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February 7, 2011

Ernesto Duran (South Portland)

v.

Hannaford Bros. Co. (Portland)

I. Complainant's Charge:

Ernesto Duran alleges that Hannaford Bros. Co. discriminated against him on the basis of race, color and national origin (Latino, originally from Puerto Rico) by treating him less favorably than other non-Latino employees by "papering" his file with unwarranted disciplines and terminating him. Mr. Duran also alleges that he was terminated in retaliation for complaining of discrimination.

II. Respondent's Answer:

Hannaford Bros. Co. denies discrimination and alleges Complainant was terminated for serious food and safety violations and for being the slowest employee in the meat department. Hannaford Bros. Co. also alleges that that Complainant never complained of discrimination.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: May 20, 2009.
- 2) Date complaint filed with the Maine Human Rights Commission: August 24, 2009.
- 3) Respondent employs over 25,500 people and is subject to the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, as amended, as well as state and federal employment regulations.
- 4) Complainant is represented by Chad Hansen Esq. Respondent is not represented.

- 5) Investigative methods used: A thorough review of the written materials submitted by the parties, follow-up requests for information and documents.

IV. Development of Facts:

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

- a) Complainant is Latino, originally from Puerto Rico. He began working at Hannaford in a Scarborough store in 2001 and transferred to a Portland location in 2008. It was at the new store that he alleges less favorable treatment by management and subsequently termination due to race, color and national origin.
- b) "Manager" was manager of the meat department where Complainant worked and was his direct supervisor in the Portland store.
- c) "Assistant Manager" was assistant manager of the meat department and was also Complainant's direct supervisor.
- d) "Mr. R" was Complainant's coworker in the meat department and reported violations by Complainant which led to his termination on May 20, 2009.
- e) "Mr. J" is an African American employee in the meat department of the Portland Store.

- 2) Relevant information and documents are as follows:

- a) Two employees of Hannaford Bros. Co. submitted affidavits through Complainant's attorney stating that while they worked with Complainant at the Scarborough location, he was very clean and neat and did not violate any safety codes.
- b) Complainant's annual evaluations from the years he worked at the Scarborough store were positive.
- c) Respondent was asked to provide disciplinary notes and warnings placed in other meat department employees' files in a two-year span. The only discipline that that occurred prior to the filing of Complainant's Charge of Discrimination was given to an African American employee, Mr. J.

- 3) Complainant provided the following:

- a) He worked for Respondent since 2001 in the meat department, mostly in the Scarborough store. During his time in the Scarborough store he received all favorable evaluations indicating that he met or exceeded expectations. In August of 2008, he transferred to a store in Portland. It was in the Portland store where

he began to be discriminated against. He was subjected to unwarranted disciplinary actions and demeaning comments from his coworkers and supervisors. He complained to management about this but was told there was no discrimination and that he should not accuse people of this. His direct supervisors began placing negative notes in his personnel file. He was falsely accused in these disciplinary notes.

- b) There are several examples of false accusations. On January 6, 2009 he was accused of mislabeling meat with the wrong date. This is not what happened. Another employee took over his task and either there was a misunderstanding or he lied. He was accused on January 3, 2009 of not helping out when another employee took her break. Also, there is a note in his file dated January 24th which states that he used a knife to clean pork trim off the floor. He was never spoken to about any of these incidents.
- c) His supervisors never counseled white employees when they slacked off, only non-white employees. He believes other employees did much worse things and notes were not placed in their files. When Respondent provided examples of other employees who were given warnings, the only employee with a warning prior to the filing of the charge of discrimination was African American. This is further evidence of race discrimination.
- d) Another note in his file dated January 31st states that Mr. R complained about him after they got in an argument. He acknowledges there was an argument, but nothing out of the ordinary. He believes Mr. R complained about him because of his racial bias. In the past Mr. R had made derogatory comments to him such as, "why don't you go back to where you came from."
- e) On February 4th, Manager spoke to him about the incidents that occurred on January 31st and characterized the incidents as "possible workplace violence." This is not true and should not have been written. Mr. R had done much worse in the past, including getting into physical fights and was never reprimanded for this. On March 9th he spoke to Manager and Assistant Manager after Mr. R complained about him again. He voiced his frustration and stated that he believed management was discriminating against him because he is Puerto Rican. Manager and Assistant Manager reprimanded him for complaining about his lack of training and for alleging discrimination. He feared termination, so he just apologized and returned to work. Every time there was an altercation between him and Mr. R, he was given a note in his file and not Mr. R.
- f) On March 31st Mr. R complained again about him to management, this time about clipping his nails over the floor which is false. After this complaint, Manager issued him a Step 3 disciplinary warning. The warning was for supposed health and safety policy violations on January 24th, January 31st, and March 31st. At this meeting he was shown a picture of nail clippings and was told they were his. He believes at this meeting he also brought up the fact that Mr. R made the statement,

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"go back to where you came from." Management was unconcerned when he brought this up.

