



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

MHRC Case No. E15-0552

November 9, 2017

Michael J. Henry (Jay)

v.

RSU 73 (Livermore Falls)¹

I. Summary of Case:

Complainant Michael J. Henry, who worked as a teacher for Respondent RSU 73, a regional school unit, alleged that Respondent discriminated against him based on age when it reassigned the Advanced Placement ("AP") classes he taught.² Complainant also alleged Respondent retaliated against him when he complained about age discrimination by issuing him letters which threatened his employment. Respondent denied discrimination or retaliation and stated it needed to train a new teacher to teach AP classes to prepare for the future, and that it disciplined Complainant when he acted unprofessionally in response to the reassignments.³ The Investigator conducted a preliminary investigation, which included reviewing all of the documents submitted by the parties, holding an Issues & Resolution Conference ("IRC"), and requesting additional information. Based upon this information, the Investigator recommends that the Commissioners find that there are reasonable grounds to believe that Respondent discriminated against Complainant on the basis of age and reasonable grounds to believe that Respondent retaliated against Complainant for engaging in protected activity.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: April 8, 2015 through June 2, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): December 7, 2015.

¹ Complainant named Respondent as "RSU 73"; Respondent provided that its legal name is Regional School Unit #73. As Complainant did not amend his complaint, the name he used has been retained.

² Complainant alleged that he was demoted because he was teaching lower-level classes; even though he was not teaching his preferred classes, his position did not change and his salary subsequently increased. He was not demoted.

³ At the IRC and in later submissions, Complainant suggested he had been subjected to a hostile work environment and constructively discharged in the school year after he had been disciplined; he alleged that when Principal instituted a policy requiring teachers to greet one another in the hall, he felt targeted, mocked, and pressed to attend meetings, and felt his free speech was impacted. Complainant did not substantiate his claim of a hostile work environment, as the record does not show alleged harassing behavior that was severe, pervasive, objectively offensive, or that created an abusive work environment. Complainant also did not establish discriminatory conditions at his employment that were so severe that a reasonable person would have felt compelled to resign. Thus, to the extent they may have been raised, any potential claims of hostile work environment and/or constructive discharge are not analyzed further here.

- 3) Respondent has approximately 310 employees and is subject to the Maine Human Rights Act ("MHRA"), the Age Discrimination in Employment Act ("ADREA"), and state and federal employment regulations.
- 4) Complainant is represented by Jordan Payne Hay, Esq. Respondent is represented by Michael Buescher, Esq.

III. Development of Facts:

- 1) Complainant provided the following in support of his claims:

Complainant, who is 68 years old, taught AP United States History ("U.S. History") at RSU 73 for 23 years. When he received his teaching assignments for the 2015-2016 academic school year, Respondent had not assigned him any AP classes. Respondent told Complainant that he was not assigned his usual AP class because he was nearing retirement; Respondent needed to "think about the future" and train another teacher ("Teacher 2") to instruct the class. After Complainant objected to the reassignment and accused Respondent of age discrimination during a departmental meeting, Principal met with Complainant about his unprofessional response and told Complainant he had been "insubordinate." When Complainant asked how, Principal told him his allegation of age discrimination was inappropriate. Subsequently, Complainant received letters about his conduct which threatened his employment. Complainant objected to the letters, after which Respondent distributed classes again, giving Complainant College Preparatory sections, but not any AP class. Complainant was then given a different reason for the reassignment, which was a pretext for discrimination.

- 2) Respondent provided the following in support of its position:

For several consecutive years, Complainant provided Respondent with notice of his intent to retire. Respondent needed to have another teacher gain experience teaching its AP U.S. History class, so it assigned those classes to Teacher 2. Class assignments are subject to change, and no teacher is ever guaranteed a specific class. In addition to the matter of imminent retirement, Complainant also failed to attend a number of departmental meetings, including the meetings in which class assignments were discussed. When Complainant learned of the reassignments, he became angry and yelled at Department Head in her office and was inappropriate to Principal in another departmental meeting. At this meeting, Complainant raised his voice and alleged Respondent was engaging in age discrimination. This was inappropriate; Complainant should have made this allegation in private, and his conduct was disruptive to the meeting. Thereafter, Principal and Complainant met to discuss Complainant's unprofessional conduct. The letters Complainant received were summations of these meetings, and not disciplinary in nature. Respondent's decisions were informed by Complainant's failure to work collaboratively.

- 3) The Investigator made the following findings of fact based on the documentation submitted by the parties and the information gathered at the IRC:
 - a) Respondent offers a variety of classes to the high school students in its district, including: General classes, College Preparatory classes, and AP classes. AP classes are different than other classes in that they are equivalent to introductory college courses, culminate in a test administered by an independent board ("AP Board"), and may be transferable for college credit.
 - b) Teaching duties are discussed within departmental meetings, recommended by the Departmental Head, and finalized by the School Board. Respondent provided the School Board delegates its authority to

the Superintendent and the Principal, who retain significant discretion.

