



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

E17-0029

December 14, 2018

Jimmy L. Ford (Portland)

v.

Home Depot USA¹ (North Windham)

Summary of Case:

Complainant, who worked as an assistant store manager for Respondent, a retail store, alleged that he was subjected to unlawful employment discrimination (denied a reasonable accommodation) because of his disability.² Respondent denied discrimination and provided that Complainant's requested accommodations were not compatible with his job responsibilities. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and holding a Fact Finding Conference ("FFC"). Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe

¹ Complainant named "Home Depot USA" as the Respondent in his complaint; Respondent provided that its legal name is "Home Depot U.S.A., Inc." Because Complainant did not amend his complaint, the name he used has been retained.

² Complainant's Commission complaint also alleged discrimination based upon race/color, and/or sexual orientation, and that he was subjected to retaliation (denied a requested accommodation) because he filed a workers compensation claim. The race/color claim is based on an allegation that a Caucasian (heterosexual) employee with a disability, "works as he pleases," and, "sleeps anywhere from one to three hours," during his shift, and that another Caucasian employee, "is permitted to use an [redacted] at work." However, Complainant has offered no evidence that either of these employees were in a comparable job position, or that their race/color and/or sexual orientation were possible factors in the accommodations they allegedly received. Further, since requests for accommodation were handled by Respondent's Human Resources department at the district and regional level, the decisionmakers would presumably be unaware of the race/color and/or sexual orientation of an employee requesting accommodation. Complainant was also repeatedly promoted, with accompanying pay raises, which also suggests that his race/color and/or sexual orientation were not viewed negatively by his employer. The remainder of Complainant race/color, sexual orientation claim is an alleged hostile work environment claim based upon two comments that occurred in 2014, that Complainant admittedly chose not to report. For these reasons, this portion of the claim is found to be untimely. Even if it was timely, two isolated comments over the course of years of employment would not be considered to be a hostile work environment. Lastly, the claim regarding alleged retaliation for filing a workers compensation claim, is not covered by the MHRA, because it involves a claim against a current employer, and not retaliation for a prior claim made while Complainant was working for a preceding employer. Complainant also arguably engaged in protected activity when he requested reasonable accommodations, but has not shown that he was retaliated against because of this protected activity. For these reasons, none of these claims will be analyzed further in this report.

Complainant was discriminated against on the basis of disability, and no reasonable grounds to believe that he was discriminated or retaliated against on the basis of any other protected class or activity.

Jurisdictional Data:

- 1) Dates of alleged discrimination: 1/11/2017 (ongoing).
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 1/19/2017.
- 3) Respondent is subject to the Maine Human Rights Act ("MHRA"), the Americans With Disabilities Act ("ADA"), and state and federal employment regulations.
- 4) Neither party is represented by legal counsel.

IV. Development of Facts:

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

Complainant, worked for Respondent for many years, most recently as an assistant store manager. He injured [REDACTED] at work, which resulted in [REDACTED]. His doctor cleared him to return to work, with reasonable accommodations.³ Respondent denied the request for accommodation, claiming that the [REDACTED] were unsafe to use at work. Customers routinely use such devices while shopping, and other employees have been allowed the same or similar accommodations, including Complainant, when he had [REDACTED] in the past. About six months later, Complainant again attempted to return to work with same work restrictions, and that time the were granted, without any claim of safety concerns.

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

Complainant was an assistant store manager. There would be many occasions he would be the only store-level manager on duty. His duties included the need to immediately address and resolve customer service and personnel issues, and to be responsible for supporting the safety of all associates and customers in the store in the event of an emergency. There were also safety concerns about having a [REDACTED] in a work environment, and that he would need to [REDACTED] even when there was no other key holder or manager to take over his responsibilities.⁴ Respondent decided instead to extend Complainant's workers compensation leave. Several months later, Complainant was cleared to return to work by his doctor, with fewer work restrictions. Respondent was then able to accommodate his new restrictions, and he was allowed to return to work.

