



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT

**E17-0514**

December 14, 2018

**Victoria A. Schreiber** (Minot)

v.

**The Medicine Shoppe** (Lewiston)

### Summary of Case:

Complainant, who worked as a technician for Respondent, a pharmacy, alleged that she was subjected to unlawful discrimination (hours reduced) because of her sex and/or disability. Respondent denied discrimination and stated that Complainant's hours were reduced because she failed to work a full-time schedule. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and holding a Fact Finding Conference. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Complainant was discriminated against on the basis of sex and/or disability.

### Jurisdictional Data:

- 1) Dates of alleged discrimination: 10/12/2017.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 11/20/2017.
- 3) Respondent is subject to the Maine Human Rights Act ("MHRA"), the Americans With Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964, as amended, and state and federal employment regulations.
- 4) Complainant is not represented by legal counsel. Respondent is represented by James E. Belleau, Esq.

### IV. Development of Facts:

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

Complainant, who has a disability, worked for Respondent as a pharmacy technician. Her condition required periodic medical treatment. She became pregnant and informed her employer. Complainant's doctor recommended scheduled breaks and limited her daily hours. The pharmacy manager ("Manager") seemed upset by the note. The following week, Complainant was disciplined for not taking breaks as her doctor had

ordered. A week later, Manager told her she was being reduced to part-time because she was not working a full-time schedule. Manager refused to provide proof that Complainant was not working her scheduled hours. He ignored the progressive discipline policy. Manager and Complainant's supervisor ("Supervisor")<sup>1</sup> told Complainant that she would be given only four-hour shifts so that they did have to deal with her doctor's note.<sup>2</sup> The loss of hours resulted her losing medical insurance she needed for her pregnancy and disability. Manager claimed that co-workers had complained about Complainant's attitude. Her hour were reduced again, just before her maternity leave. Complainant contacted Manager about her schedule when her leave was almost over. Manager delayed responding. Complainant resigned<sup>3</sup> because the delay gave her too little time to make daycare arrangements.

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

Manager noticed that Complainant would not work her assigned hours, and then come in, without permission, to make up time. Manager warned her that if she did not start working a full-time schedule, she would become part-time. Manager also discussed her disruptive behavior at work, and her demeanor and attitude. Respondent complied with Complainant's doctor's note restricting her hours. She failed to follow those restrictions. She was reduced to part-time because of she failed to work her full-time schedule. Complainant then made a scene in front of customers and staff. In early 2018, she contacted Manager about returning to work from maternity leave. Manager asked her for a doctor's, clearing her to return to work. After she did so, she was returned to the schedule, but she decided to resign rather than return to work.

3) The Investigator made the following findings of fact:

- a) On 5/1/2015, Complainant was hired as a full-time (40 hours per week) pharmacy technician. At the time of hire, she informed Respondent that she had a disability that required a day off for a medical treatment every six weeks. She had no apparent problem getting those days off until September 2017.
- b) Manager began managing the pharmacy in March 2017. He allegedly noticed a pattern of Complainant routinely not working her full assigned schedule. Manager stated at the FFC that he spoke with Complainant about taking too much time off in June/July 2017.
- c) In May 2017, Complainant received her yearly evaluation. She received a rating of "very good" in the categories of "attendance," and, "reliability and dependability," and a score of, "outstanding," for "adherence to company policies."
- d) On 8/9/2017, Complainant had to leave work early for a pregnancy-related issue. Respondent's owner ("Owner") told her to, "do what you need to do." The next day, Complainant came in early to make up time she lost. Supervisor told Complainant that she would need to leave work early because neither Owner nor Manager had given her permission to come in early. Complainant left early, as requested.

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<sup>1</sup> Although she did not have a supervisory title, Supervisor was in charge when Owner and Manager were not at the store.

<sup>2</sup> Manager disputed that he made this statement.

<sup>3</sup> Complainant was still employed when she filed her Commission complaint. She did not later amend her complaint to allege that she was constructively discharged. A constructive discharge occurs when an employee has no reasonable alternative to resignation because of intolerable working conditions caused by unlawful discrimination. Even if she had amended her complaint, it is found that resigning due to the need for daycare arrangements would likely not be considered a situation where an employee had no alternative except to resign. Constructive discharge is not found in this case.

