

Maine Human Rights Commission

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November 15, 2013

INVESTIGATOR'S REPORT E11-0719

[REDACTED]

v.

[REDACTED] (Sebec)

I. Complaint:

Complainant [REDACTED] alleges that Respondent [REDACTED] discriminated against her on the basis of disability by terminating her employment.

II. Respondent's Answer:

Respondent denies discrimination and alleges that Complainant was terminated because she lied on her employment application about her criminal history and because she caused Respondent to lose a client based on her poor behavior.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: March 14, 2011.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): December 15, 2011.
- 3) Respondent employs approximately 65 people and is subject to the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act, as well as state and federal employment regulations.
- 4) Respondent is represented by Thad Zmistowski, Esq. Complainant is not represented.
- 5) Investigative methods used: A thorough review of the materials submitted by the parties. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

- 1) The relevant parties, issues, facts, and documents in this case are as follows:

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- a) Complainant has psychoactive substance abuse disorder.¹ She worked for Respondent as a cleaner from January 10, 2011, to March 14, 2011, when she was terminated.
 - b) Respondent operates a cleaning service.
 - c) "Owner" is the owner and operator of the cleaning service.
 - d) "Employee A" worked for Respondent as a cleaner and interacted with Complainant during her employment.
 - e) "Husband" is the husband of Complainant and was also employed by Respondent as a cleaner.
 - f) Complainant submitted an application for employment on January 10, 2011. On this application she marked "no" in response to whether she had ever been convicted of a felony or misdemeanor crime (see file).
 - g) On March 14, 2011, Employee A called Owner and told him that Complainant and Husband had arrived late to work a few days prior and caused a disruption in the doctor's office where the cleaning job was located. During this conversation, Employee A stated that management in the office (Respondent's client) asked that Complainant and Husband not be allowed back on the premises. Employee A also stated that Complainant and Husband appeared significantly impaired upon arrival, and that Complainant had told him at a previous time that she and Husband were taking or had taken methadone.
 - h) Respondent ran a criminal background check on Complainant and Husband following the conversation with Employee A on March 14, 2011. Both background checks revealed multiple convictions of drug-related and other crimes (see file).
 - i) Respondent terminated Complainant and Husband on March 14, 2011, after running the criminal background checks.
- 2) Complainant provided the following:
- a) She has a record of drug addiction, but has been successfully rehabilitated. She has a disability and Respondent regarded her as having a disability. Her drug addiction has substantially limited her major life activities, including overall brain function and ability to independently care for herself.
 - b) She performed her job duties well and was unjustly terminated once Respondent discovered she was taking methadone. She was always complimented by clients on her cleaning work. The incident of the disturbance was used by Respondent as pretext. She was not the reason Respondent later lost the account. Respondent lost the account because Owner was never available to take complaints from the client regarding cleaning issues.

¹ While medical documents were not obtained, it is undisputed that Complainant was receiving prescribed methadone for drug addiction

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- c) During the unemployment application process after her termination, Owner admitted that he had a problem with her working in a doctor's office and for court services due to her methadone use, and that is why he terminated her. This shows Respondent's discriminatory reason for termination.
 - d) She did not check the "no" box on her employment application asking whether she had ever been convicted of a crime. She purposely left this box unchecked, as she always does, and explained to Owner that she had been convicted in the past. Owner told her not to worry. Owner later checked the box "no" in order to fabricate the fact that she had lied on her employment application.
- 3) Respondent provided the following:
- a) Complainant was terminated for causing a disturbance in the office of a long-term client and as a result, causing Respondent to lose the business of that client. Complainant was also terminated for lying on her employment application. She claimed that she had not been convicted of a crime, which proved to be false after Respondent ran her criminal background check.
 - b) All employees are requested to subject to a criminal background check on their application for employment. Respondent does not always run the check since it is costly (approximately \$30 per check).
 - c) On March 14, 2011, Employee A called Owner and told him that Complainant and Husband had arrived late to work on March 11, 2011, and had caused a disturbance by banging loudly on the office door and yelling to be allowed in, instead of contacting Employee A on his cell phone to be let in quietly. As a result, the client that owned the office instructed Employee A not to allow Complainant or her husband on the premises again. Employee A also told Owner during this conversation that Complainant and Husband appeared significantly impaired, and that Complainant had divulged to him that they either had taken or were currently taken methadone.
 - d) After hanging up the phone, Owner pulled Complainant and Husband's applications and ran the criminal background checks. Both checks came back positive with numerous convictions. Owner immediately fired both of them.
 - e) Respondent terminated an employee in the past for lying on his application when it was discovered he had been convicted of a crime.
 - f) When the contract with the client came up later in 2011, Owner received a letter stating that the contract would not be renewed. He believes that the client's decision to end the relationship was greatly influenced by Complainant and Husband's prior behavior.

