Maine Human Rights Commission
51 State House Station, Augusta, ME 04333-0051
Physical location: 19 Union Street, Augusta, ME 04330
Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711
www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT
E18-0092
June 19, 2019
AMENDED January 14, 2020

Rose Hall on behalf of Dameon Crouse (Augusta)[1]

v.

Walmart Stores, Inc.; Walmart Stores East, L.P.; Walmart Supercenter (Bangor)[2]

I. Summary of Case:

Complainant alleged that Respondent discriminated against him on the basis of disability by denying him a reasonable accommodation, treating him differently in the terms and conditions of his employment, and retaliating against him for making a request for an accommodation. Respondent denied discrimination or retaliation and stated that it denied his request for a set, predictable daytime schedule because it would negatively impact Respondent's ability to serve its customers and adversely affect the schedules of other employees. The Investigator conducted a preliminary investigation which included reviewing all of the documents submitted by the parties, a Fact Finding Conference ("FFC"), and requests for additional information. Based on this information, the Investigator recommends that the Commission find that there are reasonable grounds to believe that Respondent discriminated against Complainant based on his disabilities and retaliated against him for engaging in protected activity.

II. Jurisdictional Data:

1) Dates of alleged discrimination: June 2017 and ongoing.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): March 6, 2018.

3) Respondent provided that it employs a number of people in excess of the minimum jurisdictional requirements under state and federal employment laws. As such, Respondent is subject to the Maine Human Rights Act ("MHRA"), the American with Disabilities Act, and state and federal employment regulations.

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[1] The complaint was filed by Gary Crouse on his son's behalf; Gary Crouse was Dameon's legal guardian. On January 9, 2020, the Penobscot County Probate Court issued an order naming Rose Hall as Complainant's new legal guardian. This amended report is issued solely to change the name of Dameon's guardian to reflect this change. "Complainant" here refers to Dameon Crouse.

[2] Complainant named "Walmart Stores, Inc.; Walmart Stores East, L.P.; Walmart Supercenter" in his complaint; Respondent provided that its legal name is "Wal-Mart Stores East, LP." Complainant did not amend his complaint, so the names he used has been retained. Here "Respondent" refers to all three names provided by Complainant, as they are all one entity.

4) Complainant is represented by Kristin Aiello, Esq. Respondent is represented by Jennifer Goltermann, Esq.

III. Development of Facts:

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

> Complainant is a person with a disability. He has mental or physical impairments including [redacted][3]. Respondent regarded him as having a disability. Complainant was allowed a job coach and was provided a set, predictable daytime schedule as an accommodation for his disabilities for approximately 10 years. When a new scheduling system was implemented, Complainant's request to continue working this schedule was denied and Complainant has not been placed not been placed on the schedule since July 2017.

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

> Complainant, who has been employed as a Sales Associate since April 7, 2006, has not been discharged from his position. He has, with the use of a job coach, been able to satisfactorily perform the essential functions of his job. In July 2017, Respondent implemented a new, automated scheduling system which set all Associate work schedules. Under this new system, Associates were no longer able to request specific hours or schedules but could instead submit their preferred work schedule. Complainant's request for a set, predictable daytime schedule was denied because it would negatively impact Respondent's ability to service its customers and adversely affect the schedules of other Associates.

3) The Investigator made the following findings of fact:

a) From April 7, 2006 to July 5, 2017, Respondent accommodated Complainant's disabilities by approving the use of a job coach and providing him with a set, predictable, daytime schedule. Complainant was able to perform the essential functions of his job satisfactorily with these accommodations. Complainant was consistently rated as "solid performer" on his performance evaluations.

b) In June 2017, Respondent advised Complainant that a new scheduling system was being implemented and he would no longer be provided with a set, predictable daytime schedule. Going forward, the schedules would be based on a variety of factors, such as anticipated customer traffic, Associate availability, and Associate seniority.

c) Respondent advised Complainant he would now be scheduled in the same manner as all other employees. Specifically, he could alter his availability to his preferred schedule, but his preferences might not be honored, and his work schedule would likely change from week to week. Under this system, Complainant would be advised several weeks in advance what his schedule was going to be for any given week.

d) On July 31, 2017 Complainant made an accommodation request to Respondent in which he requested the continued use of a job coach and the continuation of his set, predictable daytime schedule. This request was supported by a letter from Complainant's doctor identifying Complainant's disabilities and explaining the connection between those disabilities and the accommodations he requested. Specifically, Complainant's doctor explained that Complainant needed a set, predictable schedule

[3] [redacted] is a "per se" disability as defined by 5 M.R.S. § 4553-A(B).

because of his [redacted], which caused him to become overwhelmed in the absence of a fixed schedule.

e) On August 3, 2017 Respondent approved the continued use of a job coach but denied the request for a set, predictable daytime schedule. Respondent denied the schedule accommodation stating that it would negatively impact its ability to serve its customers and adversely affect the schedule of other Associates.

