan, I really pushed for Lisa Pierce but I encountered major resistance. She had worked for me as a DSP for another employer and I knew that she was highly qualified. President/Executive Director and Program Director complained about Ms. Pierce and said that she wasn't doing her job, wasn't promoting the program, but she was. There were other stray remarks from President/Executive Director such as he should hire

INVESTIGATOR'S REPORT, E11-0403

Mexicans because it would cost him less money. He also owns a construction company and was apparently referring to that company at the time.

- f) Witness 2 stated that Ms. Pierce had worked for her at the Waterville location of FMI. She described Ms. Pierce as a fantastic DSP who worked exceptionally well with the clients and who was able to anticipate needs. She asserted that Ms. Pierce was targeted by management of FMI and stated that they did not want her as Assistant Director for the location which was being developed for the Skowhegan community because of bias. She stated that she heard President/Executive Director refer to Ms. Pierce as "the colored girl" in Farmington after a recognition dinner. Witness 2 stated that President Executive Director is racist and a bigot and that he talks down to people. She explained that it was her belief that President/Executive Director and Program Director were careful around her because they were aware of the fact that she worked with Ms. Pierce in the Waterville location. She quoted President/Executive Director as he asked a question while leaving the recognition dinner: "you mean the colored girl?"
 - g) Witness 2 further stated that she was aware of the fact that Program Director targeted Ms. Pierce and treated her differently than other Assistant Directors. She recounted a situation in which a client had discussed something with her sister and the sister contacted Program Director. Rather than following the standard protocol of contacting the relevant Assistant Director, Program Director contacted the Assistant Director in Farmington and had her contact Ms. Pierce. Witness 2 emphasized that Program Director should have given Ms. Pierce the opportunity to explain what had taken place.
- 4) The second issue which Ms. Pierce complained about was that she was retaliated against because of repeated reports of client abuse. She made these reports to Program Director:
- a) (Affidavit): In my employment as a DSP for FMI, I was mandated by law to report suspected abuse, neglect or exploitation of dependent adult clients for whom I provided care. In approximately early February 2011, FMI assigned DSP, a per diem employee, to work with me caring for clients. She treated clients inappropriately on multiple occasions. In about early February 2011, while caring for clients at a fitness center, I informed DSP that a client could not lift weights because of her physical condition. Defying my direction and the client's request not to use weights, DSP proceeded to add weights to the machine that the client was using. I removed the weights from the machine, but DSP put them back on, causing the client more upset.
 - b) (Per Diem DSP statement): Recently it was brought to my attention that Lisa Pierce, a former FMI employee, has made false allegations involving me. I was informed that Ms. Pierce stated that I had gone to a gym with her and our clients. This is not true; I never went to any gym with Ms. Pierce. I was accused of forcing a client to use extra heavy weights supposedly at this gym. I have never nor would I ever force a client to do any activity. I was also informed of another situation that never occurred; Ms. Pierce stated that I sat beside a client while in the van while sitting beside the client, I supposedly made her so nervous that she bit her fingers until they bled. This is not at all true. This never happened. The said client and I are very close and she seems very comfortable and happy around me. Furthermore, we let clients choose to sit where and by whom they choose and she often chooses to sit by me. I have never had any issues with any of the clients I work with. They all ask for me, request to do activities with me and seem to be happy, smiling, laughing, joking and enjoying the day at program. I

INVESTIGATOR'S REPORT, E11-0403

try my best to enrich the lives of all of our clients. I feel upset and offended by these false accusations. If it would be of any help, I am more than willing to participate in a lie detector test as I am always open and honest.

