



# Maine Human Rights Commission

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August 24, 2015

## INVESTIGATOR'S REPORT E13-0608

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### **I. Complaint:**

Complainant ██████████ ██████████ who is Native American, alleged that Respondent ██████████ ██████████ ██████████ ██████████ ("Day's") discriminated against him on the basis of race and sex by subjecting him to a hostile work environment. He also alleged that he was retaliated against for complaining about unlawful harassment and that he felt compelled to resign from employment due to the harassment and retaliation.<sup>1</sup>

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

Respondent denied any discrimination and retaliation, and alleged that Complainant voluntarily resigned his position after working three separate periods of employment with the company.

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

- 1) Date of alleged discrimination: 4/20/2013.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 10/21/2013.
- 3) Respondent employs approximately 116 people and is subject to the Maine Human Rights Act ("MHRA"), Title VI of the Civil Rights Act of 1964, as amended, and state and federal employment regulations.
- 4) Complainant is represented by ██████████ ██████████ Respondent is represented by ██████████ ██████████ ██████████ ██████████.
- 5) Investigative methods used: A thorough review of the materials submitted by the parties and a Fact Finding Conference ("FFC"). 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.

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<sup>1</sup> Complainant alleges that he resigned because of unlawful harassment, and that the circumstances amount to a "constructive discharge". In order to determine whether or not Respondent violated the MHRA, it is not necessary to reach the question of whether or not the circumstances under which Complainant's employment ended amount to a "constructive discharge" within the meaning of the case law defining and interpreting that term. Accordingly, this issue is not addressed, and no recommended finding is provided on this issue.

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

- 1) Respondent Day's owns and operates six retail jewelry stores in Maine and New Hampshire, including one in Bangor. Its corporate office is in Waterville, Maine. The company is co-owned by three individuals, "Husband", "Wife", and Husband's brother ("Brother").
- 2) Complainant originally worked for the company from October 2003 until February 2005 as a Marketing Assistant at its corporate office in Waterville. He was rehired by the company as Marketing Visual Coordinator in February 2006 and worked in that position at the corporate office until March 2009. He was rehired again in June 2010, as a Manager Trainee at the Bangor store. He worked in that capacity until August 2011, when he was hired as the Marketing Visual Coordinator at the corporate office.
- 3) Other important third parties include "President" of Day's and the "Human Resources Manager".

#### *Complainant's Commission Claims*

- 4) Complainant was at a meeting in 2008 when Husband said, "we have a n\*\*\*\*r in the woodpile." Complainant said that he did not know what that meant and Husband replied it meant they had trouble.
- 5) On another occasion, Wife called into a meeting by telephone and indicated that she was lost. When Husband asked her where she was, she replied, "I don't know. I am in n\*\*\*\*r town."
- 6) Another time, when Complainant and two female co-workers were standing nearby, Husband told one of the females that she looked like a "squaw". After Complainant and the female employees told Husband that he could not make comments like that, he replied, "Why? What's wrong with squaw?"
- 7) Throughout Complainant's three periods of employment with the company, and as recently as April 2013, Husband made repeated comments about "Indians" and "firewater". Throughout Complainant's employment Husband also repeatedly referred to Complainant as "the Big Indian"; this occurred as recently as June 2013.
- 8) Husband also showed Complainant a picture of Brother wearing a Native American headdress and breastplate, in a "Great Spirit" scene, with a beer in the picture. Complainant did not understand how Husband could think that it was okay to show him a picture of a drunken white man dressed up like an Indian, mocking his heritage. Husband also posted and left up a picture of himself in "blackface" for Halloween on the company server.
- 9) Throughout Complainant's employment, there was also a highly sexually charged work environment. Use of words such as "p\*\*\*y" and "d\*\*k" were everyday occurrences. Complainant was also kissed on the lips and had his buttocks grabbed by Wife.
- 10) Complainant had expressed his concerns on several occasions that he thought the work environment at Day's was hostile and needed to change.<sup>2</sup>

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<sup>2</sup> When Complainant was asked at the FFC to provide specifics about when and to whom he expressed such concerns, he stated that he had spoken to the President on several occasions about "n-word" comments previously made by Husband and Wife. He also allegedly told President that he had seen Husband looking down a female co-worker's shirt. Complainant also alleged that he spoken with Human Resources about Husband's "squaw" comment.