V. Analysis:

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The Maine Human Rights Act provides that it is unlawful based on disability for an employer to terminate or otherwise discriminate against an employee in the terms and conditions of employment. 5 M.R.S. § 4572(1)(A).

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3) The Maine Human Rights Act, 5 M.R.S.A. § 4553-A, defines “physical or mental disability,” in relevant part, as follows:

1. Physical or Mental Disability, defined. Physical or mental disability” means:

A. A physical or mental impairment that:

- (1) Substantially limits one or more of a person’s major life activities;
- (2) Significantly impairs physical or mental health;

2. Additional terms. For purposes of this section:

A. The existence of a physical or mental disability is determined without regard to the ameliorative effects of mitigating measures such as medication, auxiliary aids or prosthetic devices; and

B. “Significantly impairs physical or mental health” means having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population.

4) The MHRA, 5 M.R.S.A. § 4553-A further provides, in relevant part, that “physical or mental disability” does not include:

C. Psychoactive substance use disorders resulting from current illegal use of drugs, although this may not be construed to exclude an individual who:

- (1) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- (2) Is participating in a supervised rehabilitation program and is no longer engaging in such use;
- (3) Is erroneously regarded as engaging in such use, but is not engaging in such use

5) 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).

6) First, 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 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261.

7) 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 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. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.

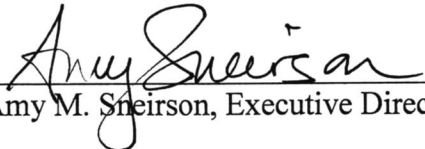
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- 8) In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.
- 9) Here, Complainant establishes a prima-facie case of disability discrimination by showing a) that she has a disability and was regarded as having a disability (Respondent was aware that Complainant was taking methadone, which is a prescribed medicine to rehabilitate those with a serious drug addiction), b) she performed her job satisfactorily (in that there is no written record of performance issues) c) she was terminated, and d) there was a continuing need for her work to be performed.
- 10) Respondent articulated legitimate, nondiscriminatory reasons for terminating Complainant, namely that she lied about her criminal history and she caused the company to lose an important client.
- 11) At the final stage of analysis, Complainant prevails in showing that Respondent's stated reasons are irrelevant and that, were it not for her disability, she would not have been terminated. Reasoning is as follows:
 - a) Owner claims that Complainant was terminated for causing Respondent to lose business, as evidenced by the fact that Respondent's contract with a long-term client was not renewed. Regardless of whether Complainant's behavior influenced the contract, however, it is not relevant to her termination because it did not occur until "later in the year" after Complainant was terminated. Respondent cannot claim to have terminated Complainant due to a loss of business before it occurred.
 - b) Even if Owner had anticipated a loss of business due to the alleged disruption caused by Complainant, his actions do not reflect that this was the reason for her termination, since he did not terminate her employment immediately after learning of it. Instead, he ran a criminal background check.
 - c) It is undisputed that Owner ran a criminal background check on Complainant only after he received the call from Employee A, and that the call was the motivating factor. Owner provided no plausible explanation as to why a criminal background check would aid him in the decision to terminate Complainant for causing a disruption.
 - d) It is far more plausible that Owner decided to run the criminal background check because Employee A divulged to him that Complainant had acknowledged taking methadone (undisputed). It is commonly known that methadone is a medication administered to those recovering from severe drug addiction. It is highly plausible that Owner ran the check to verify this (those with past addiction to illegal drugs would likely have a criminal history related to this illegal use).
 - e) It is unlawful to subject an employee to different terms and conditions of employment due to disability or perceived disability. It is clear in this case that Complainant was subjected to a criminal background check that she otherwise would not have been subjected to because of her disability / perceived disability.
 - f) It is irrelevant that Complainant's background check revealed that she had a criminal conviction history or that she may have lied about it on her application. Complainant prevails in showing that, were it not for her disability, Respondent would not have run the criminal background check, and as a result she would not have been terminated.


VI. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that [REDACTED] discriminated against [REDACTED] on the basis of disability by terminating her employment.
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Amy M. Smeirson, Executive Director



Angela Tizon, Investigator