- 3) The Investigator made the following findings of fact:

³ Complainant's initial request for accommodation included, [REDACTED]

[REDACTED] A subsequent note clarified that [REDACTED]

⁴ Respondent's articulated reasons for denial of the requested accommodation originally also included the fact that the accommodation would be necessary for up to one year. However, a subsequent note from Complainant's doctor clarified that requested accommodations would only be necessary for up to 60 days.

- a) Complainant began working for Respondent as a sale associate in 1998. He subsequently achieved several promotions (at various store locations), including attaining the position of assistant store manager in 2007. He was the Operations Assistant Store Manager ("OASM") at Respondent's North Windham store at the time he was injured at work in September 2017.⁵ The job description for the OASM position includes as physical job requirements, "Bending, stooping, reaching, twisting, lifting, pushing, pulling and moving merchandise and tools as needed when in the stores." Other physical job requirements listed included, "Moving around the store to be able to assist customers."
- b) Following Complainant's work injury on 9/8/2016, he reportedly [REDACTED]
- c) On 11/1/2016, Complainant submitted his first request for accommodation using Respondent's form. The form detailed the medical findings that supported the request for accommodation. The specific accommodations requested were as follows: [REDACTED]
[REDACTED] The specific duration of the requested accommodation was identified as, "To be determined; May last up to 1 year. Will assess regularly."
- d) On 11/16/2016, Complainant submitted the same form, which varied from the original in that [REDACTED] which could occur during Complainant's scheduled 15-minute breaks and lunch break. The second form also indicated that the specific duration of the requested accommodations was, "Until 1/1/2017, will assess regularly until then."
- e) Respondent provided that requests for accommodation are reviewed by the District Human Resources Manager ("DHRM"), the Regional Associate Relations Manager ("RARM"), the Associate Advice and Counsel Group ("AACG"), and the Medical Health Management group ("MHM").
- f) On or about 11/11/2016, Complainant contacted MHM to inquire whether his request for accommodation and information from his doctor had been received. Later that day, MHM documented that information from Complainant's doctor had been received, and that requested accommodations included: [REDACTED] the accommodations could be needed for up to a year, with reassessment to take place on a regular basis.
- g) On 11/14/2016, MHM spoke the DHRM regarding Complainant's request for accommodation. DHRM told MHM that she (DHRM) would be reaching out to the RARM to determine the next steps. On 11/15/2016, MHM sent an email to DHRM asking, "Is there any way that he [Complainant] can step down from the position?" DHRM replied by telling MHM that she had just discussed the request for accommodation with Complainant, and that his understanding was that [REDACTED] would only be needed for up to 60 days, not a year, as identified in his original request. MHM encouraged DHRM to, "Engage him [Complainant] in the interactive process," and then fax any new information to MHM.
- h) On 11/14/2016, DHRM notified MHM that she (DHRM) and the RARM had discussed the request for accommodation, but were unable to accommodate because of the following stated reasons: [REDACTED] in our environment;" 2) [REDACTED] -There may

⁵ Complainant actually sustained his workers compensation injury at Respondent's South Portland store.

not always be a key carrier or another manager present to take over management responsibilities; 3) That these accommodations would be necessary for up to one year.”

- i) On 11/29/2016, a Senior MHM notified the DHRM and RARM of Complainant's then-existing requests for accommodation, specifically, [REDACTED]. Later that day, RARM notified the Senior MHM that, “We are unable to accommodate at this time.” Complainant then remained out of work for over four months.
- j) On or about 4/7/2017, Complainant's doctor provided a note to Respondent indicating that Complainant was able to work at that time, assuming he was able to [REDACTED]. Respondent determined that they were able to accommodate these restrictions, and Complainant returned to work on 4/26/2017. Respondent claimed that it was able to accommodate the new request because Complainant's work “restrictions had changed significantly.”
- k) On 4/20/2017, Complainant and his store manager signed a form entitled “Documentation of Accommodation.” The accommodations listed included: [REDACTED]. The duration of the accommodation was listed as, “90 days – start 4/26/17 end 7/26/17,” with 7/26/17 as the date to follow-up with the associate.