- 11) Complainant was also subjected to unwelcome sexual advances by President. On a weekly basis through the Summer of 2013, President would approach Complainant from behind while Complainant was seated and hug him. After the hug, President would then stand very close to Complainant, with his crotch next to Complainant's face. Several times Complainant also noticed that President was staring at his crotch during conversations. This led Complainant to stop wearing a shirt and tie and instead wear long, untucked shirts. He also moved to more visible offices twice to try and keep President from harassing him.
- 12) On 8/19/2013, President told Complainant how he was going to retaliate against someone who had crossed him. President then stepped closer to Complainant, to the point where their faces were almost touching, and said, "That's why you don't burn bridges, because you never know when it's going to come back to get you." When President made that comment, he slapped Complainant twice on the side of his neck.
- 13) On 8/21/2013, Complainant filed a formal complaint regarding President with the Human Resources Manager. That same day, Complainant was diagnosed with stress and anxiety and prescribed medication.
- 14) On 9/3/2013, after receiving no satisfactory response to his complaints, and because he was under pressure from Day's to return to work, Complainant wrote a resignation letter indicating it was due to the hostile work environment.
- 15) Complainant believes that he was subjected to a hostile work environment based upon his race and sex. He also believes that the President's threat and assault on 8/19/2013 were in retaliation for his complaints that the work environment at Day's was hostile.

*Respondent's Answer to Complainant's Complaint*

- 16) Complainant was employed by Day's three times. The first time he left, Husband made a call to help him secure other employment. The second time he left, to work at a Native American museum, his written exit interview contained no negative comments and reflected a positive working environment. He maintained a good relationship with the company and was later rehired for a third period of employment.
- 17) Some of the incidents referred to in Complainant's complaint occurred during his first two periods of employment. The work environment could not have been as hostile as he described if he was willing to return to the company three separate times.
- 18) It was well known that Complainant was proud of his Native American heritage. His office was decorated with artifacts. Day's was supportive and denies treating him unfairly or improperly because of his heritage.
- 19) In June 2010, Complainant became a Manager Trainee in Bangor. His time in that position was uneventful aside from a complaint he made about a female co-worker who had made fun of a hearing impaired customer. Day's was supportive of his complaint against the co-worker, although Complainant later retracted his complaint.
- 20) In August 2011, Complainant returned to his prior position of Marketing Visual Coordinator at the corporate office. He started dressing formally for work, emulating President, who dresses very sharply.
- 21) Complainant's wife also worked for Day's intermittently part-time from home from 2003 until November 2012, when she was hired in a new position for the company as Assistant to the Vice President.
- 22) In July 2013, Complainant and his wife asked the interim Vice President of Finance (who held a law

degree) whether they could sue the company because Husband had dressed up as a Rastafarian for Halloween. She explained to them that this was not the basis for a suit against the company.

- 23) Complainant's wife left the company in August 2013, shortly after apparently learning of comments questioning her job performance. Respondent believes that her departure from employment just before Complainant's complaint about President and resignation influenced him greatly.
- 24) On 8/21/2013, Complainant filed a complaint against President, even though they appeared to have an excellent relationship and had worked closely on a daily basis since President was hired in July 2011. Human Resources Manager met with Complainant that day regarding alleged inappropriate and unprofessional behavior by President. Complainant referred to a conversation with President occurring on 8/19/2013, when President was so uncomfortably close that he could feel and smell President's breath on his face. He also told Human Resources that President had backed him up against the wall and slapped him on the side of the neck twice. Complainant stated that he did not say anything about being uncomfortable to President at the time but he did name a possible witness. Complainant also referred to President disclosing private information about other employees to him, as well as staring at his crotch during conversations, which he claimed led to him to dress in loose fitting clothing and long shirts.
- 25) On 8/22/2013, Human Resources met with President to review the complaint. President did recall a conversation with Complainant on 8/19/2013 and he acknowledged that he might have shared confidential information about another employee. President also stated that he did have habit standing close to the people he was talking with.<sup>3</sup> However, he denied backing Complainant into a wall or slapping him on the neck. He also denied ever staring at Complainant's crotch when speaking to him.
- 26) On 8/23/2013, Human Resources spoke to the witness Complainant had identified. While that individual did recall seeing a conversation between Complainant and the President on August 19<sup>th</sup>, she did not see President slap Complainant on the neck, or back him against the wall.
- 27) Based upon the results of this investigation, President was advised that he should not stand so close to people when speaking with them and that he was sharing more information than he should with employees. He acknowledged these concerns and said he would take responsive action. The investigation did not verify any of the other complaints made against President that were of a sexual nature. Going forward, it was determined that the best way to handle the situation was to limit contact between them to only necessary business interactions. Complainant was provided with the final conclusions section of the investigation.
- 28) When informed of the results of the investigation, Complainant took two weeks of vacation and then resigned his position before returning to the company, even though he was in good standing with the company, his job was not in jeopardy, and he had not been threatened.
- 29) Regarding specific points of disagreement with Complainant's allegations, Husband denied ever using the "n word" at any time in the workplace or at any Day's facility. Wife also denied ever using the same derogatory term, although she does recall once calling into a meeting when she was lost. None of the other participants at that meeting recalled Wife using that term either. Husband did admit to once telling a female employee that she looked like a squaw when she had her long black hair in a braid. At the time Husband was not aware that the term was a derogatory term for a Native American woman. Further, all of the above incidents occurred no later than 2008 based upon the witnesses Complainant named.

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<sup>3</sup> President stated at the FFC that this practice was due him having significant loss of hearing in both ears.