f) On August 21, 2017 Complainant requested a meeting with Respondent's representatives to engage in a good faith, interactive dialogue regarding Complainant's need for accommodation, to explore possible accommodations, and to requests that Complainant be placed back on the work schedule.

g) On August 31, 2017, Complainant, with his representatives, met with Respondent. Respondent provided that his request had been denied because it could not allow one Associate to pick their schedule and not allow others to do the same. Respondent again offered Complainant the option of modifying his availability to shifts, and explained that the new computer system only recognized specific shifts, such as early morning or overnight.[4] Until and unless Complainant altered his availability, the automated scheduling system would not recognize his requested shift as valid and he would not be scheduled. Respondent reiterated that it could not guarantee Complainant would receive his preferred schedule consistently, but noted that he would have advance notice of his upcoming schedules.

h) On September 1, 2017, Complainant submitted a request for reconsideration regarding Respondent's partial denial of his request for an accommodation.

i) On November 6, 2017, Respondent again denied his request for a set, predictable, daytime schedule. Respondent stated that providing Complainant with this schedule would have a negative impact on operations. Respondent reiterated that the original offer of requesting preferred hours, which may or may not be granted, was still an option as an accommodation and the only option being offered.

j) On December 8, 2017 Complainant submitted a second request for reconsideration requesting that Respondent either (i) reconsider its denial of his request for a set, predictable daytime schedule, or (ii) allow him to set his preferences in order to have predictable hours. Complainant also asked that, if neither of these options was available, Respondent inform him of available jobs that he could be reassigned to where he could have a set schedule. All of these requests were denied and no other assignments were offered.

k) Since July 5, 2017, Respondent has not placed Complainant on the work schedule. Complainant did not resign from his position and he never submitted a new preferred hours request.

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 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).

[4] Complainant's doctor had already provided that Complainant could only work daytime hours.

DISABILITY DISCRIMINATION- REASONABLE ACCOMMODATION

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, Complainant must show (1) that he is a "qualified individual with a disability" within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant's 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 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.

5) 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).

6) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable [him] to perform the essential functions of [his] 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. § 4553(9-B).

7) It is found that Respondent denied Complainant a reasonable accommodation for his disabilities, with reasoning as follows:

   a. Respondent provided Complainant with reasonable accommodations for his disabilities by approving his use of a job coach and providing him with a set, predictable daytime schedule for more than 10 years. When it changed its scheduling system, it told him it could no longer provide him with this accommodation.

   b. Complainant's physician provided he needed to continue being accommodated with this schedule in order to be perform the essential functions of his job. The accommodation was necessary to enable Complainant to perform the essential functions of the job, and would have allowed him to do so (as it had for more than a decade).

   c. Respondent denied the accommodation, and appeared unwilling to attempt to modify its computerized scheduling system in any way. Respondent did not offer any alternative scheduling accommodations that would meet Complainant's need for a set schedule.

d. The record indicates that Complainant attempted to engage in an interactive dialogue with Respondent to attempt to see if there was a way to accommodate Complainant's conditions in accordance with its computerized scheduling system. Respondent was less willing to engage in this dialogue and only agreed to a meeting with Complainant, which Respondent's representatives qualified as very unusual, at the insistence of Complainant's representatives. Yet, even during this meeting Respondent was very clear that it was unwilling to deviate from its initial offer of accommodation and that no other options would be discussed. Respondent's apparent unwillingness to attempt to find a possible accommodation, even after being provided with several possibilities by Complainant, is not the interactive dialogue that the MHRA requires.[5]

e. The record contains sufficient evidence to conclude that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the Complainant to continue performing the essential functions of his position, as he had been doing with the provided accommodation for more than 10 years.

8) Respondent alleged that it would be an undue burden to allow Complainant to have a set, predictable daytime schedule as this would then mean that all its employees at the store where Complainant worked would need to be given this option. There is no basis for this assertion, which appears to be based on a misunderstanding of the reasonable accommodation process. Reasonable accommodations, by definition, are modifications to the manner in which the work environment or the way a function is customarily performed. *See* 94-348 C.M.R. § 2(17)(A).

9) Respondent asserted that it is not required to provide an accommodation that is excessively costly, disruptive, or would alter the nature or operation of the business. Respondent did not show, and the record does not support, that allowing this accommodation for Complainant would be excessively costly, disruptive, or would alter the nature or operation of the business. By contrast, the record supports that Complainant was given the scheduling accommodation for more than 10 years and Respondent did not seem to suffer any undue hardship due to this.

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

TERMS AND CONDITIONS/DISCHARGE

11) The MHRA provides, in part, 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).

[5] 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).

12) 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).

13) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that he (1) was a member of a protected class, (2) was qualified for the position he held, (3) suffered an adverse employment action, (4) in circumstances giving rise to an inference of discrimination. See *Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). *Cf. Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1st Cir. 2002).

14) 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; *City of Auburn*, 408 A.2d at 1262, 1267-68. 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. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16. 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.