- c) Witness 3 recalled an incident in which a client had become upset by a stressful interaction between two FMI staff persons. Ms. Pierce and Per Diem DSP had taken a group of clients to a retail bookstore. Ms. Pierce mentioned to Per Diem DSP, who was new, that her mileage had been improperly recorded and offered to help her make the necessary corrections. Per Diem DSP became very angry and yelled at Ms. Pierce in public with the group of clients. Witness 3 stayed with the clients while Ms. Pierce went to the restroom to regain her composure. Per Diem DSP stormed off from the group, changing the ratio of clients to DSPs and she remained separated from the group of clients until they gathered in the parking lot 20 minutes later to get into the van. Ms. Pierce had no idea why Per Diem DSP reacted in this manner. Meanwhile, Per Diem DSP had contacted Program Director. Witness 3 stated that she felt that Ms. Pierce was not in the wrong.
- d) (Complainant's Affidavit): On or about February 15, 2011, while transporting a client in a van, I went to pick up Per Diem DSP. Per Diem DSP got into the van and sat next to the client. This was the same client who had become upset by Per Diem DSP's yelling at me in public on February 11. The client became nervous and stated that she did not want Per Diem DSP to sit next to her. She asked permission to move to the back of the van, which I gave her. Per Diem DSP questioned the client several times as to why she wanted to move, to which the client responded more than once that she was uncomfortable and claustrophobic. After I told Per Diem DSP that it was okay for the client to be in the back seat and that she liked her space. The client continued to appear nervous and began biting at her fingers until two were bleeding. After the incident, I provided the client with bandages for her fingers. That same day, I called Program Director and informed her of the improper treatment of the client by Per Diem DSP. On February 16, 2011, I asked Program Director if I should report the incident to DHHS. Program Director said that I should do so. On or about February 16, 2011, I filed an online report with DHHS about Per Diem DSP's conduct which I believed put the client's health and safety at risk and which I believed was potential abuse because the conduct involved intimidation which caused physical injury and mental anguish. I believed that as a mandated reporter, I was required to make this report by law. I also provided a written incident report to FMI and informed the client's guardian.
- e) Early in the last week of February 2011, an adult client was snapping and rude to her peers as well as crying throughout the day. I asked her what was wrong. She said the anniversary of the death of a family member was near. She said that she needed a break. I asked her if she meant from the program. She said yes. As that was her right and her choice, I said that she could stay home the following day. The client's guardian first called Program Director, then called me, upset that the client was not attending program that day. I talked to Program Director who said the Female Client's Guardian had admitted that I had done nothing wrong and told me not to worry about the incident, that I handled it well and that I did good work. In this instance, I did not do anything that violated any standards of care, rules of my employer or any other standard of professional conduct.
- f) FMI's submission dated January 10, 2012 states that Ms. Pierce's last day of work was March 1, 2011 due to her inexcusable conduct in disciplining a special needs adult client which was reported on February 25, 2011, investigated and resulted in dismissal pursuant to § 5 of the

FMI Employee Handbook. Section 4 of this handbook does state that FMI employs both progressive discipline and immediate dismissal of employees. "Employee was dismissed for inappropriately disciplining a client by unilaterally taking away the recreational activities of a client as a form of discipline. This type of mistreatment of the client results in dismissal. It is in direct contravention to the sole purpose of the Personal Social Awareness Program which is to provide services for special needs adults and not to take them away."