- 30) Husband did not recall ever making comments about Indians and firewater, although it is possible that he did refer to Complainant as the "Big Indian", as he is over six feet tall and of Native American heritage. If this term was used, no offense was intended and Complainant never told anyone that it was unwelcome.
- 31) Husband did show a picture of Brother wearing a Native American headdress and breastplate to Complainant because of his open interest in this culture. The photo does not appear to be offensive. Husband did dress as a Rastafarian for Halloween and the photographs were posted on the company server.
- 32) Wife absolutely denied ever kissing Complainant on the lips or grabbing his buttocks, or ever making any sexual advances towards any employee. Day's also denied Complainant's claim that vulgar sexual terms were tolerated in the workplace. He never complained about such language at any time during his multiple periods of employment.
- 33) Complainant also never stated that any of his office relocations were due to sexual harassment by President. And, despite his claim that he had expressed concerns on several occasions that the hostile work environment at Day's needed to change, in fact, aside from his complaint about President just before he resigned, his only other complaint<sup>4</sup> concerned a co-worker who mocked a disabled customer in 2010.

*Complainant's Reply to Respondent's Answer*

- 34) The hostile work environment at Day's began in 2008, when Husband used the "n word" at a weekly marketing meeting. Wife's use of the word when calling into a meeting also occurred in 2008. Complainant distinctly recalls later telling President about both Husband and Wife using the term.
- 35) Complainant left Day's in 2009 because the racist attitudes and hostile work environment were escalating. He did not say anything negative on his exit interview because he did not want to burn any bridges and thought he might need a favorable reference from Respondent in the future. He returned to the company in 2010 because his wife was attending college in Bangor and they had only one car. He had hoped that by that time the hostile work environment had ceased. The Bangor location was managed by Brother. However, Complainant soon learned that inappropriate behavior was tolerated at that store, including by a female co-worker about whom he filed a complaint<sup>5</sup>. He did withdraw his complaint after Brother made him feel like he was in the wrong for making a complaint about one of the store's top sales associates.
- 36) Later in 2010, when Complainant moved to the corporate headquarters as a Marketing Visual Coordinator, he did so because the female co-worker remained an employee at the Bangor store, and because President had been hired at the corporate office. Complainant believed that a President, with over 40 years' experience in the industry, could put a stop to racist and sexual behavior.
- 37) Even if Respondent "supported" Complainant's Native American heritage, such support would not excuse Husband's repeated comments to him about Indians and firewater, which even Wife once cautioned Husband to stop saying. Husband's use of the term Big Indian, and squaw, and showing him a picture of his brother mocking a sacred Native American ceremony, all illustrate his cultural insensitivity. Husband also showed the picture of himself in blackface to an African-American employee.

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<sup>4</sup> At the FFC it was determined that Complainant had also once complained about the behavior of a store manager during his second period of employment (2006 – 2009). The complaint was unrelated to Complainant's race or sex.

<sup>5</sup> The complaint alleged that the co-worker mocked a customer with disabilities.

- 38) Complainant was also subjected to sexual harassment in the workplace when President hugged him and stared at his crotch when speaking to him, which led Complainant to change how he dressed and move his office. Complainant was also sexually harassed by Wife, when she kissed him on the lips while intoxicated after a company dinner in Portland after a training. She also grabbed Complainant's buttocks while on a summer marketing sailing trip. This was witnessed by two female co-workers.
- 39) Although he may not have complained at the time, Complainant did ultimately complain about what had happened to him. It was extremely upsetting to him that President would speak to him about another employee, while violating his personal space, and then slap him on the side of the neck and threaten him.

*Investigator*

40) The following information was provided by **Complainant** at the FFC:

- a) When he was first hired by the company, he was interviewed by Husband and Wife. He worked at the corporate office in Waterville. He agrees his race was not a negative factor at the time he was hired. His primary duty as a Marketing Assistant was to assist Wife, who was the Marketing Director. There were no racial comments or sexual harassment during his first period of employment with the company, from 2003 to 2005.
- b) He returned to the company in 2006 because he wanted to move back to Maine. The first comment by Husband about Indians and firewater occurred approximately one year later. He made this comment about 8-12 times total over Complainant's last two periods of employment. Complainant never said he was offended and would respond to these comments by just joking it off.
- c) It was also during Complainant's second and third period of employment that Husband began calling him "Big Indian". Complainant just laughed it off rather than say anything at the time.
- d) Husband's comment about "n\*\*\*\*r in the woodpile" occurred in 2008, just as Husband was entering a weekly meeting. Two female co-workers also heard Husband make that comment. He has no idea why the witnesses denied recalling the comment in their submitted written statements, although for one of them it may be because she is still an employee. Both of the witnesses' statements did acknowledge that Husband made the squaw comment, but that is only because that comment is not as severe.
- e) Wife made the comment about being "lost in n\*\*\*\*r town" later that same year. The same two female co-workers heard that comment. No one said anything at the time in response to the comment but everyone in the room exchanged looks, including Husband.
- f) Complainant did not report any of these comments because he was afraid of the backlash. He does not know if anyone else reported Husband's or Wife's comment. That was the only time he ever heard either one of them use that word.
- g) He believes that he did speak to Human Resources informally about some of these comments during his second and third periods of employment, but he never filed any formal report because he was still afraid of losing his job if he did so.
- h) Husband showed Complainant a picture of Brother in a Native American costume in 2010 or 2011. Complainant thought dressing this way for Halloween was mocking his culture. He does not recall if he told either Husband or Brother that he was offended by this. He believes that the picture of Husband in blackface was posted on the company server in the corporate office in October 2010. He was not at the corporate office at that time. He was still working as a Manager Trainee at the Bangor store when it was first posted. He denies that he or his wife ever asked anyone if they could file suit on the basis of that picture.
- i) His wife did work as an Executive Assistant for the company from November 2012 until 8/26/2013, when she resigned to take a better job. No performance issues were ever mentioned.