- e) On 8/18/2017, manager had a meeting with Complainant. Manager's memo of that meeting reflects that he verbally warned her that she would be demoted to part-time unless she began working a full-time schedule, in addition discussing her disruptions in the pharmacy and her attitude. This is disputed by Complainant, who claimed that the only subject discussed was that she was not allowed to come in early to make up hours. She allegedly asked Manager what would happen if she was unable to work the minimum 36 hours. Manager allegedly told her they would talk if it later became an issue.<sup>4</sup>
- f) On 9/7/2017, Respondent informed staff that a new schedule was being implemented, with nine-hour days, and one hour for lunch. Staff were allegedly told that they were to use sick or vacation time to make up for any lost hours. One employee (not Complainant) allegedly asked Manager what would happen if they had no accrued time to use. Manager allegedly replied that there would be a "three-strike" policy, and then a meeting would be held with the employee to discuss the issue.
- g) On 9/11/2017, when the schedule for October was posted. Complainant noticed that a day she had requested off for her periodic disability treatment was not on the schedule, even though she spoke with Supervisor about this in early August. Manager allegedly told Complainant that all requests for time off now needed to be in writing, and that requests for time off were not, "guaranteed."
- h) On 9/15/2017, Complainant submitted a note from her disability doctor because she was afraid that she might not get the treatment day off. The note indicated that she needed the treatment every six weeks for her disability, and that delaying or postponing the treatment could lead to further medical issues. Manager later agreed to give Complainant the day off.
- i) On 9/21/2018, Complainant had an appointment with her maternity doctor. They discussed the newly implemented work schedule, and its possible effect on Complainant and her baby. The doctor's note restricted her to eight hours in a day, and recommended a 30-minute break after each four hours worked.
- j) The following day, Complainant gave the note to Manager, who allegedly became upset, and said the "note did not make sense," and that he was going to call her doctor to clarify the note.<sup>5</sup> Later that day, Manager told Complainant that he would comply with the requested work restrictions.
- k) On 10/6/2017, Manager gave Complainant a written warning for not taking a break after four hours on October 4<sup>th</sup> and October 5<sup>th</sup>.<sup>6</sup> Complainant claimed that they were short staffed on both days, and that there was no one available who could provide coverage so that she could take a timely break.
- l) On 10/12/2017,<sup>7</sup> Manager informed Complainant that she was being placed on a part-time schedule, because she failed to work a full-time schedule. Manager said that the reduced hours would allow her to transport her child to and from school, and that it would allow her an extra day off during the week to

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<sup>4</sup> In an audio recording of a meeting with Manager on 10/13/2017, Complainant stated that she did ask Manager what would happen if she was unable to work (or use accrued time) to meet the 36 hour minimum, and that Manager allegedly replied that she could be changed to part-time, although Complainant disputed that this was framed or intended to be a verbal warning.

<sup>5</sup> Complainant also claimed that Manager confronted her about the note in front staff and customers and accused her of "getting a note" anytime things did not go her way. This is disputed by Manager.

<sup>6</sup> Complainant worked 4.35 hours straight on October 4<sup>th</sup>, and worked 5.55 hours without taking a break on October 5<sup>th</sup>.

<sup>7</sup> Respondent claimed that the meeting actually occurred on 10/11/2017.

schedule medical appointments for herself and her in-laws.<sup>8</sup> Respondent claimed Complainant stormed of the meeting, yelling in front of staff and customers, which Complainant disputed.

- m) The following day, Complainant (and her husband) met with Manager and Owner. Complainant recorded the meeting, Manager told Complainant that he had received complaints from other employees that Complainant was receiving "special treatment" regarding her schedule due to her ability "to come and go." Manager said that if Complainant wanted to leave at 3:15 to get her child off the bus, she needed to change to part-time, and get, "mother's hours."
- n) Complainant received her new work schedule and noticed that she would be working every Saturday, instead of every third. Manager (and Supervisor) allegedly told Complainant that she was getting four hour shifts so they would not have to deal with her doctor's note. Respondent disputed this was said.
- o) On 11/28/2017, Complainant began her maternity leave. Her doctor indicated that she would not return to work until 6-8 weeks after her delivery, which was estimated to be 1/6/2018. In late January 2018, Complainant contacted Manager to inquire what her schedule might be when she returned to work. Manager told Complainant that he would need a doctor's note before she returned to work.
- p) On or about 2/14/2018, Complainant provided manager with a doctor's note with a return to work date was 3/5/2018. Complainant contacted Manager regarding her schedule upon her return. Manager told Complainant that she would need to check back on 2/26/2018, when the schedule would be completed.
- q) On 2/26/2018, Complainant received her return schedule. On 3/1/2018, she resigned indicating that this was due to the reduction in her hours to 20 per week, and the "rising cost of daycare."