- g) (Female Client's Guardian) From the beginning of her attending the Skowhegan program, I was receiving either phone calls or e-mails calls from Ms. Pierce complaining about Female Client. I respectfully listened or offered suggestions. When I felt it was necessary I spoke to Female Client regarding her behavior and whether her choices were good or bad. On at least one occasion, I encouraged Female Client to apologize to Ms. Pierce when she returned to program. In hindsight, now knowing that Female Client was being verbally abused daily by Ms. Pierce, I regret having been so sympathetic to Ms. Pierce's concerns. Female Client had a bad day with Ms. Pierce and was told by Ms. Pierce that she should take the next day away from the program. There had been instances in the past where Female Client did not go to program due to weather or something else and her [residential program] Skills staff was not notified that she was home all day. A request had been made by Skills to be notified as a courtesy to them and Female Client so that her needs could be better met. Ms. Pierce failed to notify Skills that Female Client was going to be home for the day. Not only was this disrespectful but it also left Female Client dealing with her emotions of the altercation on her own. There was nobody who knew what had happened and it was one of the rare times that Ms. Pierce did not contact me regarding an incident. The reason for my finally complaining was an extremely unsatisfactory conversation with Ms. Pierce regarding something that happened at program the day before. When I spoke to her, she could not recall what she had done with the clients the day before but insisted that Female Client's version of events was incorrect. When I reminded her by conveying what I was told, she stated that she just could not remember things. I would observe that she had selective memory because when it came to any misbehavior or disrespect Female Client displayed, there never appeared to be any hesitation in her memory. I demanded to have the phone numbers of the owners of FMI. Ms. Pierce did provide them but stated that I would not be able to get hold of anyone. I called and spoke to Program Director and explained the entire situation. I stated that I was so upset that we were considering taking Adult Client out of the program because she was so upset every day. She had developed certain behaviors even outside of the program which indicated to us that she was stressed.
- h) (Female Client's Guardian) After speaking with Program Director about the upcoming PCP meeting for Female Client, she agreed to be there in addition to Ms. Pierce representing FMI. It was during this meeting that I gathered information from previous neuropsychology and occupational therapy exams. Both of these indicated how some things that would not bother others were a big problem for Female Client and coping skills. For example, one thing that FMI participated in was horseback riding. Female Client had indicated on more than one occasion that the horses made her sick because they smelled. Additionally, Female Client has a balance issue which would make her feel unsteady on a horse. Ms. Pierce insisted that Female Client try new pieces of exercise equipment. One was the treadmill. I am not impaired mentally or physically and cannot maneuver on a treadmill. One of her notes said that Female Client resisted but then she tried it. When I shared this with the attendees at the meeting, Ms. Pierce stated that she already knew all of that about Female Client. Ms. Pierce totally

dismissed any further discussion regarding Female Client's issues. In the 'go between' notes there were several comments on Female Client's eating habits and choices. At least one of the notes indicated that Ms. Pierce had forbidden Female Client to have a second helping of food. I am not sure who gave Ms. Pierce authority to dictate to Female Client what she could and could not eat. Many of the altercations centered around Female Client being told not to eat or buy something food related then 'being caught' doing it anyway. That put Female Client on the defensive and created anger in her resulting in temper tantrums which then led to a discussion about her choice and an eventual apology by Female Client. Never did there appear to be remorse on Ms. Pierce's part that perhaps the situation could have been handled differently and more consideration given to the individual personality of Female Client.

5) A safety concern regarding a handrail for the Skowhegan facility was the third issue:

- a) Ms. Pierce repeatedly complained about potential safety hazards because there was no railing in the stairway at new Skowhegan facility which she prepared for FMI. Ms. Pierce stated that she complained repeatedly to President/Executive Director, also to Program Director, that this was a potential safety hazard, not only for herself, but for the clients. She also said that she reported this to the Board. Two days or so before she was summarily fired, the railing was finally installed by the landlord. FMI argues that this was pure coincidence.
- b) (President/Executive Director) As regards the "handrail" issue, there was more than sufficient area to accommodate the three clients on the first floor. Of our 3 other Program locations, none have second floor areas. There is a telephone on the first floor; so the use of the second floor area was not necessary or required. The landlord was notified that we wanted a handrail installed and he finally installed it. This issue in no way factored into the decision to terminate her employment and, certainly, the decision to terminate Ms. Pierce was not in retaliation for her requesting the handrail be installed.
- c) (Program Director) Ms. Pierce did set up a quiet room upstairs in our facility in Skowhegan. She wanted it to be a place for clients to go if they needed their space. At this point, there were only 2 clients and on February 7, 2011 another client joined making a total of 3 clients. At no time during Ms. Pierce's tenure as Assistant Director in Skowhegan did she ever have 4 clients enrolled. In the downstairs Skowhegan location, there is a large common area for all clients to interact with each other. There is also another area off of the common area on the same floor that is quiet with seating and a table. Ms. Pierce should have used this room as the quiet area until the hand rail was installed. That would have been the safest way for her to deal with this situation instead of guiding the clients up and down the stairs. As Program Director, I do not understand how Ms. Pierce can say that the male and female clients had no boundaries. We have no clients enrolled in our program who do not have boundaries. Some days Ms. Pierce had only 1 client, some days 3. All FMI DSPs, especially the Assistant Directors, know that FMI has a policy of 100% supervision of all clients. That means that no clients are left alone at any time during daily operation. Paperwork should be done at 8:00am or after transportation in the afternoon. There was an answering machine to take messages and Ms. Pierce could have returned phone calls. There always have been 2 phones, one upstairs in her office and one downstairs. This was neglect of her duties as Assistant Director and Direct Support Professional, to leave the clients alone to do paperwork and answer the phone. If I had known this at the time, she would have been disciplined.