- j) He finally decided to file a report with Human Resources on 8/21/2013 because his encounter with President on August 19<sup>th</sup> was the final straw. President began violating Complainant's personal space, both when seated and when standing, as soon as President was hired in July 2011. Although Complainant did not say anything at the time, he would move away when this occurred. Both Husband and President occasionally gave standing hugs to employees that were not of a sexual nature. It was only when President hugged Complainant while he was sitting that Complainant felt uncomfortable. Complainant never saw President stare at the crotch of any other employees. He does not know why President singled him out. He does not believe that President did this as anything sexual, but rather did it as a power thing.
- k) Wife kissed him on the lips once at a restaurant in Portland in 2010. While it was not an open mouth kiss it also was not a peck. He did not object or say anything at the time. Wife had also previously grabbed his buttocks during a sailing trip in 2008 or a prior year. He did not report Wife's conduct at the time as he was concerned that Husband may have seen her do this.
- l) After President started in 2011, Complainant recalls telling him about both Husband and Wife previously using the "n word" in 2008. He also told President about seeing the Husband looking down a female employee's shirt but he does not recall what year that occurred.
- m) The incident with President on 8/19/2013 that led to Complainant making a report of sexual harassment began with President telling Complainant about another employee who President was upset with for leaving just before the busy Christmas season. Complainant believed that President was telling him this because Complainant's wife had just left and this was President's way of warning Complainant that he better not leave too. He believes that the witness he named may not have arrived on the scene until after the President had slapped his neck. He did not say anything to President at the time this incident occurred, but instead reported it to Human Resources. He received a copy of the investigation the day he was due to return to work. He was told that President had been spoken to about his behavior, but he did not believe that President would change, so he decided to resign. The resignation letter refers to offensive comments and behavior and a demeaning and offensive work environment.
- n) He believes that both the racial comments and the sexual harassment interfered with his ability to perform his job duties. Although near the end of his employment Complainant did learn that the company was considering an individual for a Director of Marketing position, and that some of Complainant's duties were included on the job description for that position, these were not factors in his decision to resign. He resigned because of everything that had occurred during his multiple periods of employment.
- o) He agrees that he did invite both Husband and Wife to his wedding, that he had stayed on their boat overnight, and that Husband helped him get a job after his first period of employment with the company. He also agrees that he referred to Husband and Wife as "all my family" in a May 2012 email thanking them for letting him work at home due to back pain.
- p) He also agrees that most of the racial comments occurred in 2008 or 2009, during his first period of employment. The only racial comments made during his final two years were regarding Indians and firewater. He agrees that he did have a good relationship with the Human Resources Manager and could have used her to report offensive conduct or comments, but he used her more to just vent frustrations rather than to file formal complaints.

41) The following information was provided by **Husband** at the FFC:

- a) Aside from being an owner of Day's, he is also its Vice President of Marketing. The owners hire a President to actually run the company. He was Complainant's supervisor during both his first (2003 - 2005) and second (2006 - 2009) periods of employment with the company.
- b) It is possible that he did make comment about there being a "n\*\*\*\*r in the woodpile," but he did not say

it in a derogatory manner. This was a phrase his father used. It is also possible that Wife used the same word when calling in to a meeting although she almost never uses that word.