- c) Respondent employed Complainant as a social studies teacher from 1972-2016. From 1992 until 2015, Complainant was assigned to teach AP U.S. History (as well as other classes).
- d) Teachers employed by Respondent and contemplating retirement send Respondent informal letters of possible retirement by February 1st each year ("February 1st Letters"). According to the collective bargaining agreement ("CBA") between the teachers' union and the School Board, this reserves the teacher's right to payment for accrued sick time in the event they do retire that year. Teachers who chose to retire sent a second letter later in the year.
 - i. Complainant sent February 1st Letters in four consecutive years: 2010, 2011, 2012, 2013. The practice of submitting February 1st Letters ended for all teachers in 2014 with a new CBA.
 - ii. Between 2009 and 2013, fourteen other teachers submitted February 1st Letters. Seven of those teachers also submitted the letters in multiple consecutive years; in at least two cases, the teachers did not retire and taught for several years after they began submitting February 1st Letters. The record does not reflect those teachers had their classes reassigned or that Respondent otherwise began planning for their retirement.
 - iii. Other than the February 1st Letters, Respondent could not recall discussing retirement with Complainant.⁴
- e) Each year the AP Board holds a training for teachers instructing AP classes, and each year teachers are asked to submit their curriculum for approval. The AP training in March 2015 included information about a new style of test the AP Board was implementing, among other things.
- f) Sometime in Fall or early winter 2015, the history Department Head ("Department Head") asked Complainant if he intended to attend the training. He stated that he did not.⁵ Respondent never told Complainant the training was required.
- g) In or around January or February 2015, Respondent asked Teacher 2 if she would like to attend the training; Teacher 2 did attend.
- h) On April 8, 2015, Complainant's department held a meeting where teaching assignments were discussed and made. Complainant did not attend the meeting because after he attended the meeting on teaching assignments the previous year, Respondent changed his schedule over the summer; he did not want to attend the meeting if his teaching assignments could later be changed without notice or agreement. Complainant was not assigned any AP class, including the AP U.S. History class he had taught for 23 years, which was assigned to Teacher 2.
- i) That same day, Department Head sent an email announcing the teaching assignments. Complainant objected to this assignment, and felt hopeful when the Principal offered to meet to discuss his

⁴ Respondent stated it also knew Complainant intended to retire because Complainant discussed the matter with students, but provided no supporting evidence even after being asked to do so.

⁵ Complainant already had studied the philosophical changes and new standards from the AP Board, rewritten his curriculum to accommodate the changes, and taught the new test to students once the previous year. Complainant's AP syllabus for the 2015-2016 school year had already been approved by AP Board when Respondent decided to reassign his class. Department Head stated at the IRC that some students had told her that they felt unprepared for the new test, but provided no additional details. Department Head never spoke to Complainant about these complaints.

assignment. Complainant went to Principal in his office and asked him why he had only been assigned General level courses. Complainant alleged Principal explained that the assignment was made because Complainant was "nearing retirement." Complainant asked what Principal meant, and Principal only reiterated, "You are nearing retirement." Principal could not remember whether or not he had made any statement about retirement at this meeting.

- j) Complainant then went to Department Head to seek further explanation.⁶ Complainant alleged that Department Head stated he was being reassigned because they needed to "plan for the future." According to Respondent, Complainant yelled and slammed the door; it provided witness statements from Teacher 2 and another history teacher ("Teacher 1"). Complainant stated the halls were empty and there were no other witnesses. Neither party disputes Complainant was emotional in this exchange.
- k) On April 9, 2015, another departmental meeting was held, with Principal, Department Head, and Complainant all in attendance. Principal and Department Head explained to Complainant that Teacher 2 was assigned the AP class because the school needed "to plan for the future" in the interest of students. Principal and Department Head also discussed Complainant's conduct toward Department Head the previous day, as well as meeting attendance.
 - i. In this meeting, for the first time, Complainant stated he thought Respondent was making conclusions based only on age; Complainant said that others at the meeting laughed and assured him he was not going to lose his job. Both parties agreed that the meeting became heated and Complainant and Teacher 1 raised their voices while arguing about whether Complainant was being given unwanted assignments because he came to the RSU from a different school than the others at the time the district was formed.
 - ii. Respondent suggested during the meeting that Complainant could co-teach the AP class as a mentor to Teacher 2; this was the first and only time this was proposed, and the parties never returned to discuss the mentoring proposal.
- l) On April 16, 2015, Principal sent an email to Complainant asking to meet with him because of his "tones and demeanors" on April 8, 2015 and April 9, 2015. At the IRC, when Principal was asked to what he meant by "tones and demeanors," he stated it meant "the volume" of Complainant's voice on these two occasions.
- m) On April 27, 2015, Principal met with Complainant to discuss Complainant's behavior on April 8, 2015 and April 9, 2015 and Complainant's non-attendance at earlier departmental meetings. Principal told Complainant he had been "insubordinate" with him at the April 9, 2015 meeting. Complainant's Union Representative also attended the meeting. Union Representative's contemporaneous notes show that the insubordination charge was related to Complainant's allegation of age discrimination.
- n) On April 29, 2015, Principal sent Complainant a letter commemorating the April 27, 2015 meeting. The letter clearly stated that it was a letter of reprimand, which would be placed in Complainant's file. The letter went on to threaten further discipline and termination if insubordinate behavior continued.
 - i. Teacher 1 was not disciplined for his April 9, 2015 behavior. Respondent did not demonstrate how Teacher 1's raised voice, tone, or demeanor was different than Complainant's, but provided that Teacher 1 was not disciplined because he was reacting to Complainant.
- o) On May 5, 2015, Complainant objected to the content of Principal's letter and its disciplinary nature,

