# Maine Human Rights Commission

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**INVESTIGATOR'S REPORT**
**MHRC Case No. E16-0268**
March 5, 2018

**Marcia Cray (Presque Isle)**

**v.**

**Central Aroostook Association (Presque Isle)**

## I. Summary of Case:

Complainant Marcia Cray, who was employed by Respondent Central Aroostook Association as a supervisor of direct support professionals, alleged Respondent discriminated against her based on disability by denying her requests for a reasonable accommodation and by discharging her; she also alleged that she was discharged in retaliation for her accommodation requests and for reporting unsafe working conditions. Respondent, a non-profit organization providing services for people with developmental disabilities, denied discriminating or retaliating against Complainant and stated that Complainant could not perform the essential functions of her job. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and requesting additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that both unlawful disability discrimination and unlawful "whistleblower" retaliation occurred.

## II. Jurisdictional Data:

1) Dates of alleged discrimination: 2015 through April 5, 2016.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): May 19, 2016.

3) Respondent has 146 employees and is subject to the Maine Human Rights Act ("MHRA"), Americans with Disabilities Act ("ADA"), the Maine Whistleblowers' Protection Act ("WPA"), as well as state and federal employment regulations.

4) Complainant is represented by John Gause, Esq. Respondent is represented by Sarah E. Newell, Esq.

## III. Development of Facts:

1) Complainant provided the following in support of her claims:

Complainant was twice assaulted by a resident ("Resident") in one of the two residential homes she supervised. The first time, in May 2015, she suffered [redacted], and a [redacted]. The second assault, in February 2016, resulted in Complainant suffering [redacted], a [redacted] and [redacted] Complainant reported to Respondent her injuries and her concerns about workplace safety due to this Resident, and requested reassignment and other accommodations because her medical provider had restricted her from contact with Resident. Respondent denied her requests and terminated her employment.

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

Respondent granted Complainant's request to minimize contact with Resident temporarily by not requiring her to work in Resident's home while she recovered from her injuries. Respondent believed Complainant's condition to be temporary and provided for accommodation up until a point where her restrictions would be lifted. When it became apparent Complainant's request was not temporary and she changed her requested accommodation to ask for "no contact" with Resident, Complainant could no longer perform the essential functions of her job and her employment was terminated.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties:

a) Respondent provides services to individuals with developmental disabilities, including through residential programs. At the time of her discharge, Complainant worked as a supervisor of direct support professionals ("DSP") who worked with residents at two of Respondent's residential homes. Complainant had supervised a single home at some point; Respondent provided that at the time of her discharge, its supervisors were assigned only one home early in their careers or when the home was not near any other home.

b) An inherent part of Complainant's job was to interact with and restrain individuals who may exhibit dangerous behavior.

c) On May 21, 2015, Complainant was assaulted by Resident at his residential home. She subsequently requested a male DSP always be present in the home in case Resident needed to be restrained. Complainant stated Respondent denied the request because it would be "discriminatory." Respondent provided it did not have enough male DSPs to staff every shift at Resident's home.

d) On February 12, 2016, Complainant was assaulted again by Resident. After the second assault, Complainant was diagnosed with [redacted]; Respondent knew of this diagnosis. Respondent disputed that Complainant had a disability. Complainant provided medical documentation showing that her [redacted] continued for at least six months, and apparently significantly impaired her health in that she continued to require treatment and exhibit symptoms.[1]

e) Between February and April 2016, Complainant's doctors restricted her from working with Resident. Complainant made several requests for accommodations so that she could perform her job while avoiding contact with Resident, including:

[1] The MHRA defines disability as including a physical or mental impairment that significantly impairs physical or mental health. 5 M.R.S. § 4553-A(1)(A)(2). A condition "significantly impairs physical or mental health when it "ha[s] an actual or expected duration of more than 6 months and impair[s] health to a significant extent as compared to what is ordinarily experienced in the general population." 5 M.R.S. § 4553-A(2)(B).

i. Always having a male DSP in the room with Resident. Respondent provided that it could not staff this request because it had too few male DSPs.
ii. Reassignment to supervise a single home which was not Resident's home. According to Complainant, Residential Director responded that she could not pick and choose her assignments.
iii. Reassignment to two different homes, with the supervisor currently assigned to those homes taking over Complainant's assigned homes. Respondent provided that this would not allow Complainant to avoid all contact with Resident, because of group visits between homes, and because of Complainant's on-call duties. Complainant provided that the switch would have eliminated most contact.

