Maine Human Rights Commission

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INVESTIGATOR'S REPORT
MHRC Case Number E18-0029
September 10, 2019

Brian Richardson (Bridgton)

v.

Williams Scotsman, Inc. (Auburn)

I. Summary of Case:

Complainant, a former employee of Respondent, claimed that Respondent discriminated against him based on his disability and retaliated against him for engaging in protected activity when it discharged him. Respondent, a company which designs and builds mobile and modular building systems, denied Complainant's allegations and stated that Complainant was discharged for violating company safety policies. The Investigator conducted a preliminary investigation, which included reviewing all of the documents submitted by the parties and holding a Fact-Finding Conference ("Conference"). Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe unlawful discrimination occurred.

II. Jurisdictional Data:

1) Dates of alleged discrimination: March 2017 – June 1, 2017.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): January 22, 2018.

3) Respondent has more than 500 employees and is subject to the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act, the Maine Whistleblowers' Protection Act ("WPA"), as well as state and federal employment regulations.

4) Complainant is represented by Andrew Cotter, Esq. Respondent is represented by Daniel Schwarz, Esq.

III. Development of Facts:

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

Complainant has [redacted]. He began working for Respondent part-time in October 2015, then full-time in January 2016 as a Lead Service Technician. In August 2016 Complainant had [redacted]. He initially returned to work in October 2016 with a 10-pound lifting restriction. This restriction was effectively lifted in January 2017. Respondent accommodated Complainant's lifting restriction.

In March and April 2017, Complainant made several oral and written complaints regarding his Branch Manager ("Branch Manager") sleeping on the job and neglecting his duties, which included monitoring safety in the workplace. Complainant believed that Branch Manager's negligence put other employees at risk and created an unfair amount of work for Complainant. Respondent's Area Manager ("Area Manager") investigated Complainant's assertions, but Area Manager was an old friend of Branch Manager and no action was taken. Branch Manager became hostile and critical, and disparaged Complainant to Complainant's co-workers. On May 3, 2017, Complainant was written up for several minor safety violations. This was the first time in his employment with Respondent that he'd ever been written up. From May 15th to May 19th, 2017, Complainant was out of work due to [redacted]. He provided a doctor's note for this absence. When he returned to work on May 22nd, he reported to Branch Manager that he would likely need additional [redacted] in June or July. Three days later, Respondent discharged him. At the meeting where he was discharged, Respondent's Regional Manager ("Regional Manager") said to Complainant, "You're hobbling around here, we don't think you can do the job."

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

Complainant worked as a Lead Service Technician for Respondent from January 25, 2016 until June 2, 2017. In August 2016, Complainant began a leave of absence for [redacted] When Complainant returned in October, Respondent accommodated his 10-pound lifting restriction. Branch Manager occasionally noticed that Complainant would refuse to work due to [redacted] On March 29, 2017, Complainant sent an email to Area Manager about Branch Manager. Complainant's email did not raise any issues that were violations of any law or that presented a safety risk. The next day, Complainant, Area Manager, and Respondent's Human Resources Manager ("HR Manager") spoke on the phone about Complainant's concerns, and about a week later Area Manager made an unannounced visit to Respondent's Auburn branch where Complainant worked. Area Manager found that the branch employees were supportive of Branch Manager, but felt Complainant was difficult to work with. Area Manager had a conversation with Complainant about his findings, but Complainant's performance did not improve.

On May 2, 2017, the morning safety meeting covered smoking and personal protective equipment ("PPE"). Complainant attended this meeting. The next day, Branch Manager issued a written warning to Complainant for disregarding several safety rules, including not reporting a workplace injury, not wearing PPE, and smoking in a non-smoking area. Branch Manager was out of the office from May 22 to May 29, 2017. During this time, the new Area Manager discovered that Complainant had taken May 16 to May 19 off with no doctor's note to excuse his absence; another employee provided a photo of Complainant carrying a 50-pound barrel on his shoulder in violation of Respondent's lifting policy and reported that Complainant had used his shoulder to attempt to open a door in violation of safety protocols; and Complainant had failed to complete some of his administrative responsibilities. When Branch Manager returned, he recommended that Complainant be discharged but said he would recuse himself from the final decision. The new Area Manager and Branch Manager discharged Complainant on June 1, 2017. No one made any mention of Complainant's [redacted] problems at this meeting.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties and the information gathered at the Conference:

   a) Complainant was hired as a part-time employee by Respondent in October 2015. Complainant was hired full-time as a Lead Service Technician on January 25, 2016.

   b) In August 2016 Complainant applied for and was granted short term disability leave and benefits. He had [redacted] and was out of work until October 2016.