- c) He agrees that he did tell a female employee with a long braid that she looked like a squaw, but he meant this as a compliment.
- d) He also agrees that he may have made comments about Indians and firewater, including possibly at the annual meeting in New Hampshire in April 2013. He may also have called Complainant "Big Indian" but he did not do this often. He did not believe that Complainant would take any offense at this because of how close they were both inside of and outside of work. Complainant never told him that he was offended by this or any other comment he made. He did show Complainant a picture of Brother in Native American dress because Brother had several close friends who were Native American and Brother collected artifacts. It did not occur to him that Complainant might be offended by the picture.
- e) He dressed in blackface for 2010 Halloween but he did not bring the picture to work and he was not aware it was posted on the company's server. An African-American employee did ask him to show her the picture and then asked him to mail it to her. She never said she was offended.
- f) He denies that sexual talk was common in the workplace. He was not aware that Wife was accused of kissing Complainant on the lips or grabbing his buttocks until receiving the charge. He does not recall ever seeing either of those two things occur.
- g) He was interviewed by Human Resources after Complainant complained about President's alleged conduct. He does not believe that anyone else had ever made similar complaints about President. President was warned to temper his closeness. The company did not want to lose Complainant as an employee. He was not aware Complainant intended to resign until he received his resignation letter. He contacted Complainant while Complainant was on vacation and on Facebook to see if he would be returning to work, but he never responded. Complainant did not refer to alleged sexual harassment by President as a reason for why he resigned.
- h) While he agrees that the company did briefly explore the possibility of hiring a (Caucasian) male after someone else had spoken very highly of him, no position was ever offered to him.

42) The following information was provided by **Wife** at the FFC:

- a) Aside from being an owner of Day's, she is also its Vice President of Human Resources and Marketing, as well as its Chairman of the Board. She was never Complainant's supervisor although they did have weekly meetings when he was in the position of Visual Marketing Coordinator.
- b) While she does recall the company treating employees to a dinner in Portland after a training, she denies ever kissing Complainant on the lips. She would never do this, or grab Complainant's buttocks, especially since she was also Vice President of Human Resources. While she did not have certification in Human Resources, the person below her did.
- c) She does not believe a picture of someone in blackface would constitute a hostile work environment, nor would someone in Native American dress, at least under these circumstances.
- d) She does not recall her Husband ever using the "n word" in the workplace although she has heard him use it on rare occasions outside of work. She denies ever using the same word when calling in to a meeting when she was lost, or on any other occasion in her life.
- e) She also denies ever hearing Husband make comments about Indians and firewater, or hearing him refer to Complainant as the "Big Indian".
- f) While she did see President and other managers occasionally touch employees on the shoulder or give an occasional hug, there was nothing sexual about it. While the investigation did reveal that President was not aware that his style of interactions made others uncomfortable, it was concluded that this did not amount to sexual harassment.



43) The following information was provided by **President** at the FFC:

- a) He has been President of the company for about four years. He oversees all operations, including store managers and the marketing department. He worked with Complainant for about two years. They would interact daily because Complainant would do the windows, ad signs, and web pages for various stores. He believes that Complainant would have told him if he believed he was being treated unfairly because he was Native American.
- b) Complainant never told him or complained to him about Husband and Wife using the "n word." He would not have tolerated anyone using this word in the workplace because he has a relative who is of color. He also would not have tolerated sexual talk in the workplace.
- c) He did often speak to Complainant while he was seated at his desk. He never hugged Complainant, but he may have placed his hand on Complainant's shoulder. He absolutely never stared at his crotch while speaking to him. He has no idea how Complainant could perceive this to have happened.
- d) He recalls having a conversation with Complainant on August 19<sup>th</sup>, and agrees that he may have been standing close to him, since he has 65% hearing in one ear and 45% in the other. He does not recall what or whom the conversation was about. He could have made the statement attributed to him about "not burning bridges." He does not recall backing Complainant in to a wall or touching his neck. He believes that he and Complainant could have continued to work together even after Complainant filed a complaint about him with Human Resources.
- e) Based upon his own involvement in some Human Resources, he agrees that the picture of someone in a Rastafarian costume, or in a Native American costume, could be considered inappropriate by some people.

44) The following information was provided by **Human Resources** at the FFC:

- a) She has been a Human Resources Manager for about 29 years. Her duties include investigating reports about discrimination and harassment. She was also involved in the investigation into the report Complainant made about the co-worker who made fun of a customer. He later withdrew his complaint but she does not recall why. He seemed satisfied with the results of the investigation at the time. The female co-worker left the company soon afterwards.
- b) Complainant never gave any indication to her that he was being disrespected in the workplace or being treated unfairly because of his Native American heritage.
- c) While she and Complainant were friends and often spoke in general terms about workplace issues, the only time he ever spoke to her about any racial comment was when he told her that Husband had used the word squaw in referring to a certain female employee who had her hair in braid. Complainant told her that he had informed Husband that the term was derogatory. He never reported that either Husband or Wife had used the "n word," or the Indian and firewater comment, or that he had been called "Big Indian". Complainant also never reported to her that he was offended by the picture of Husband as a Rastafarian or the picture of Brother in Native American dress. She agrees that both pictures could possibly be considered inappropriate if they were displayed in the workplace. She never knew about the Native American picture until the charge was received but she did know about Husband's Rastafarian costume as she and her children had trick or treated at his house that year.
- d) Complainant never reported to her that Wife had kissed him on the lips or grabbed his buttocks.
- e) She was responsible for conducting the investigation after Complainant filed a complaint about President. While she did not ask Complainant to provide a written statement, she did interview him and then ask him to verify the accuracy of the information she wrote down. Only one witness to the interaction between Complainant and President on August 19<sup>th</sup> was identified. Complainant did not indicate that there were any witnesses to President touching his shoulders or staring at his crotch.
- f) The investigation was concluded in about two days. It was determined that while President may have

touched Complainant's shoulder at some occasion, there was no evidence that anything sex-based had occurred. She also did not believe that President's behavior on August 19<sup>th</sup> was an attempt by President to intimidate Complainant. While President was not disciplined, had Complainant returned to work, there would have been a plan to limit the amount of contact they had.