INVESTIGATOR'S REPORT, E11-0403

- d) The fourth issue is that she claimed FMI absolutely refused to pay her for 72 vacation hours which she had earned during her employ. Ms. Pierce asserted that her attempts to be compensated for earned vacation wages were unsuccessful. FMI explained that this is simply company policy.
- 6) Additional investigation reveals:
 - a) Witness 1, FMI Former Program Operations Manager/Personnel Director had his position with FMI terminated in December of 2010 for non-performance.
 - b) Witness 2 substantiated Ms. Pierce's allegation that when FMI terminated employees, it refused to compensate them for earned vacation and sick time, asserting that it was company policy.
 - c) In attempting to make sense of Ms. Pierce's sudden termination, without any supporting disciplinary activity or notes in Ms. Pierce's personnel file, one must ask whether she was ever reported to DHHS for suspected client abuse. She was not. Yet, during the Issues and Resolution conference, President/Executive Director asserted that she was terminated because of a "negative reinforcement technique. This technique is utilized to punish clients for prior behavior, i.e., you engaged in this action, therefore, you cannot have this activity tomorrow." Specifically, FMI terminated Ms. Pierce on March 1, 2011 due to her inexcusable conduct in disciplining Female Client on February 25, 2011 when she unilaterally took away the recreational activities of this client as a form of discipline. Female Client's Guardian called FMI very upset and angry about the situation which resulted from Female Client's misuse of a piece of equipment at the fitness center.
 - d) Ms. Pierce worked with Per Diem DSP for a total of 6 days.
 - e) Program Director stated that Ms. Pierce's employment was terminated on March 1, 2011 when she, President/Executive Director and President 2 went to the Skowhegan office to terminate Ms. Pierce's employment, explaining that FMI was going in a different direction. The statement which President 2 made rings true because we, as the management team needed our Skowhegan program to have an Assistant Director who truly had a passion for Skowhegan and who would follow direction and make the Skowhegan program what the management team wanted it to be. Ms. Pierce did not have this passion because she was convinced that "there is nothing to do in Skowhegan." We did go in a different direction and now our Skowhegan Program is thriving and all clients are very happy.

V. Analysis:

- 1) The Maine Human Rights Act requires the Commission 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, based on race, color, ancestry or national origin to "fail or refuse to hire or otherwise discriminate . . . [or] discharge an employee or 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. . . ." 5 M.R.S.A. § 4572(1)(A).

- 3) Here, Complainant Lisa Pierce alleged that Respondent FMI discriminated against her in employment because of race, color, national origin and ancestry.
- 4) Respondent FMI asserted that Ms. Pierce was not unlawfully discriminated against because of her race, color, national origin and ancestry.

Race, Color, National Origin and Ancestry Discrimination

- 5) Because here there is no direct evidence of discrimination, the analysis of the claims of race, color, and national origin and ancestry discrimination 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).
- 6) With respect to her claims relating to adverse job actions, 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 when her position was terminated, (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 (1st Cir. 2002).
- 7) 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, para. 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.

Adverse Job Action

- 8) The Maine Human Rights Act provides, in part, that it is unlawful, based on protected-class status, to "fail or refuse to hire or otherwise discriminate . . . [or] discharge an employee or 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. . . ." 5 M.R.S.A. § 4572(1)(A).
- 9) 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*

INVESTIGATOR'S REPORT, E11-0403

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").