f) Respondent temporarily allowed Complainant to work in only one home while her injuries healed. During this time period, Complainant twice ran into Resident at Respondent's administrative offices. While this concerned her, Respondent was able to escort Resident out of the offices without incident.

g) In March 2016, Complainant witnessed Resident slam another staff member against a wall and taunt her. Complainant reported this incident, and her safety concerns, to Respondent.

h) At least one of Complainant's work restrictions specified "no contact" with Resident. However on April 4, 2016, less than two weeks before her discharge, Complainant's doctor provided the following restrictions: "avoid contact with offending consumer as much as possible" and "no one on one care with offending consumer."

i) On April 2, 2016 and April 4, 2016, Complainant met with Respondent to discuss her continuing requests for reasonable accommodation. Complainant stated that her assignment to a single home was working well, but that she continued to have concerns about encountering Resident. Respondent asked Complainant if she could think of any additional accommodation requests. Complainant provided she could not think of a new accommodation request other than those she had already suggested.

j) Respondent did not believe it needed to continue this accommodation indefinitely, because it did not allow Complainant to eliminate all contact with Resident.
i. Respondent provided that it could not ensure no contact with Resident because of group travel between homes and because Resident would also sometimes be present at its administrative offices. In her position, Complainant was expected to be in the administrative offices once daily to brief the Residential Director and pick up residents from a day program to transport them back home.
ii. Respondent stated that even if Complainant was assigned to a single home on a permanent basis, she would have been on a rotating on-call supervisor list. As such, Complainant may have been called in to Resident's home to deal with an emergency or to address staff shortages.

k) On April 15, 2016, Respondent terminated Complainant's employment.

l) In August 2016, after multiple violent assaults, Respondent decided to remove Resident from its home.

## IV. Analysis:

1) The MHRA provides the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary 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 change of Complainant prevailing in a civil action.

*Disability Discrimination — Denial of a Reasonable Accommodation*

2) Unlawful discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity." 5 M.R.S. §§ 4553(2)(E), 4572(2).

3) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complainant must show (1) that she is a "qualified individual with a disability" within the meaning of the MHRA; (2) that Respondent, despite knowing of her physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent's failure to do so affected the terms, conditions, or privileges of her employment. *See id.* Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.

4) The term "qualified individual with a disability" means "an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." 5 M.R.S. § 4553(8-D). Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . ." 5 M.R.S. § 4553(9-A).

5) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." *See Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm'n Reg. 3.08(D)(1) (July 17, 1999). The term "undue hardship" means "an action requiring undue financial or administrative hardship." 5 M.R.S.A. § 4553(9-B).

6) The Commission's Employment Regulations provide that in order "[t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a physical or mental disability in need of the accommodation. This process should identify the precise limitations resulting from the physical or mental disability and potential reasonable accommodations that could overcome those limitations." 94-348 C.M.R. Ch. 3, § 2(17)(C) (2014). An "employee's request for a reasonable accommodation requires a great deal of communication between the employee and employer . . . both parties bear responsibility for determining what accommodation is necessary." *Criado v. IBM Corp.*, 145 F.3d 437, 444 (1st Cir. 1998).

7) Failure by the employer to engage in the interactive process may constitute a failure to provide a reasonable accommodation, amounting to a violation of the MHRA. *See Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 515 (1st Cir. 1996). In determining responsibility for a breakdown in the interactive process, courts consider good faith and reasonable efforts in light of all the circumstances. *Goonan v. Federal Reserve Bank of N.Y.*, 12-CV-3859, Opinion and Order (SDNY 2014); citing *Beck v. University of Wisc. Bd. Of*

*Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996). Liability requires a "finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job's essential functions." *Jones v. Nationwide Life Ins.* Co., 696 F.3d 78, 91 (1st Cir. 2012); *see also Kvorjak v. State of Maine*, 259 F.3d 48, 52 (1st Cir. 2001).

