



Maine Human Rights Commission

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INVESTIGATOR'S REPORT MHRC Case Number PA18-0009 August 20, 2019

Esther O'Brien-Nolin (Livermore Falls)

v.

Vincent Herzog, DO (Scarborough)

I. Summary of Case:

On January 5, 2018, Complainant, a [REDACTED] woman, filed this Complaint with the Maine Human Rights Commission ("Commission") alleging that Respondent, discriminated against her based on disability by refusing to allow her Communication Access Real-Time Translation ("CART") services provider to set up in his office. Respondent denied discrimination, stating that allowing the CART provider to set up in his waiting room posed a direct threat to the health or safety of others and was a potential HIPAA violation. The Investigator conducted a preliminary investigation, which included reviewing all of the documents submitted by the parties, including video footage submitted by Respondent, and holding an Issues and Resolution 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: November 28, 2017.
- 2) Date complaint filed with the Commission: January 5, 2018.
- 3) Respondent is a healthcare provider and is a public accommodation under the Maine Human Rights Act ("MHRA").
- 4) Complainant is represented by Samuel Riotte, Esq. Respondent is represented by Christopher Taintor, Esq.

III. Development of Facts:

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

Complainant [REDACTED] at a very young age. She [REDACTED] [REDACTED] [REDACTED] sometime in 2013. Complainant does not speak American Sign Language ("ASL") and relies on CART services, which provides real-time captioning, to communicate. On November 28, 2017, in connection with an ongoing workers' compensation case, she had a medical exam scheduled with Respondent at his office in Scarborough. Complainant scheduled a CART services provider to attend the appointment with her. Respondent's practice

manager ("Practice Manager") was aware before the day of the appointment that Complainant would have a CART provider with her. Complainant arrived at her appointment shortly before the CART provider and spoke briefly with Practice Manager, explaining that she would be reading Practice Manager's lips and that her CART provider would be arriving shortly. Complainant told Practice Manager she hadn't received any paperwork from Respondent in the mail. Practice Manager handed Complainant intake forms to complete.

Complainant had been told by her workers' compensation attorney that she would not have to fill out any paperwork, and she was unable to answer many of the questions asked on the intake form. Respondent came into the waiting room to speak to Complainant. Complainant could not understand what he was saying because she is [REDACTED]. The CART provider asked if she could set up her equipment so Complainant could understand what Respondent was saying. Respondent refused to let her set up her equipment and walked away while she was still speaking to him. Complainant and her husband stepped outside to confer with their workers' compensation attorney. While they were outside, Respondent came back into the waiting room, where the CART provider again tried to speak with him, and he again walked away from her. When Complainant and her husband returned to the waiting room, Respondent came to speak with them, again refused to allow the CART provider to set up her equipment and threatened to call the police if they did not leave.

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

Complainant communicated perfectly well with Practice Manager and fully understood what was being asked of her. Practice Manager informed Complainant that she should have received the forms in the mail. Complainant began filling out the forms, stopped, left the office with her husband for a period of time, and returned to tell Practice Manager she would not fill out the forms. Complainant also refused to provide ID, as required for this type of appointment. Practice Manager told Respondent that Complainant refused to produce ID and would not fill out the intake forms. Respondent could not commence the appointment without Complainant's ID. Respondent went into the waiting room to talk to Complainant, and the CART provider asked to set up her equipment in the waiting room. The waiting room is quite small, and many people pass through. Respondent was concerned that the equipment would pose a health and safety risk, and that discussing Complainant's medical history in the waiting room would violate the federal Health Insurance Portability and Accountability Act ("HIPAA"). Respondent told the CART provider that she could not set up her equipment in the waiting room and that the appointment could not begin without the intake forms and ID, but once Complainant provided those documents the CART provider could set up in the exam room. At one point, Complainant's husband became very aggravated and barked at Respondent about evaluating Complainant, saying that if Respondent did not evaluate her that would be discrimination. Respondent told Complainant's husband that hostile behavior was not permissible, and that Respondent would call the police if he persisted. Respondent returned to his office and Complainant, her husband, and the CART provider left shortly thereafter.

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 is [REDACTED]. She requires a CART provider or other captioning service to communicate.
- b) Complainant had an appointment scheduled with Respondent on November 28, 2017, in connection with an ongoing workers' compensation case.
- c) Complainant arranged to have a CART provider present at the appointment. Respondent's Practice Manager was aware of this and made a note in Complainant's file.

- d) Complainant and her husband arrived at the appointment before the CART provider. Complainant approached Practice Manager and told her she would be attempting to lip-read. On video footage provided by Respondent, Complainant can be seen pointing at her lips shortly after beginning her conversation with Practice Manager.
- e) It is difficult to lip-read with great accuracy. As an example, Practice Manager told Complainant that Practice Manager had sent Complainant the intake forms. Complainant believed that Practice Manager told her that Practice Manager had forgotten to mail the intake forms.
- f) Complainant began filling out the intake forms, then stopped.
- g) About five minutes before Complainant's appointment was scheduled to begin, Respondent came into the waiting room. He spoke to Complainant, who could not understand him. The CART provider spoke to Respondent and asked to set up her equipment so Complainant could participate in the conversation. Respondent refused. The video footage shows Respondent walking out of the waiting room while the CART provider was still speaking.
- h) Complainant and her husband stepped outside so Complainant's husband could call Complainant's workers' compensation attorney. While they were outside, Respondent came into the waiting room to water some plants. The CART provider attempted to speak to him again. The video footage shows Respondent continuing to water the plants, then again walking out of the waiting room while the CART provider was still speaking to him.
- i) Complainant and her husband came back into the waiting room. About forty-five minutes later, Respondent returned. The CART provider again requested that she be allowed to set up her equipment so that Complainant could understand what was happening. Respondent again refused. Complainant's husband told Respondent that if Respondent did not evaluate Complainant, he would be discriminating against her. Respondent told Complainant's husband and the CART provider that he would call the police. Respondent then walked out of the waiting room.

