



Maine Human Rights Commission

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INVESTIGATOR'S REPORT MHRC Case Number: E18-0084-A/B June 6, 2019

Sarah Whynaught (Augusta)

v.

Creative Wood Products of Maine, Inc. (Wilton)¹
Michael Deschenes (Farmington)

I. Summary of Case:

On March 1, 2018, Complainant filed her Complaint with the Maine Human Rights Commission ("Commission") alleging that Respondent retaliated against her² and discriminated against her based on her sex³ and disability when he did not hire her. Respondent denied discrimination, stating that Complainant was pushy on the phone and he decided she was not right for the position.

II. Summary of Investigation:

The Investigator reviewed the following documents as part of the investigation: (i) Complaint filed by Complainant on March 1, 2018; (ii) Respondent's Response received on April 30, 2018; (iii) Amended Complaint filed by Complainant on July 18, 2018; (iv) Complainant's Rebuttal received on July 18, 2018; and (v) requests for additional information.

III. Analysis:

¹ Creative Wood Products of Maine, Inc. was the business owned by Respondent Michael Deschenes; he has since sold the business. Mr. Deschenes was named individually; since he was named as the business owner, rather than as an employee, see *Fuhrmann v. Staples the Office Superstore East, Inc.*, 2012 ME 135, the claim against him will proceed. Both Respondents will be referred to collectively in the report as Respondent.

² A retaliation claim will not be analyzed in this report because Complainant did not allege an independent basis for retaliation. Once Respondent did not hire Complainant, they had an additional conversation when Complainant immediately called him back. During this second call she asserted she was able to perform the duties of the position and he repeated that he was not going to hire her. Since the decision had already been made, there was no retaliatory adverse action when Respondent repeated his decision not to hire Complainant.

³ Complaint made a claim of sex discrimination based on a single comment made by Respondent where he referenced "women who were disabled" had been applying for the advertised position. While Complainant alleged other comments that supported an animus towards disabled individuals, she did not provide the same with regard to sex. In the circumstances of this case, there is insufficient evidence to establish that Complainant's sex was a reason for Respondent's decision not to hire her. This claim was unsubstantiated and will not be further analyzed in the report.

The Maine Human Rights Act (“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 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.

In July 2017, Respondent placed an advertisement in the paper for an office assistant. On July 27, 2017, Complainant called the number in the advertisement to apply for the position. Complainant has several degrees in business and technology and wanted to work part-time. The call lasted only a few minutes and the parties differ on their recollection of the call.

Complainant provided that she called, and Respondent asked about her qualifications. After she provided them, he asked if she was working and when she replied she was not, Respondent asked if she was “on disability.” Complainant told Respondent she received Social Security Disability Income (“SSDI”). Respondent replied that he had many women applying who wanted to work part-time so they don’t lose their benefits and stated “that’s my money you’re living off of.” He told her he wouldn’t hire her and hung up. Complainant called Respondent back to explain she was able to do the job and he repeated that he was not going to hire her and hung up again.

Respondent replied that he remembers getting a call from Complainant. He asked all of the callers the same questions and he did not ask Complainant if she was on disability. He recalls that after 45 seconds on the phone she was “pushy” and overqualified, so he determined she was not right for the job and ended the call. Respondent then provided that Complainant called him back twice to talk to him and threatened that he had to give her preference because she had a disability. Respondent also alleged that Complainant threatened him with legal action. He admits that he may have said some inappropriate things or made rude comments but could not remember exactly what was said. After the calls from Complainant, Respondent decided that hiring someone was “too risky” and he put his business on the market shortly thereafter.

The MHRA provides that it is unlawful, based on protected-class status, to “fail or refuse to hire or otherwise discriminate . . . [or] discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment.” 5 M.R.S. § 4572(1)(A).

Complainant establishes a prima-facie case of unlawful discrimination by showing that (1) she belongs to a protected class, (2) that she applied and (3) met the minimum objective qualifications for the job sought, and (4) that she was rejected. *City of Auburn*, 408 A.2d at 1263. 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. 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.

Complainant established her prima-facie case by showing she was a qualified person with a disability, she met the minimum qualifications for the job she applied for and was rejected. Respondent provided the legitimate nondiscriminatory reason that Complainant was overqualified and pushy on the phone and he wanted someone more personable.

In the final stage of analysis, Complainant was able to provide enough evidence to establish that it was least as likely as not that she was denied the position because of her disability. Complainant and Respondent have differing recollections of the phone conversation and there were no witnesses or recordings of the call. After a review of the information provided, Complainant has cast sufficient doubt on Respondent's version of events. First, Respondent did provide he had hired a disabled male veteran in the past as proof he would not discriminate. However, he did not provide specific responses to all of the alleged statements. He denied asking if Complainant was "on disability" but did admit he said some rude or otherwise inappropriate things. Second, Respondent alleged that Complainant said she would "drag him through this exact process." Complainant replied she had no knowledge of the Commission process until after she called Respondent. She provided contemporaneous notes and an affidavit explaining how she sought assistance.

Finally, Respondent argued that he could not have discriminated against Complainant because he never hired anyone for the position. That, however, is not an element of the claim of discriminatory failure to hire. As long as the job was open and available at the time Complainant was rejected, then she has a legal basis for a claim of discrimination. Complainant was consistent in her recollection and provided an affidavit in addition to her sworn complaint. Complainant has met her burden of showing she has at least an even chance of prevailing on her claim of disability discrimination.

IV. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that Creative Wood Products of Maine, Inc. and Michael Deschenes discriminated against Sarah Whynaught on the basis of disability, and conciliation of this claim should be attempted in accordance with 5 M.R.S. § 4612(3).
- 2) There are **No Reasonable Grounds** to believe that Creative Wood Products of Maine, Inc. and Michael Deschenes discriminated against Sarah Whynaught on the basis of sex or retaliated against Sarah Whynaught for engaging in MHRA-protected activity, and these claims should be dismissed in accordance with 5 M.R.S. § 4612(2).


Jane O'Reilly, Investigator