## 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.

### *Sex and Disability Discrimination<sup>9</sup> – Terms and Conditions of Employment*

- 2) The MHRA provides that it is unlawful to discriminate with respect to terms, conditions, and privileges of employment because of an employee's sex and/or physical or mental disability. *See* 5 M.R.S. § 4572(1)(A). It is also unlawful to retaliate against an employee for asserting rights protected under the MHRA. 5 M.R.S. § 4572(1)(E).
- 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).

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<sup>8</sup> Complainant denied that she ever requested time off to transport her in-laws to medical appointments.

<sup>9</sup> Complainant alleged discrimination based upon disability and/or sex (pregnancy). Although pregnancy is not considered to be a disability, in this case her per se disability raised the risk of miscarriage and other possible complications. Since here Complainant's sex (pregnancy) and disability impacted each other, they are considered to be interrelated for purposes of a terms and conditions analysis.

- 4) When the adverse employment action involves a termination or demotion, 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 (1<sup>st</sup> Cir. 2000); *cf. City of Auburn*, 408 A.2d at 1261.
- 5) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. *See id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16. 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.
- 6) Complainant establishes a prima-facie case by showing that she is female and that she has a (per se) disability, that she performed her job satisfactorily, that her employer took an adverse employment action against her by demoting her, and that her employer continued to have a need for the work she performed.
- 7) Respondent provided a legitimate, nondiscriminatory reason for Complainant's demotion by explaining that she was reduced to part-time status because of her failure to work a full-time schedule.
- 8) In the final analysis, Complainant has met her burden of showing that the real reason for her demotion was her sex and/or disability, with reasoning as follows:
  - a. Respondent claimed that the decision to demote Complainant to part-time was that she failed to work her assigned full-time schedule. Manager stated at the FFC that he had noticed this as a pattern by Complainant soon after he took over as manager in March 2017.
  - b. In support of this claim, Respondent provided a chart showing the dates and times Complainant was scheduled to work for January through May 2017, August 2017, October 2017, and November 2017.<sup>10</sup> Manager began working in that position on 3/20/2017. From that date through the end of March, Complainant did not work her assigned schedule on seven different occasions. In April 2017, she failed to work her scheduled hours on six days. In May 2017, she failed to work her scheduled hours 13 times. In August 2017, she failed to work her scheduled hours on three days, only one of which occurred after the alleged verbal warning she received from Manager on 8/18/2017. Although the September 2017 work schedule is unavailable, time card records reflect that Complainant worked 33.56 hours during the first week of September 2017, 36.74 the second week, 36.14 the third week, and 30.19 the final week of the month. During the first week of October 2017, Complainant worked a total of 35.48 hours. The following week, Complainant was out for the entire day on 10/9/2017 (due to her periodic treatment for her disability). She worked 7.93 hours on 10/10/2017, and 8.13

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<sup>10</sup> Respondent represented that it did not have copies of the schedule for June 2017, July 2017, or September 2017.

hours on 10/11/2017. On 10/12/2017, Complainant was demoted to part-time by Manager, for the asserted reason for failing to work her assigned full-time schedule.