⁶ Complainant provided Principal sent him to do so, after he was frustrated he could not satisfactorily explain the reason for the reassignments.

and stated a desire to file a grievance. Complainant and Principal met, and Complainant made some apology for his behavior. They agreed that Principal would revise the letter, which he did on May 11th. The new letter was a "letter of summation", and was not disciplinary.

- p) On May 19, 2015, Respondent held another departmental meeting, and class assignments were redistributed. Complainant was given two College Preparatory classes, but was still not assigned to teach any AP classes. This time he was given a different reason for not being assigned AP classes: because the other, younger teacher had received required training on changes to the AP test and he had not.⁷
- q) On May 20, 2015, Complainant sent a final letter to Principal objecting to his letter of summation, which still included a warning that further insubordination would result in discipline.
- r) In June 2016, Complainant retired. Complainant provided he felt pressured to do so earlier than he had otherwise planned because of Respondent's response to his age discrimination claim, which he felt was embarrassing, and created intolerable social pressures and conditions for possible dismissal in what was otherwise an unsullied career.

IV. 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.

Terms and Conditions of Employment

- 2) The MHRA provides that it is unlawful to discriminate in the terms, conditions, or privileges of employment based on age. 5 M.R.S. § 4572(1)(A). The phrase "terms, conditions or privileges of employment" is broad and not limited to discrimination that has an economic or tangible impact. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "An employee has suffered an adverse employment action when the employee has been deprived either of 'something of consequence' as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld 'an accouterment of the employment relationship, say, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.'" *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20 (citations omitted). An abusive reprimand may also be actionable. *See King*, 611 A.2d at 82.
- 3) Because here 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).⁸
- 4) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that he (1) was a member of a protected class, (2) was qualified for the position he held, (3) suffered an adverse employment

⁷ Complainant disputed this training was required.

⁸ "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination...." *Doyle v. Dep't of Human Servs.* 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. Under the circumstances of this case, where Principal and Department Head denied some of the alleged statements and provided a context for raising the issue of Complainant's retirement in others, Principal and Department Head's statements are not considered direct evidence of Respondent's discriminatory intent.

action, (4) in circumstances giving rise to an inference of discrimination. *See Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). *Cf. Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1st Cir. 2002).

- 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 his 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. 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.
- 6) Complainant established a prima facie case by showing that he was a member of a protected class, that he was qualified for the positions he held, that he was subjected to adverse employment action when he was assigned lower-level classes⁹, and the circumstances give rise to the inference of discrimination since the parties agree that Complainant's potential retirement was a consideration in the class assignment. Respondent in turn articulated a legitimate, nondiscriminatory reason for its action: Respondent needed to have another teacher who could teach the AP classes once Complainant retired and Complainant's repeated notices of potential retirement suggested that his retirement could be imminent.
- 7) At the final stage of the analysis, Complainant has demonstrated that Respondent's reasons were false or irrelevant and that unlawful discrimination was the reason for Respondent's action:
 - a. The process by which classes are assigned is highly discretionary, in which Respondent's Principal is one of the ultimate decision-makers. Principal specifically testified that, in this instance, he based his assignment on Department Head's decision and recommendation. Though not direct statements, both Principal and Department Head made comments about retirement that suggest that Complainant's being of retirement age was a significant factor in their decision-making.
 - b. Respondent stated Complainant's impending retirement was the legitimate, nondiscriminatory reason for class reassignment, but at the same time it denied ever directly discussing retirement with Complainant. Respondent relies almost solely on Complainant's February 1st Letters to show that he had "a pattern" of introducing the idea of retirement; it is undisputed that these letters must be sent to preserve the right to certain benefits under the CBA. In the absence of any other indicator, Principal's decision to plan "for the future" suggests a discriminatory motive based on the assumption older workers are ready to retire.
 - c. The other reasons Respondent raised for the reassignment are not credible, most notably because Respondent only provided them after Complainant asked it to explain why it assumed he was retiring.