- g) In January of 2009 he asked management if his wife could have permission to communicate with his supervisors if he needed clarification about anything since English is his second language but they refused. As a result, he signed many documents without fully understanding them. He believed he had to or he would lose his job.
 - h) In his second or third month of working at the Portland store he was named employee of the month. He had a flawless record before that in the Scarborough store. All of the false warnings and incidents in his file happened shortly after this and led to his termination.
 - i) On May 18, 2009 he was suspended because Mr. R falsely reported that he blew snot out of his nose into a sink. He was fired on May 20th because of this false accusation. He feels he was terminated because of his race, color, national origin and because he complained about discrimination. He was replaced by a white, non-Latino employee. Mr. R was prejudiced against him and management just took his side.
 - j) His termination was not only due to his race, color and national origin, but also in part due to retaliation for complaining of this differential treatment. When he went to management and told them he felt discriminated against, they ignored him and reprimanded him for alleging discrimination. He told Mr. R as well as Manager and Assistant manager about how he felt he was being discriminated against because he is Puerto Rican. They did not take his concerns seriously and discouraged him from exercising his rights. The step three disciplinary warning happened after he complained, as well as his termination.¹
- 4) Respondent provided the following:
- a) While Complainant's customer service skills were generally good, he did not perform at the speed expected. He was the slowest of all meat department associates which caused frustration for everyone in the department since others had to pick up the slack to make up for his slow performance. Mr. R made this observation. Complainant was not named employee of the month, but was given a Service Star which is an award based solely on customer service, which he was generally good at.
 - b) Management did exactly what they were trained to do when they placed papers documenting performance concerns in Complainant's personnel file. This is a

¹ The investigation of this case surrounded the claim of termination due to race, color, national origin and retaliation. The analysis in this Report will reflect this focus of the investigation. Complainant also alleges instances of differential treatment during his employment but does not recall specific dates and times. This information was used as background evidence.

common practice which they do with all employees. Complainant was not singled out as he alleges.

- c) Complainant was never denied an interpreter and was never told that his wife could not help him with reviewing documents. Complainant was offered an interpreter once and specifically stated that one would not be necessary. Whenever Complainant was presented with a disciplinary document, he was always asked if he understood it, and always indicated that he did. He always chose to sign the documents and was never told he could not review them with his wife. He was given no reason by management to fear the loss of his job if he did not sign a document. In fact, signing the documents signified only that the employee received the document, not that they agreed with it. He was never pressured into signing anything.
 - d) At no point did Complainant allege to management that he felt he was being discriminated against because of his race, color or national origin.
 - e) Complainant was terminated for legitimate reasons, mainly food safety and sanitation issues. The first health and safety violation was on March 31, 2009 when he clipped his finger nails in the meat room. Some of his clippings ended up on the floor and in bowls which are kept on a shelf under the meat table. He did not do it over the trash, and even if he had, this is a sanitary concern and he should not be doing it in the meat area at all. Mr. R took pictures of the clippings and reported him. Complainant received a step three discipline for this violation because of how serious a sanitary violation it was. This action was justified. Step three disciplines are commonly given directly when the violations are severe.
 - f) The second action occurred on May 18, 2009 when Complainant blew his nose into one of the sinks in the meat room. A short time later he put a clean meat tray into a sink with dirty water from seafood. This was a serious violation because it could cause health issues for any customers with a seafood allergy. Mr. R reported both these incidents to management. Complainant denied these actions even though they had clearly occurred. He was suspended on May 18th and management subsequently decided to terminate him due to his sanitation and safety violations. It had nothing to do with his race, color, national origin, or retaliation for complaining of discrimination.
 - g) Mr. R began working for Respondent in 2006 and it is likely that he reported other employees. They do not keep track of these records and have no examples to provide. The only way to get this information would be to review every employee's personnel file. Mr. R had no incentive to fabricate his reports about Complainant's behavior. Complainant also did not initially deny clipping his nails and did not use the Grievance and Arbitration process pursuant to policy to dispute his step 3 discipline.
- 5) Mr. J provided the following:

- a) He is African American. He worked with Complainant in the meat department at the Portland store. He saw Assistant Manager wear his hair in a ponytail without a hairnet which is a violation of the store's policy. He remembers there was hair once in a customer's meat and he suspected it was Assistant Manager's. He heard from people that Complainant violated health and safety rules, but he never saw him violate the rules. He heard others (including Assistant Manager) say that they did not like him and that he was fat and worthless. He has felt discriminated against since Assistant Manager took over the meat department. He feels that he and Complainant are treated differently than other employees and believes it is a race issue.

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.

Termination – Race / Color / National Origin

- 2) The Maine Human Rights Act provides that it is unlawful to terminate an employee because of race, color or national origin. 5 M.R.S.A. § 4572(1)(A).
- 3) 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).
- 4) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) he belonged to a protected class, (2) he performed his job satisfactorily, (3) his employer took an adverse employment decision against him, and (4) his employer continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261.
- 5) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. See *Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. See *id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory

motive or by proof that Respondent's proffered reason should be rejected. See *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet her overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.