- g) A copy of the investigation's conclusions was sent to Complainant, but he never responded to it. He later said that he was uncomfortable returning to work under the circumstances but never claimed that it was because of racial issue or sexual harassment.
- h) She does not know why two employees were asked [in response to the Commission complaint] to confirm whether wife had made the comment regarding being "lost in n\*\*\*\*r town," and whether husband had used the word "squaw," but neither were asked to confirm whether husband had made the comment about "n\*\*\*\*r in the woodpile."
- i) The witness identified by Complainant as having seen his interaction with President on August 19<sup>th</sup> always appeared anxious, but did not seem to be intimidated during the interview.
- j) While she agrees that Complainant stated that offensive comments and behaviors had led to his resignation, she disagrees that he ever discussed such concerns with her. She agrees that she did not dispute his claim of this when his letter came in.

## **V. Analysis:**

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 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 MHRA provides, in part, that it is "unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of race or . . .sex. . . discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment." 5 M.R.S. § 4572(1)(A).

### *Hostile Work Environment – Race, color, national origin, ancestry<sup>6</sup>*

- 3) The Commission's Employment Regulations provide, in part, as follows:

Harassment on the basis of race is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct of a racial nature constitute racial harassment when:

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

Me. Hum. Rights Comm'n Reg., 94-348 Code of Maine Regulations Ch. 3, § 3.09(F) (1) (July 17, 1999).

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

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<sup>6</sup> Although Complainant only checked the box for "race" on his Commission complaint, it is clear on the basis of the submissions and information provided at the FFC that his claim also alleged discrimination based upon his color, ancestry, and national origin. In this report, those protected categories will be referred to collectively as "race."

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

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

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

*Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 22, 969 A.2d 897, 902-03.

6) The Commission's Regulations provide the following standard for determining employer liability for racial harassment committed by a supervisor:

An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to racial harassment. When the supervisor's harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

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

Me. Hum. Rights Comm'n Reg. Ch. 3, § 3.09(F) (2) (July 17, 1999).

7) The Law Court has held as follows: “The immediate and appropriate corrective action standard does not lend itself to any fixed requirements regarding the quantity or quality of the corrective responses required of an employer in any given case. Accordingly, the rule of reason must prevail and an employer's responses should be evaluated as a whole, from a macro perspective.” *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 28, 969 A.2d 897, 905.

8) Here, Complainant establishes a hostile work environment claim by showing that he was subjected to unlawful harassment on the basis of race, that the harassment was severe or pervasive enough to create an

abusive environment, that the harassment was both objectively and subjectively offensive, and that a basis for employer liability has been established. Reasoning is as follows:

- a) As a threshold matter, it is disputed whether Husband and Wife were ever Complainant's direct supervisors. Complainant claimed that during his first period of employment with the company, 2003–2005, when he was a Marketing Assistant, his primary duties were to assist the Marketing Director (Wife). It does not appear that Husband was ever Complainant's direct supervisor. Regardless, in this case, the affirmative defense described above is not available because the alleged harassers were also co-owners of the company. Therefore, even if the harassment did not result in any tangible employment action, the owners' unlawful actions are imputed automatically to the employer since owners are considered to be the "alter ego" or "proxy" of the company.
- b) The record reflects that Complainant was likely subjected to repeated comments from Husband about Indians and firewater. It is notable that while Respondent claimed in its written response to the charge that Husband "does not recall" ever making the alleged statement, at the FFC he stated that he "may have," and that "yes, it was possible," that such a comment was said as recently as April 2013, well within the 300 day period<sup>7</sup> preceding Complainant's filing of his complaint. Since this comment is considered timely under the MHRA, other racial comments that occurred beyond the 300 day period may also be considered as evidence relevant to events that are deemed timely.
- c) Similarly, while Respondent initially denied in its written response to the Commission complaint that Husband had ever referred to Complainant by the name "Big Indian", at the FFC Husband admitted that he had "may have" used that term, at least on an infrequent basis as well. Husband claimed that he felt comfortable using the term around Complainant because they were very close both inside and outside of work.
- d) It is also undisputed that on at least one occasion Husband referred to a (non-Native American) female co-worker who had a braid as a "squaw," although it is alleged that Husband was not aware that this was a pejorative word at the time. Although the female employee with the braid was apparently not offended, possibly because she was not Native American, Complainant did find the term offensive. Similarly, Husband also showed Complainant a picture of Brother dressed in a Native American costume, which Complainant interpreted as mocking of his culture.
- e) In addition to these comments that related to Native American heritage or culture, it is more likely than not that Husband and Wife also each used the racial slur "n\*\*\*er" in the workplace on at least one occasion. Again, it is notable that while in Respondent's submission Husband "adamantly denies" ever using the term in the workplace, at the FFC he acknowledged that "may have said it, but not in a derogatory manner." He also conceded that it was a phrase his father had used, by way of explanation or as an excuse. Further, while at the FFC Wife continued to insist that she would never have used the word in the workplace (despite recalling she once called into a meeting while lost), Husband stated that while he could not specifically recall her using the word at work, "it was possible" that she had. The fact that Respondent also never asked any witness to confirm that Husband had not used the term (as opposed to Wife's comment) could also suggest that Respondent was leery of asking this question because the incident may have occurred as alleged.