⁹ Respondent argued that because it has control over teaching assignments pursuant to the CBA and Maine law, *see* 26 M.R.S. § 965(1)(C), the assignment of a particular class is not an adverse employment action. Under the particular circumstances of this case, and considering that Complainant was assigned only lower-level classes after 23 years of teaching at the highest level, the reassignment is considered an adverse employment action.

- i. Respondent suggested Complainant was not qualified to teach AP U.S. History because of his failure to attend the training and because students had complained about their performance on the new test the prior year. Respondent never told Complainant about the alleged complaints, and never told him that he needed additional training because of his performance. Complainant's curriculum for the year had already been approved by AP Board, which meant that it considered him qualified.
- ii. Department Head decided to send Teacher 2 to complete the AP Board training months before class reassignments were made, and well before Complainant failed to attend the department meeting where class assignments were discussed. This strongly suggests that the explanation that Complainant's absence at the meeting influenced Respondent's behavior is false.
- iii. Other (younger) teachers who sent February 1st Letters did so repeatedly, and also continued to teach for years thereafter. There is nothing in the record to suggest that these teachers were given inferior teaching assignments as a result.

8) Discrimination in the terms and conditions of employment on the basis of age is found.

Retaliation Claim¹⁰

- 9) The MHRA also 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. § 4553(10)(D). The MHRA also provides that “[a] person may not discriminate against any individual because that individual has opposed any act or practice that is unlawful under this Act or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this Act.” 5 M.R.S. § 4633(1).
- 10) 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.*
- 11) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wyrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (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.* Complainant must show that he would not have suffered the adverse action but for his protected activity, although the protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).

¹⁰ At the outset of his complaint, Complainant also alleged retaliation in violation of the Maine Whistleblowers' Protection Act (“WPA”). At the IRC, Complainant stated he was not pursuing a WPA claim and asked to proceed with his retaliation claim under a MHRA analysis only.

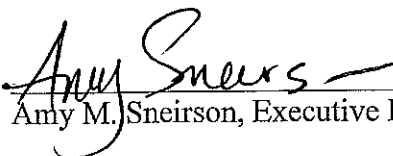
- 12) Here, Complainant established a prima-facie case by showing that he asserted a right to be free from age discrimination, and soon thereafter was deemed insubordinate for raising the issue of age discrimination at a department meeting and received letters which were disciplinary in nature. Respondent in turn provided a legitimate, nondiscriminatory reason for its actions: Complainant received disciplinary letters because of his inappropriate and unprofessional conduct toward Principal and Department Head.
- 13) In the final analysis, Complainant has met his burden of showing a causal connection between the protected activity and the adverse action, with reasoning as follows:
- a. Respondent argued that the final letter was one of summation, and was not disciplinary. While that letter had been revised to no longer state that it was discipline, as the initial letter did, the final letter continued to issue "directives", find Complainant's behavior unjustified and intolerable, and note that further similar behavior could result in discipline up to and including discharge. Under the particular circumstances here, the letter and its directives are being considered an adverse employment action.
 - b. Principal focused on the tone and demeanor of Complainant's statements as justifying the letters. At the IRC, Principal could not elaborate what this meant except to say Complainant twice raised his voice. It is undisputed that Teacher 1 also raised his voice, but he was not disciplined.
 - c. When Complainant and Principal met to discuss Complainant's intention to file a grievance about the initial disciplinary letter, Principal stated that was insubordinate because he raised his age discrimination claim inappropriately. Complainant's Union Representative produced contemporaneous notes which corroborate this statement by Principal. Principal also admitted he made the statement, but qualified it by saying what was inappropriate was "the volume of Complainant's voice" and that he should have made the complaint in private. Complainant explained that his complaint included Department Head, who had also stated his retirement was the reason for his reassignment.
 - d. The only action Respondent took in response to Complainant's complaint of age discrimination was to issue disciplinary letters. Respondent did not conduct any investigation into Complainant's age discrimination claim; instead it disciplined him for making it.

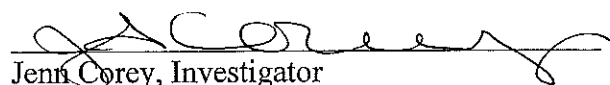
14) Retaliation for MHRA-protected activity is found.

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 RSU 73 subjected Michael J. Henry to unlawful age discrimination in the terms and conditions of employment;
- 2) There are **Reasonable Grounds** to believe that RSU 73 retaliated against Michael J. Henry for asserting MHRA-protected rights; and
- 3) The claims should be conciliated in accordance with 5 M.R.S. § 4612(3).


Amy M. Sneirson, Executive Director


Jenn Corey, Investigator