c) When Complainant returned to work, he had a 10-pound lifting restriction, which Respondent accommodated. Complainant's lifting capacity was increased to 50 pounds in January 2017. At this point there was nothing for Respondent to accommodate since Complainant's job description only required him to be able to lift 50 pounds.

d) On March 29, 2017, Complainant sent an email to Area Manager complaining that Branch Manager was verbally abusive, sat in his car smoking and napping, left the site frequently on unnecessary trips to pick up supplies, and pushed most of his duties onto Complainant. Complainant asked Respondent to make an unannounced visit to the site.

e) On March 30, 2017, Complainant, Area Manager, and Respondent's HR Manager had a phone call to discuss Complainant's concerns.

f) On April 6 and 7, 2017, Area Manager made an unannounced visit to the Auburn branch. Area Manager's contemporaneous notes indicate that both Complainant and Branch Manager were told their performance needed to improve. Branch Manager was specifically told to stop making daily trips to pick up supplies.

g) On May 2, 2017, Complainant attended the daily morning safety meeting. The topics covered that day included the branch smoking policy and wearing PPE. Later that day Complainant helped one of his co-workers with a trailer hitch. While doing this he got a small metal splinter in his hand, which he took care of with a band aid. Branch Manager was not present that day.

h) On May 3, 2017, Complainant told Branch Manager about the splinter and said that Respondent should revisit its glove policy which did not address wearing gloves while working on trailer hitches. Branch Manager became upset and told Complainant there was already a policy in place. Complainant asked to see it because no one ever wore gloves while working on trailer hitches. Branch Manager ended the conversation at that point. Later in the day he came back with the new Area Manager and gave Complainant a written warning for not wearing gloves while working on the hitch, a safety glasses violation, and smoking in his car.

i) Respondent's policy on "Hitch Assembly Removal/Installation" does not require employees to wear gloves while working on the hitch assembly. Respondent's "Glove Usage Policy" specifies when cut resistant gloves are to be worn; working on a trailer hitch is not listed. Complainant's injury from the trailer hitch was superficial, required only a band aid to treat, and Complainant reported the injury to Branch Manager the next day in order to attempt to change Respondent's policies to require that gloves be worn while working on trailer hitches.

j) There was a ramp from the office trailer, where Complainant primarily worked, to the parking lot. Employees were supposed to wear safety glasses in the parking lot, which was adjacent to the workshop. Complainant was walking down the ramp from the office with his safety glasses on his head, took one or two steps off the ramp, and put his safety glasses on.

k) Employees who, like Complainant, worked in the office trailer could not smoke in front of the office trailer. Branch Manager had given those employees permission to smoke in their cars, as he himself often did.

l) Complainant had a doctor's appointment on the afternoon of Monday, May 15, 2017. His doctor gave him a note excusing him from work for the rest of that week. Complainant went back to work, finished out the day, and gave the note to Branch Manager. Complainant returned to work on May 22, 2017.

m) On May 24, 2017, Complainant had another doctor's appointment and his doctor scheduled him for an [redacted] and told Complainant he would likely need another [redacted] When Complainant went back to work later that day, he told Branch Manager that the two of them needed to get everything wrapped up as best they could before his next [redacted] Branch Manager was very upset about the impact Complainant's absence would have.

n) In late May, a co-worker provided a photo of Complainant walking with a large plastic barrel on one of his shoulders, which Respondent alleged weight more than 50 pounds. The barrel Complainant lifted was empty; the empty barrels weigh only 22 pounds. A co-worker also reported that Complainant had used his shoulder to try to open a door; Complainant denied doing so.

o) Branch Manager alleged that Complainant had left early on the Friday before Memorial Day without finishing administrative tasks. These tasks were actually either completed or were not Complainant's responsibility.

p) Based on these alleged safety and administrative issues, Branch Manager recommended to Regional Manager that Complainant be discharged.

q) Respondent's Discipline/Dismissal Policy states that, while employment with Respondent is at will, dismissal will only occur after an employee has received an oral or written warning from a supervisor and has had an opportunity to improve their performance or conduct.

r) Complainant was discharged on June 1, 2017. Despite having allegedly recused himself from the decision, Branch Manager was present at the meeting where Complainant was discharged. According to Complainant, Regional Manager told Complainant that he had been "hobbling around" and that Respondent did not think he could do the job as a result.

IV. 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.

Disability Discrimination: Discharge

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

2) Because here there is no direct evidence of discrimination,[1] 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).

3) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) he belonged to a protected class, (2) he performed his job satisfactorily, (3) his employer took an adverse employment decision against him, and (4) his employer continued to have his 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.

4) 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 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. *Id.* 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.