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<sup>7</sup> Under the MHRA, a person may file a complaint with the Commission "not more than 300 days after the alleged act of unlawful discrimination." 5 M.R.S. § 4611.

- i) It is found in this case that while the use of the “n word” would presumably have been even more offensive to those of another race or color than to a Native American, it still could be evidence of a bias towards any member of a racial minority, and therefore could contribute to a hostile work environment even if it was not a direct reference to Complainant’s own race.
- f) It is clear that many of the racial comments, aside from comments regarding Indians and firewater and use of the term “Big Indian”, may have occurred only during Complainant’s second period of employment (2006 – 2009). The fact that he later returned for yet a third stint with the company does suggest that, even in the face of such language, that he did not consider it to be a hostile work environment. However, he claimed that he returned a third time because he needed a job in the Bangor area (because his wife was enrolled in college there) and/or because he thought the workplace environment may have changed since he last left. In any case, since it is probable that some racial comments continued (Indians and firewater, “Big Indian”), it is possible that Complainant did not determine that a truly hostile work environment arose until it continued into his final period of employment.
- g) Therefore, in this case, even though Complainant never reported that he felt harassed or subjected to a hostile work environment because of his race, Respondent is nevertheless liable because Complainant could not reasonably have been expected to report that two of the three co-owners of the company were the alleged harassers. The fact that Wife also held the title of Vice President of Human Resources would also reasonably cause Complainant to doubt whether the traditional reporting process for discrimination would be effective and fair in this case.
  - i) Even if Husband and Wife were not co-owners whose conduct was directly imputed to Respondent, Complainant would likely nonetheless succeed on his claim by establishing that he suffered a tangible employment action when he resigned his position due to the harassment he experienced. It is a violation of the MHRA if, although not formally terminated, an employee has no reasonable alternative to resignation because of intolerable working conditions. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). “The test is whether a reasonable person facing such unpleasant conditions would feel compelled to resign.” *Id.* In addition, “an employee can be constructively discharged only if the underlying working conditions were themselves unlawful (i.e., discriminatory in some fashion).” *Sweeney v. West*, 149 F.3d 550, 557-558 (7<sup>th</sup> Cir. 1998). Here, the underlying conditions were discriminatory, and Complainant felt compelled to resign when he realized that the racial harassment by the owners was not going to stop.
- 9) Some the remaining alleged incidents offered by Complainant as evidence of racial discrimination are less clear, and seem to involve issues that are more demonstrations of cultural insensitivity than demonstrably unlawful discrimination, such as Husband showing Complainant a picture of Brother in Native American dress, or showing a picture of Husband dressed as a Rastafarian for Halloween. While each of these acts arguably reflects a lack of cultural awareness, they appear to be isolated incidents that do not either individually or together significantly contribute to a hostile work environment. Even the so-called “squaw” comment made by Husband occurred on a single occasion, and he never used the term again after Complainant (and the females) advised him the term was considered offensive.
- 10) In sum, Respondent is found to be liable for the hostile work environment because both the relative pervasiveness of some comments (Indians and firewater, “Big Indian”), and the severity of another term likely used by Husband and Wife regarding other people of color, taken together, would meet the MHRA’s reasonable grounds standard of at least an even chance of proving in a civil action that a hostile work environment existed in this case based upon the racial comments made by the owners.