- c. While it does appear that Complainant was unable to work her full schedule during the first and last week of September (33.56, and 30.19, respectively), and that she fell just short during the first week of October (35.48), the records provided reflect that she had improved significantly in this regard after her meeting with Manager in mid-August 2017. From mid-March 2017 (when Manager began) through May 2017, she averaged eight days per month not working her assigned schedule. After her meeting with Manager in mid-August, she failed to work her assigned schedule on only three days, based upon the schedules that were available to the Commission. Complainant's May 2017 evaluation also reflected no concern about her hours, attendance, or reliability.
- d. Complainant also disputed that she was warned about failing to work a full-time schedule at the August 2017 meeting, despite Manager alleged contemporaneous memo indicating otherwise. Even assuming that the mid-August 2017 meeting qualified as a verbal warning, Manager admitted at the FFC that no written warning was ever given prior to the demotion, as was required by the company's progressive discipline policy. When he was asked at the FFC why he skipped this step, Manager claimed it was because it was a severe amount of time that was being taken off. This is not found to be credible. As noted earlier, if anything, Complainant's adherence to her assigned schedule seemed to have improved considerably after Manager's "warning" in mid-August through the date of her demotion, 10/12/2017, as compared to earlier that year.<sup>11</sup>
- e. Further, in this case, it appears to be more likely that Complainant's request for time off for her disability, and request for accommodation were the cause of her demotion. Although Complainant never had any problem getting a day off for her disability treatments prior to September 2017, at that time Manager allegedly told her that such requests now needed to be in writing, and that they were "not guaranteed." This led Complainant to obtain a doctor's note confirming the medical necessity for these treatments, and possible risks if postponed. Although Manager provided the day off, the note made clear that this would be an ongoing scheduling issue every six weeks.
- f. In early September 2017, Respondent implemented a new, more rigid, schedule that would require employees to work a nine-hour day, with one hour for lunch, rather than a staggered start time schedule that had been in place. During a pre-scheduled appointment with her maternity doctor later that month, the schedule was allegedly discussed, and Complainant's doctor made recommendations that could possibly interfere with the new schedule. Manager clearly had concerns about the note, and contacted Complainant's doctor for "clarification," despite the fact that the note appeared to be self-explanatory – a limit of eight hours per day, and a 30-minute break every four hours.
- g. Although Respondent claimed that it "fully honored" the requested limitations, it did so for less than three weeks, before demoting Complainant. She was also disciplined for not taking timely breaks on two days, but Respondent has not refuted Complainant's claim that she requested breaks, and no one was available due to short-staffing. It is also possible that Respondent issued the warning to protect itself if Complainant later claimed that the company failed to comply with her work restrictions.
- h. Regardless, Complainant has sustained her burden of showing that Respondent's articulated reason for the asserted adverse employment action is not worth of belief under these circumstances.

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<sup>11</sup> Respondent also did follow the alleged "three strike" rule that was discussed at the meeting announcing the newly implemented schedule, that would result in a "strike" for each week that fell short of full-time hours, and then a meeting.

Although Respondent claimed that Complainant's requests for (non-medical) time off were excessive as compared to other employees, it has offered no documentary proof, such as schedules or time records of co-workers, to support this claim. The fact that Complainant presented two medical notes requesting accommodation only weeks prior to the demotion occurring strongly suggest a causal connection between the events.

- i. Complainant also alleged that Manager and Supervisor expressly told her that the demotion was so that the company did not have to "deal" with her doctor's note. Although this was disputed by Respondent, they admitted that at least one factor in the demotion was to allow Complainant to schedule her needed medical appointments on her additional weekday off. This suggests that Respondent determined that the path of least resistance was reducing Complainant to part-time, both to avoid having to deal with her break requirement, and her need for disability treatments every six weeks. Respondent also claimed that other employees had complained about Complainant receiving "special treatment," which would also presumably be eliminated as a concern if she was part-time.
- j. Lastly, the record does not support Complainant claim that Respondent engaged in disability discrimination when she sought to return to work from her maternity leave. Although Complainant allegedly contacted manager in January about a target return to work date, Respondent was entitled to have a note from her doctor providing clearance before actively seeking to return her to the schedule. After the note was provide, Respondent apparently returned her to the schedule and provided a copy to her. While it is unfortunate that the schedule was not issued in time for Complainant to make adequate daycare arrangements, there is nothing in the record to suggests that Respondent purposefully delayed issuing the schedule because of Complainant's sex or disability.

9) Discrimination on the basis of sex and/or disability 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 Medicine Shoppe discriminated against Victoria Schreiber on the basis of sex and/or disability in terms and conditions of employment (demotion); and
- 2) Conciliation should be attempted in keeping with 5 M.R.S. § 4612(2).

  
Robert D. Beauchesne, Investigator