- 10) In order to prevail, Complainant must show that she would not have suffered the adverse job actions 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.
- 11) Here, Ms. Pierce established a *prima facie* case by showing that she is bi-racial (Hispanic and Native American), she performed her job satisfactorily, and she suffered adverse job actions relating to the terms and benefits of her employment (she was not given the same opportunities as other employees who were not bi-racial and ultimately her employment was terminated).
- 12) FMI did not provide evidence of a persuasive legitimate, non-discriminatory reason for Ms. Pierce's adverse treatment during her employment. The following are relevant considerations:
 - a) With regard to the issue of racial discrimination, President/Executive Director's comment at the Issues and Resolution conference "I do not recall having made this comment" when asked if he had called Ms. Pierce the colored girl, is not credible. His tone was calm and measured, not defensive, simply conversational. This is not a comment one would be vague about. His demeanor was not credible. It stands to reason that, if he had not made this comment, he would have protested. He would have been offended. Also, during a phone interview with Witness 1, Former Program Operations Manager/Personnel Director it was revealed that, during a business discussion about the company's employee handbook holidays were discussed. When asked about Doctor Martin Luther King Day, President/Executive Director allegedly replied, "over my dead body." Witness 1 was credible when he explained the context of the conversation and Program Director's presence. Witness 1 also was credible in describing Program Director's alleged comment, "you have no idea", particularly when recalling President/Executive Director's cavalier response during the Issues and Resolution conference. Witness 1 stated that although Ms. Pierce was very capable and more than able to successfully perform the role of Assistant Director for the Skowhegan location, he knew after this meeting at their home that Ms. Pierce' days in that role were numbered due to President/Executive Directors' attitude about her, even though they had never interacted.
 - b) Witness 1, Former Program Operations Manager/Personnel Director stated that he had seen President/Executive Director in the parking lot following a recognition dinner and that President Executive Director said, "I didn't know that you hired a woman of color." Witness 1, Former Program Operations Manager/Personnel Manager stated "President/Executive Director was clearly very disappointed to learn that." Witness 1 was credible in recounting these conversations.
 - c) Witness 2 recounted having seen President/Executive Director in the Farmington parking lot that same evening. She was credible in her assertion that he said: "you mean the colored girl?" in describing Ms. Pierce. Witness 1 did not hesitate in her recall; she said that she recalls that comment very clearly. She had worked with Ms. Pierce in Waterville and said that, although they were not friends outside of work, they worked well together and she believed that Ms. Pierce was very well qualified for the role of Assistant Director in Skowhegan.

- e) President/Executive Director's discriminatory attitude toward Ms. Pierce actually impacted Ms. Pierce's employment. Witness 2 credibly stated that she was aware that Program Director targeted Ms. Pierce and treated her differently than other Assistant Directors. She recounted a situation in which a client had discussed something with her sister and the sister contacted Program Director. Rather than following the standard protocol of contacting the relevant Assistant Director, and first giving that person an opportunity to explain what happened, Program Director contacted the Assistant Director in Farmington and had her contact Ms. Pierce. Witness 2 emphasized that Program Director should have given Ms. Pierce the opportunity to explain what had taken place and viewed this different treatment as significant for Ms. Pierce's employment.
 - f) Ms. Pierce firmly believed that she was not receiving notice of management decisions on the same basis as other Assistant Directors. She complained that she repeatedly had to ask her peers for information which had been timely provided to them but not to her by FMI management. This was embarrassing, personally and professionally, to Ms. Pierce and left her at a disadvantage with her peers and management. This issue was disputed by Program Director who stated that Ms. Pierce attended mandatory staff meetings where management decisions were made. This is not particularly responsive to Ms. Pierce's allegation. The fact that Ms. Pierce attended mandatory staff meetings where management decisions were made does not provide relevant information as to whether Ms. Pierce was provided with the same information in the same fashion as her peers. Ms. Pierce was more credible on this point than Program Director.
 - g) Even in light of a disputed issue regarding the sharing of information regarding management decisions, Ms. Pierce was credible in establishing that she suffered an adverse job action during her employment (being denied the same information and opportunities as her non-bi-racial peers) and in establishing a link between that adverse action and her race, color, national origin and ancestry. Respondent did not provide persuasive evidence of a legitimate, non-discriminatory reason for that adverse treatment.
- 13) FMI did provide evidence of a persuasive legitimate, non-discriminatory reason for Ms. Pierce's adverse treatment in terminating her employment. The following are relevant considerations:
- a) FMI did articulate a legitimate, nondiscriminatory reason for dismissing Ms. Pierce, namely that she inappropriately disciplined a client by unilaterally taking away recreational activities as a form of discipline. FMI asserted that this type of mistreatment of a client results in dismissal because it is in direct contravention to the sole purpose of the Personal Social Awareness Program which is to provide services for special needs adults and not to take them away. Female Client's Guardian offered insight regarding incidents which were clearly very difficult for Female Client.
 - b) It is troubling that Ms. Pierce's personnel file does not contain contemporaneous notes documenting "inexcusable conduct" which could rise to the level of terminable offense, as one would expect. However, FMI's employee handbook does state that FMI employs both progressive discipline and immediate dismissal of employees ("Termination of employment can be direct dismissal by the employer"). FMI and Female Client's Guardian were credible in describing the circumstances leading to Ms. Pierce's termination.