- 6) In order to prevail, Complainant must show that he 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.
- 7) Here, Complainant establishes a prima-facie case of discrimination by showing that he is Latino from Puerto Rico (not disputed), he performed his job satisfactorily (his performance evaluations on record were positive), he was terminated, and he was replaced.
- 8) Respondent articulated legitimate, nondiscriminatory reasons for terminating Complainant, namely that he violated health and safety protocol and was written up for the violations, which resulted in his termination. The specific violations were cutting his nails in the meat department, blowing his nose in a sink and dipping a clean tray in dirty seafood water. Respondent also alleges he was the slowest employee in the meat department.
- 9) While Complainant does not have substantial evidence to show unlawful discriminatory motive, based on this brief, preliminary investigation, there are reasonable grounds (at least a 50% chance of prevailing in a civil action) that race/color/national origin discrimination was a factor in Complainant's termination. Reasoning is as follows:
 - a) Complainant alleges that he was treated differently than other, non-Latino employees in the Portland store by receiving unwarranted warnings and notes in his file when others did not. Respondent was asked to provide warnings placed in other meat department employees' files, and out of the warnings provided, the only warning that dated prior to the Charge of Discrimination was given to Mr. J, an African American employee. There were no further warnings or disciplines submitted. Mr. J then submitted an affidavit to the investigation stating that he did feel discriminated against in that department (although no examples of discrimination were given).
 - b) Complainant also alleged that Mr. R told him at one point to "go back to where he came from" and that he felt Mr. R was prejudiced against him and reported it to management. Mr. R denied this statement and management denied that Complainant ever reported that he felt discriminated against. While there is no evidence to prove that Mr. R targeted him due to racial discrimination, it is clear that Mr. R was the sole person to report the violations which led up to

Complainant's termination. Respondent also admitted that it was Mr. R's observation that Complainant was the slowest in the meat department. Respondent was asked to provide instances where Mr. R reported other employees, in order to determine if he also reported and complained of non-Latino, white employees. Respondent stated that he likely had reported others, but they provided no evidence to prove this.

- c) Complainant denies that he blew his nose in a sink or clipped his nails in the meat station. Respondent provided date-stamped photographs of clippings as evidence that the violation had occurred. While it is clear the photographs show clippings on a ground, there is nothing verifying who the clippings belong to. Respondent alleges that Mr. R would have no reason to frame Complainant for this violation or fabricate any of the actions he reported. However, given Complainant's testimony that Mr. R targeted him for discrimination, given that all of his violations were reported solely by Mr. R, and that no evidence was provided to show that Mr. R reported other employees as well, this reason cannot be credited.
- d) Respondent was also asked to provide a list of other employees, denoting race, color and national origin, who were terminated specifically for food health and safety violations prior to the filing of Complainant's Charge of Discrimination. Respondent provided a long list of terminations for "unacceptable behavior" but none indicating health and safety violations. While Respondent explained the difficulty of gathering this information, this was necessary comparative evidence to show whether other non-Latino white employees were terminated for reasons similar to Complainant.

Termination - Retaliation

- 10) 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).
- 11) 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).
- 12) The Maine Human Rights Commission regulations provide as follows:

No employer, employment agency or labor organization shall discharge or otherwise discriminate against any employee or applicant because of any action taken by such employee or applicant to exercise their rights under the Maine Human Rights Act or because they assisted in the enforcement of the Act. Such action or assistance includes, but is not limited to: filing a complaint, stating an intent to contact the Commission or to file a

complaint, supporting employees who are involved in the complaint process, cooperating with representatives of the Commission during the investigative process, and educating others concerning the coverage of the Maine Human Rights Act.

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

- 13) In order to establish a prima-facie case of retaliation, Complainant must show that he engaged in statutorily protected activity, he 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.*
- 14) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st 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 his overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.*
 - a) Here Complainant could not establish a prima-facie case of retaliation because he could not show that he complained of discrimination. Respondent denies that he complained and there is no further evidence to show that he did. Therefore, a causal link could not be established.

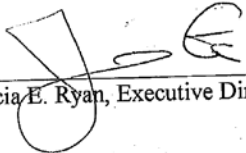
VI. Recommendation:

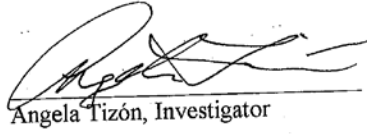
For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that Hannaford Bros. Co. discriminated against Ernesto Duran on the basis of race, color and national origin by terminating him.
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).
- 3) There are **No Reasonable Grounds** to believe that Hannaford Bros. Co. terminated Ernesto Duran in retaliation for complaining of discrimination.

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- 4) This portion of the case should be dismissed in accordance with 5 M.R.S.A. § 4612(2).



Patricia E. Ryan, Executive Director

Angela Tizon, Investigator