8) It is found that Respondent denied Complainant a reasonable accommodation for her disability, with reasoning as follows:

   a. Complainant suggested several reasonable accommodations which would have met her work restrictions. Respondent did not propose any alternative accommodations, instead asking Complainant if she had any other suggestions. When she did not, Respondent – having offered no alternative at any point – discharged her. Respondent never argued Complainant's suggested accommodations would be an undue hardship, only that Complainant's suggestions would not fully address her restrictions and allow her to perform the essential functions of her position.

   b. Respondent acknowledged that in certain circumstances supervisors are permitted to supervise only one home; Complainant also suggested switching her assignment to two different homes. Respondent insisted that these accommodations would not have met Complainant's "no contact" restriction. Complainant's most recent restrictions, however, were not "no contact" with Resident, but rather to avoid contact as often as possible and not to engage in one-on-one care of Resident. Complainant's suggested accommodations would have met this restriction and allowed her to perform the essential functions of her position,[2] including being at Respondent's offices, since it allowed for some incidental contact with Resident.

   c. Even if Complainant's request had not been for "reduced contact" and had been for "no contact," Respondent could have honored Complainant's request. Just four months after Complainant's dismissal, Respondent discharged Resident for his dangerous behavior and decided to no longer provide care to him in its homes.

9) Denial of a reasonable accommodation in violation of the MHRA is found.

*Disability Discrimination: Dismissal*

10) The MHRA provides that it is unlawful to discharge an employee because of physical or mental disability. *See* 5 M.R.S. § 4572(1)(A).

11) 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).

12) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) she belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her 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); *cf. City of Auburn*, 408 A.2d at 1261.

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[2] Respondent provided the job description for its Residential Supervisor positions. The job description does not require supervision of two homes.

13) 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. 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. *Id.* In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.

14) Here, Complainant established a prima-facie case, and Respondent provided that it discharged Complainant because she could not perform the essential functions of her position.

15) In the final analysis, Complainant established that she would not have been discharged but for her disability. If Complainant was unable to perform the essential functions of her position, with or without reasonable accommodation, she would not be a "qualified employee with a disability", and her discharge would not be prohibited by the MHRA. In this case, however, there were reasonable accommodations that Respondent refused to make that would have allowed Complainant to perform the essential functions of her position. Instead, once it realized Complainant's restrictions were ongoing, it opted to discharge her without attempting to accommodate her.

16) It is found that Complainant's discharge was due to disability discrimination.

*Retaliation Claim*

17) The MHRA prohibits retaliation against employees who, pursuant to the WPA, make good faith reports of what they reasonably believe to be a violation of law or a condition jeopardizing the health and safety of the employee or others in the workplace. *See* 5 M.R.S. § 4572(1)(A); 26 M.R.S. § 833(1)(A). The MHRA also makes it unlawful for "an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of [the Act] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S. § 4572(1)(E).

18) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse action, which may be proven by a "close proximity" between them. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). The prima-facie case for a claim of MHRA retaliation requires, in addition, that the adverse employment action be "material," which 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 & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).

19) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in 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." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. *See also Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse action." *Id.* Complainant must show that she would not have suffered the adverse action but for her 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) (MHRA discrimination claim).

20) Here, Complainant established a prima-facie case by showing that she engaged in protected activity by requesting reasonable accommodations and reporting safety concerns, and she was discharged soon thereafter.

21) Respondent provided a legitimate, nondiscriminatory reason for its actions. Complainant could no longer perform the essential functions of her job, with or without an accommodation.

22) In the final analysis, Complainant has met her burden of showing that the real reason she was terminated was her protected activity, with reasoning as follows:

a. The record compels the conclusion that Complainant would not have been discharged but for her request for a reasonable accommodation. As noted above, Respondent denied all of Complainant's requests, and chose to discharge her rather than work with her to identify an acceptable accommodation.

b. Even though Complainant's disability was a factor that led to her discharge, the record also supports a finding that Complainant's report of safety concerns caused her discharge. Complainant reported her own concerns for her safety, as well an incident where a second staff member was physically accosted by Resident. Again, rather than address the source of the safety concerns, Respondent chose to discharge Complainant. Respondent was forced to address the issue several months later, when it discharged Resident because of his dangerous behavior, belatedly validating Complainant's concerns.

23) Retaliation for MHRA- and WPA-protected activity is found.

## VI. Recommendation:

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

1) There are **Reasonable Grounds** to believe that Respondent Central Aroostook Association discriminated against Complainant Marcia Cray on the basis of disability by denying her request for a reasonable accommodation and by discharging her from employment;

2) There are **Reasonable Grounds** to believe that Respondent Central Aroostook Association retaliated against Complainant Marcia Cray for engaging in MHRA- and WPA-protected conduct; and

3) The claims should be conciliated in accordance with 5 M.R.S. § 4612(2).

Amy M. Sneirson, Executive Director

Jenn Corey, Investigator