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.
- 2) Here, Complainant, who is [REDACTED] alleged Respondent refused to allow her CART provider to set up her equipment so Complainant could understand what Respondent was saying to her. Respondent denied this request on the basis that Complainant had communicated effectively with Practice Manager by lip-reading, and that setting up the CART equipment would pose a safety risk and possibly violate HIPAA.
- 3) The Commission's Accessibility Regulation provides:

A public accommodation shall take those steps that may be necessary to ensure that no individual with a physical or mental disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would

fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

Me. Human Rights Comm'n Reg., Ch. 7, §7.17(A).

- 4) The term "auxiliary aids and services" specifically includes "real-time computer-aided transcription services." Me. Human Rights Comm'n Reg., Ch.7, §7.17(B)(1).
- 5) To establish a denial of reasonable modification by a public accommodation, Complainant must show that:
 - (1) She comes within the protections of the MHRA as a person with a disability;
 - (2) Respondent operates a public accommodation under the MHRA;
 - (3) Respondent has in effect a policy, practice, or procedure that, directly or indirectly because of Complainant's disability, results in Complainant's inability to access Respondent's goods, services, facilities, privileges, advantages or accommodations;
 - (4) Complainant requested a reasonable modification in that policy, practice, or procedure which, if granted, would have afforded her access to the desired goods, services, facilities, privileges, advantages or accommodations;
 - (5) The requested modification—or a modification like it—was necessary to afford that access; and
 - (6) The Respondent nonetheless refused to modify the policy, practice, or procedure.

See 5 M.R.S. § 4592(1) & (1)(B); *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003). In proving that a modification is "reasonable," Complainant must show that, at least on the face of things, it is feasible for the public accommodation under the circumstances. See *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (employment case).

- 6) Upon such a showing, Respondent must make the modification unless it proves that doing so would alter the fundamental nature of its goods, services, facilities, privileges, advantages or accommodations; would impose an undue financial burden; or that the requested modification poses a direct threat to the health or safety of others. See 5 M.R.S. § 4592(1) & (1)(B); *Maine Human Rights Com'n v. City of South Portland*, 508 A.2d 948, 955 (Me. 1986); *Dudley v. Hannaford Bros. Co.*, 333 F.3d at 308; *Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454, 464 (4th Cir. 2012).
- 7) Complainant has shown that she was denied a reasonable modification by Respondent, as follows:
 - a) ██████████ is a *per se* disability (without regard to severity) under the MHRA definition of disability, 5 M.R.S. §4553-A(1)(B).
 - b) Respondent is a public accommodation under the MHRA.
 - c) Respondent has a policy, practice, or procedure that resulted in Complainant's inability to access his services, namely, he refused to allow Complainant's CART provider to set up her equipment so Complainant could understand what was being asked of her.
 - d) Complainant requested a modification. Complainant brought *her own* CART provider to her appointment. She simply requested that the CART provider be allowed to provide the services for which she had been hired and which Respondent was aware Complainant required. This modification would have afforded her the same access to Respondent's services enjoyed by hearing

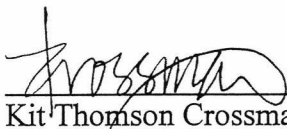
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- e) Complainant did, in fact, require this modification in order to access Respondent's services. While Respondent may have believed Complainant was able to understand the forms and to communicate effectively without CART services, Complainant explained that she did not understand what was happening. The Commission's rules grant public accommodations the right to decide what type of auxiliary aids and services are needed, "provided that the method chosen results in effective communication." Me. Human Rights Comm'n Reg., Ch.7, §7.17(C)(1)(ii). Here, Respondent chose not to permit auxiliary aids in the waiting room, and the record supports a finding that, as a result, Complainant was unable to communicate effectively.
 - f) Respondent refused to allow the CART provider to set up her equipment in the waiting room. It is not credible that the CART equipment would have posed a threat to public safety. Despite Respondent's statements at the Conference, the CART equipment is contained in a box the size of a milk crate. Complainant's appointment was scheduled for 9:00 AM. Respondent did not have another appointment scheduled until 10:30 AM. Respondent could easily have put a sign on his office door or invited Complainant and the CART provider into an exam room, in order to allow the CART provider to set up her equipment so Complainant could fully understand what was being asked of her.
 - g) Respondent does not dispute that he refused to grant the requested modification.
 - h) Respondent has presented no credible evidence that allowing the CART provider to set up her equipment would alter the fundamental nature of its goods, services, facilities, privileges, advantages or accommodations; would impose an undue financial burden; or that the requested modification poses a direct threat to the health or safety of others. Respondent cannot allege that the cost of the CART provider's services was prohibitive, since Respondent was not being asked to pay for these services. Complainant had arranged to have the CART provider at the appointment herself.
- 8) Discrimination based on disability in public accommodation is found.

V. Recommendation:

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

There are **Reasonable Grounds** to believe that Vincent Herzog, DO discriminated against Ester O'Brien-Nolin on the basis of disability, and conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).



Kit Thomson Crossman, Investigator