- c) Ms. Pierce did not show that FMI's explanation was untrue or a pretext, or that she would not have been terminated but for membership in the protected class.

Elements of Whistleblower Protection Act/MHRA Retaliation Claim

- 14) The Maine Whistleblowers' Protection Act prohibits retaliation because of previous actions that are protected under the Whistleblower Protection Act ("WPA"). See M.R.S.A. § 4572(1)(A). 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.A. § 833(1)(A).
- 15) With respect to the retaliation claim, the Maine Human Rights Act 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 Act] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.H.R.A. § 4572(1)(E).
- 16) 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). 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.
- 17) 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 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*
- 18) In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant's protected activity, although protected activity need not be the only reason for the decision. See *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).
- 19) Ms. Pierce established a *prima facie* case of retaliation in violation of the WPA, as she did engage in activity protected by the WPA (reporting missing handrails and a possibly abusive co-worker) and was the subject of adverse employment action (termination), and there was seemingly a temporal/causal link between the protected activity and her dismissal, an adverse employment action.
- 20) FMI did articulate a legitimate, nondiscriminatory reason for dismissing Ms. Pierce, namely that she inappropriately disciplined a client by unilaterally taking away recreational activities as a form

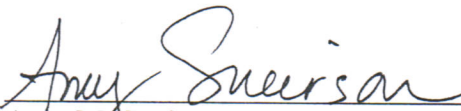
of discipline. FMI asserted that this type of mistreatment of a client results in dismissal because it is in direct contravention to the sole purpose of the Personal Social Awareness Program which is to provide services for special needs adults and not to take them away. Female Client's Guardian offered insight regarding incidents which were clearly very difficult for Female Client. It is troubling that Ms. Pierce's personnel file does not contain contemporaneous notes documenting "inexcusable conduct" which could rise to the level of terminable offense, as one would expect. However, FMI's employee handbook does state that FMI employs both progressive discipline and immediate dismissal of employees ("Termination of employment can be direct dismissal by the employer"). FMI and Female Client's Guardian were credible in describing the circumstances leading to Ms. Pierce's termination. Ms. Pierce did not prove that this was untrue or a pretext.

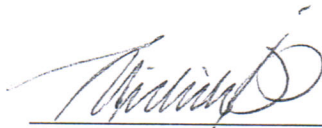
- 21) There is no evidence offered, or found, which would suggest that the absence of the handrail at the Skowhegan facility played any part in termination of Ms. Pierce's employment. FMI's assertion that the landlord finally installed the handrail a couple days before Ms. Pierce's termination is accepted as coincidence.
- 22) There is no objective evidence that FMI retaliated against Ms. Pierce for her reporting of Per Diem DSP to FMI or DHHS.
- 23) At the final stage of the analysis, Ms. Pierce has shown that *during* her employment she was discriminated against due to her protected class. She has not, however, shown that FMI's reasons for *terminating* her were unreasonable or discriminatory. There is no indication that termination was unfair or based upon retaliation for blowing the whistle on unsafe, illegal conditions in the workplace or harmful treatment in violation of standards of care.

VI. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that Respondent FMI discriminated against Ms. Pierce based upon race, color, national origin and ancestry; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).
- 3) There are **No Reasonable Grounds** to believe that Ms. Pierce was retaliated against for engaging in protected activity; and
- 4) The charge should be dismissed in accordance with 5 M.R.S.A.


Amy M. Sneirson, Executive Director


Michèle Dion, Investigator