V. Analysis:

- 1) The MHRA provides that 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 Maine Revised Statutes (“M.R.S.”) § 4612(1)(B). The Commission interprets the “reasonable grounds” standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA provides that it is unlawful to discriminate against an employee because of physical or mental disability. *See* 5 M.R.S. § 4572(1)(A).
- 3) Pursuant to the MHRA, 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).
- 4) 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, Complaint must show that they are a “qualified individual with a disability”⁶ who needed a reasonable accommodation for their physical or mental limitations, that Respondent was aware of their disability but failed to reasonably accommodate their limitations, and that Respondent's failure to do so affected the terms, conditions, or privileges of Complainant's 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.

⁶ 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).

- 5) In proving that an accommodation is “reasonable,” Complainant must show “not only that the proposed accommodation would enable [them] to perform the essential functions of [their] 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). The term “undue hardship” means “an action requiring undue financial or administrative hardship.” 5 M.R.S.A. § 4553(9-B).
- 6) In this case, Complainant established a prima-facie case by showing that he is a qualified individual with a disability who needed a reasonable accommodation for his physical limitations, that Respondent was aware of his disability but failed to reasonably accommodate their limitations, and that Respondent’s failure to do so affected the terms, conditions, or privileges of Complainant’s employment.
- 7) In this case, Respondent’s primary argument for refusing Complainant’s request for accommodation, is essentially that it was not feasible for Respondent to grant the requested accommodation due to safety reasons,⁷ and potential customer service issues. These explanations are found to be unpersuasive in this case for the following reasons:
 - a) Complainant submitted an initial request for accommodation on 11/1/2016, that requested use of a [REDACTED]. The request also indicated that the requested accommodations could “last up to 1 year.”
 - b) In response to this note, Respondent’s Human Resources department, at the regional and district levels, and the medical health management group, reviewed these restrictions and determined on 11/14/2016, that the company could not grant those accommodations, based upon a number of articulated factors, including that there were (unspecified) safety concerns about, “[REDACTED]” and that the, “...accommodations would be necessary for up to one year.”
 - c) While it is arguable whether this first request for accommodation was “reasonable” on its face, that is largely irrelevant in this case, given that a subsequent note (dated 11/16/2016) appeared to eliminate, or at least alleviate, many of the concerns that were the basis for the initial denial. The anticipated period of accommodation was reduced from up to one year, down to six weeks, and the [REDACTED] was reduced to 15 minutes (at breaks), from 20 minutes, “when there is a need.”
 - d) However, there is nothing to suggests that any further review of these lessened limitations was considered prior to Respondent reiterating its decision not to accommodate a couple weeks after these clarifications/modifications occurred. It is also notable that in April 2017 (after Complainant filed his charge with the MHRC), he renewed his request to be returned to work, and that on 4/20/2017, Respondent granted the same requests for accommodation [REDACTED] that it deemed “unsafe” for unspecified reasons less than six months earlier. This strongly suggests that the initial denial of the requested accommodation was not because it was “unreasonable on its face,” and that

⁷ Although Respondent asserted a general safety defense to the request for accommodation, it has provided no specifics aside from a general assertion that Complainant would not be able to assist employees and customers out of the store in the unlikely event of an unspecified emergency. However, Respondent has not indicated why they believe that Complainant would be any less able to assist in such situations, even if he was using [REDACTED]

Complainant was prevented from working for more than four months because of that erroneous conclusion.

e)

f) Complainant also credibly alleged that he (and other employees) had used [REDACTED] in the past, without Respondent raising any safety concerns.

8) Discrimination on the basis of a failure to provide a reasonable accommodation 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 Home Depot USA discriminated against Jimmy L. Ford on the basis of disability and conciliation of this claim should be attempted in keeping with 5 M.R.S. § 4612(3).
- 2) There are **No Reasonable Grounds** to believe Home Depot USA discriminated against Jimmy L. Ford on the basis of sex, sexual orientation, or race, or retaliated against him for engaging in protected activity, and these claims should be dismissed in accordance with 5 M.R.S. § 4612(2).


Robert D. Beauchesne, Investigator