5) Complainant has [redacted], which is a disability because it substantially limits his ability to perform a major life activity and significantly impairs his physical 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). Complainant's [redacted] is incurable. It is difficult for Complainant to walk without pain, and he has weakness and numbness in his hands and his right leg.

6) Complainant has established his prima facie case. He has a disability. He began working for Respondent in October 2015. He performed his job satisfactorily, with no written or verbal warnings until May 3, 2017. He received three raises and was commended by Respondent's management over the course of his employment. Respondent discharged Complainant on June 1, 2017 and had a continuing need for Complainant's work to be performed.

7) Respondent has presented a legitimate, nondiscriminatory reason for discharging Complainant, namely that he violated company safety policies.

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[1] "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. Where this evidence exists, Complainant "need prove only that the discriminatory action was a motivating factor in an adverse employment decision." *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Doyle*, 2003 ME 61, ¶ 14, n.6, 824 A.2d at 54, n.6. Upon such a showing, in order to avoid liability, Respondent must prove "that it would have taken the same action in the absence of the impermissible motivating factor." *Id.* In this case, Regional Manager's comment that Complainant could not do the job because he was "hobbling around" could be considered direct evidence. Because that statement is disputed, and because the result is the same under the *McDonnell-Douglass* burden-shifting analysis, in which the burden of proof remains on the Complainant, that standard is used here.

8) Complainant has established that Respondent's reason is pretextual and that the real reason for his discharge was his disability, with reasoning as follows:

   a. Respondent's reasons for discharging Complainant do not withstand scrutiny. First, Complainant received a "final" warning as his first discipline, for several minor incidents, including taking a few steps off of the office ramp into the parking lot before lowering his safety glasses, and smoking in his car, which was apparently not only permitted but practiced by Branch Manager. He was then discharged for alleged safety violations that he denied, including one – carrying a barrel allegedly weighing more than 50 pounds – that was easily disprovable had Respondent done any investigation.

   b. The record reflects that the real reason for Complainant's discharge was that he notified Respondent that he would need time off for [redacted] related to his disability. Complainant took four days off in May due to [redacted], for which he provided a doctor's note. On May 24, Complainant alerted Branch Manager that he would need to take another leave of absence for [redacted]. Branch Manager was upset about the impact Complainant's absence would have on the workload. Just a few days later, Branch Manager recommended to Respondent's HR Department that Complainant be discharged, and even though Branch Manager purported to recuse himself from the decision, he was present at the meeting where Complainant was discharged on Branch Manager's recommendation.

9) Discrimination on the basis of disability is found.

WPA Retaliation

10) 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).

11) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that he engaged in activity protected by the WPA, he was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514. One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *Id.* at 1998 ME 227, ¶ 16, 719 A.2d at 514-15.

12) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA 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 employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry his overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.* In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant's protected activity, although protected activity need not be the only reason for the decision. *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).

13) Complainant has established his prima facie case. On March 29, 2017, Complainant reported Branch Manager's behavior, which Complainant in good faith believed to be jeopardizing the health and safety of his co-workers. Area Manager investigated Complainant's report on April 6 and 7, 2017. Complainant

received his first written warning in twenty months of employment on May 2, 2017, three and a half weeks after the investigation. Complainant was discharged on June 1, 2017, barely a month later.

14) As discussed above, Respondent's stated reason for Complainant's discharge is pretextual. The violations for which Complainant was written up and ultimately discharged are minor. According to Respondent's "Discipline/Dismissal Policy," an employee may only be dismissed after being given a written or verbal warning from their supervisor and an opportunity to improve their performance. Complainant was not given corrective counseling or a performance improvement plan, as indicated by Respondent's Discipline/Dismissal Policy. Here, Complainant received his first written warning on May 3. He worked a total of 16 days between receiving this warning and being discharged, which is hardly enough time to improve performance assuming improvement was needed. Instead, Complainant was discharged eight weeks after Respondent's investigation into his safety complaints. Moreover, although Branch Manager – the subject of Complainant's safety concerns – purported to "recuse" himself from the discharge decision, it was Branch Manager who issued the written warning and who recommended dismissal soon thereafter; he also was present at the discharge meeting.

15) Retaliation for engaging in protected activity is found.

V. Recommendation:

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

1) There are **Reasonable Grounds** to believe that Williams Scotsman, Inc. discriminated against Brian Richardson on the basis of disability;

2) There are **Reasonable Grounds** to believe that Williams Scotsman, Inc., retaliated against Brian Richardson for engaging in WPA-protected activity; and

3) Conciliation should be attempted in accordance with 5 M.R.S. §4612(3).

Kit Thomson Crossman, Investigator