### *Sexual Harassment*

- 11) Harassment on the basis of sex is a violation of Section 4572 of the MHRA. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when "such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Me. Hum. Rights Comm'n Reg. Chapter 3, § 3.06(I) (1)(c) (July 17, 1999). Complainant's sexual harassment claim is analyzed under the same standards as those used to analyze his racial harassment claim.
- 12) As it relates to Wife, Complainant's claim of sexual harassment hinges on two incidents: Wife allegedly grabbing Complainant's buttocks while on a sailboat trip in 2008, and allegedly kissing him on the lips after a company dinner in Portland in 2010. Neither of these events can be considered timely under the MHRA since both far exceed the 300-day period that preceded Complainant's filing of his complaint.<sup>9</sup> However, even if this claim was timely, it is unlikely that these two isolated incidents of alleged sexual harassment occurring two years apart in a span of approximately eight years of total employment, could be considered "pervasive", and neither can reasonably be described as "severe."
- 13) Regarding President's alleged sexual harassment, it is unclear when Complainant contends that it began. Complainant stated at the FFC that President began hugging him (both standing and while seated) as soon as President was hired in July 2011. However, in his original Commission complaint, Complainant suggested that it was not until the Summer of 2013 that President would hug him and stand very close to Complainant with President's crotch next to Complainant's face. Complainant has not provided any time frame for when President allegedly began staring at his crotch during conversations, which allegedly led to Complainant changing his manner of dress, and moving his office twice.
- 14) In the complaint made to Respondent's Human Resources department, Complainant also referred specifically to an interaction he had with President on 8/19/2013. However, Complainant did not allege that President's behavior that day was in any way sexual. Instead, Complainant stated at the FFC that he believed President backed him in to a wall, approached him until their faces were almost touching, made a comment about not burning bridges, and slapped him twice on the neck, "as a power thing." Complainant stated that he believed President did this to warn Complainant not to cross him and leave the company suddenly, as Complainant's wife had recently done.
- 15) This statement is somewhat contradicted by Complainant's statement in his Commission complaint that he believed President's actions and comments that day "were in retaliation for [his] complaints that the work environment at Day's Jewelry was hostile," which would arguably constitute unlawful retaliation under the MHRA for asserting rights protected under the Act.<sup>10</sup> However, at the time the above interaction occurred

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<sup>9</sup> The fact that Complainant also alleged that he had been subjected to sexual harassment by President, at least some of which occurred during the 300-day period preceding Complainant's filing of his Commission complaint, does not remedy the untimeliness of claims against Wife since it involves a different alleged harasser and conduct.

<sup>10</sup> Complainant did not check the box indicating that he was making a retaliation claim, although he did state that he thought President's actions on 8/19/13 were retaliation for Complainant's complaints that the work environment was hostile. To the extent Complainant was seeking to claim retaliation for complaining about unlawful harassment, his claim must fail. The only report evidenced in the record was Complainant's complaint to Human Resources about President's alleged sexual harassment. This complaint was made on 8/21/13 – *after* the alleged neck-slapping incident. In fact, the 8/19 incident was the impetus for Complainant's formal report. Accordingly, the neck-slapping incident could not have been retaliation for Complainant's report about President.

Complainant had not yet filed his sexual harassment complaint about President with Human Resources, nor had Complainant made any other type of report or complaint about discrimination, harassment, or a hostile work environment. While Complainant did state at the FFC that he had discussed Husband's and Wife's use of the "n word" soon after President was hired in 2011, as well as possibly discussing with President Husband's allegedly looking down a female co-worker's shirt, Complainant did not identify any contemporaneous report about a hostile work environment, or any other type of discrimination or harassment, that might have motivated President to retaliate against him on August 19<sup>th</sup> for that report. Further, even if President's actions and comments were designed to dissuade Complainant from abruptly leaving the company and "burning bridges", this would not necessarily be illegal, so long as it was not done in response to him raising concerns about discrimination, harassment, or a hostile work environment.

- 16) There is little, if any, evidence - aside from Complainant's own perception - that President engaged in sexual harassment towards him, or directed harassment at him because of his sex. Complainant stated at the FFC that it was not unusual for President and Husband to hug both male and female employees on occasion as a show of support or congratulations. President also explained at the FFC that his habit of speaking very closely to people was due to him having significant hearing loss in both ears. Complainant's remaining allegation that President stared at his crotch during conversations is impossible to prove or disprove, although President vehemently denied ever doing so, both at the FFC and when he was interviewed by Human Resources. Even assuming that President's staring/hugging harassment did occur, there is no evidence that it unreasonably interfered with Complainant's work performance, even if it did lead him to adopt a more casual style of dress. This conduct clearly did not have either the purpose or effect of substantially interfering with Complainant's work performance or creating an intimidating, hostile, or offensive working environment.
- 17) In sum, Complainant has not established that he was likely subjected to unlawful sexual harassment by either Wife or President.

#### **VI. Recommendation:**

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

- 1) There are **Reasonable Grounds** to believe that Respondent H.E. Murdoch d/b/a [REDACTED] discriminated against Complainant [REDACTED] on the basis of race by subjecting him to a hostile work environment, and conciliation of this portion of the complaint should be attempted in accordance with 5 M.R.S. § 4612(3);
- 2) There are **No Reasonable Grounds** to believe that Respondent discriminated against Complainant [REDACTED] on the basis of sex by subjecting him to a hostile work environment, and this portion of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).

  
Amy M. Sneider, Executive Director

  
Robert D. Beauchesne, Investigator