15) Complainant established his prima-facie case by showing that he was a member of a protected class, that he was qualified for the position he held, that he was subjected to adverse employment actions (he was taken off the work schedule when he requested to keep his set, predictable daytime schedule, effectively resulting in his constructive discharge)[6], and the circumstances give rise to the inference of discrimination because Respondent refused him a reasonable accommodation.

16) Respondent has articulated a legitimate, nondiscriminatory reason for its action, namely, that no employee was provided with a set, predictable daytime schedule after it implemented its nationwide, computerized scheduling system.

17) At the final stage of the analysis, Complainant has demonstrated that he would not have been taken off the schedule and effectively discharged but for his disability. Complainant was taken off of the work schedule, and not scheduled after July 5, 2017, because of his disabilities and his request to continue being provided with the same set, predictable daytime schedule. But for his disabilities, and Respondent's refusal to accommodate him, Complainant would have been able to continue to perform his job successfully. Instead, Respondent took Complainant off its schedule and would not allow him to continue to work unless he

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[6] An employee "may use the doctrine of constructive discharge to satisfy the elements of 'discharge' or 'adverse employment action' in an otherwise actionable claim" under the MHRA. *Levesque v. Androscoggin County,* 2012 ME 114, ¶ 8. An employee is constructively discharged when they have no reasonable alternative to resignation because of intolerable working conditions caused by unlawful discrimination. *See Sullivan v. St. Joseph's Rehab. and Residence,* 2016 ME 107; *King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "The test is whether a reasonable person facing such unpleasant conditions would feel compelled to resign." *Id.* Here, because Respondent would not accommodate his need for a set schedule, which has been found to be the unlawful denial of a reasonable accommodation, Complainant could not work.

altered his schedule to comply with its new computer system. As a result, Complainant has, in effect, lost his job, since he has not been scheduled since the new system was implemented.

18) Discrimination in the terms and conditions of employment on the basis of disability is found.

MHRA RETALIATION

19) The MHRA 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 MHRA] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S.A. § 4572(1)(E). The MHRA further defines unlawful discrimination to include "punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act. . . ." 5 M.R.S. § 4553(10)(D).

20) In order to establish a prima-facie case of retaliation, Complainant must show that he engaged in statutorily protected activity, he was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56; *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006). The term "materially adverse action" covers only those employer actions "that would have been materially adverse to a reasonable employee or job applicant. In the present context that 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, 126 S. Ct. 2405*. One method of proving the causal link is if the adverse action happens in "close proximity" to the protected conduct. *See id.*

21) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily 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. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry his overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. See id. Complainant must show that he would not have suffered the adverse action but for his 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).

22) Complainant established his prima-facie case by showing that he engaged in a statutorily protected activity when he requested accommodations for his disabilities, he suffered a material adverse action (he was removed from the work schedule, constructively discharging him) and the adverse action happened in close proximity, here within several weeks at most, of Complainant engaging in the protected conduct.

23) Respondent provided a legitimate, nondiscriminatory reason for Complainant being taken off the work schedule. It asserted that it was Complainant's choice to not revise his preferred work hours and days to comply with the newly-implemented scheduling system, which did not recognize Complainant's established work hours as a valid shift.

24) In the final analysis, Complainant has met his burden of showing that he was discharged in retaliation for his request for a reasonable accommodation, with reasoning as follows:

a. Complainant was advised in late June 2017 that he would no longer be provided with a set, predictable daytime schedule as an accommodation for his disabilities. Within a short period of time, several weeks at most, of this notification and after Complainant had notified his management of a continued need for this accommodation as Respondent's policy required, he was taken off the work schedule. Although never officially discharged, Respondent has constructively discharged Complainant by not scheduling him for any shifts. Based on the "even chance" standard of prevailing in a civil action, the timing is enough to establish a causal connection between his request for a reasonable accommodation and his constructive discharge.

b. Respondent's reaction to Complainant's request for accommodation demonstrated that it was unwilling to work with him after he requested a reasonable accommodation. It refused to consider any modification to its computer system, and refused the accommodation claiming inexplicably and without factual or legal support that it would then have to allow all of its employees to choose their own set schedules. This explanation appears to be mere pretext for its desire not to have to work with Complainant in light of his need for this particular accommodation.

25) Employment retaliation for engaging in protected conduct 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 that Walmart Stores, Inc.; Walmart Stores East, L.P.; Walmart Supercenter discriminated against Rose Hall on behalf of Dameon Crouse on the basis of Dameon's disability by denying a request for a reasonable accommodation;

2) There are **Reasonable Grounds** to believe that Walmart Stores, Inc.; Walmart Stores East, L.P.; Walmart Supercenter discriminated against Rose Hall on behalf of Dameon Crouse on the basis of Dameon's physical or mental disability in the terms and conditions of his employment, including by constructively discharging him;

3) There are **Reasonable Grounds** to believe that Walmart Stores, Inc.; Walmart Stores East, L.P.; Walmart Supercenter retaliated against Rose Hall on behalf of Dameon Crouse for engaging in a protected activity when it constructively discharged Dameon from his employment; and

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

Alice A. Neal, Chief Investigator
Ron Dreher, Extern