



Maine Human Rights Commission

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Amy M. Sneirson
EXECUTIVE DIRECTOR

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February 28, 2014

INVESTIGATOR'S REPORT E12-0107

██████████ (Alfred)

v.

██████████ Inc. (Portland)

I. Complaint:

Complainant ██████████¹ alleges that Respondent ██████████ Inc. discriminated against him on the basis of age and disability by subjecting him to less favorable terms and conditions of employment, including an unnecessary medical examination.

II. Respondent's Answer:

Respondent denies discrimination and alleges that Complainant was subjected to a medical examination because the contractor for whom Complainant was working reported that Complainant was exhibiting signs that he was unfit for duty.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: January 16, 2012.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): March 6, 2012.
- 3) Respondent employs more than 15 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) Complainant is represented by ██████████. Respondent is represented by ██████████, Employee Relations Representative.
- 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.

¹ Complainant passed away in January 2014, after this investigation was conducted but before the report could be issued. Because his personal representative may act in his stead as an "aggrieved person" for the purposes of the MHRC procedure, this report is being issued despite Complainant's death; this is not intended as a reflection of whether or not a court of law would allow this action to proceed.

IV. Development of Facts:

- 1) The relevant parties, issues, facts, and documents in this case are as follows:
 - a) Complainant was 78 years old at the time this Complaint was filed. Complainant has medical issues including anemia, arthritis and hypertension. He was employed as a security guard for Respondent for 15 years. He was still employed (though he had been placed on an unpaid leave of absence) at the time this Complaint was filed.
 - b) Complainant believes that Respondent perceived him as disabled.
 - c) On or around January 2, 2012, HR Director took Complainant out of work and required him to go for a fitness-for-duty exam with Respondent's medical provider.
 - d) On January 4, 2012, Complainant provided a doctor's note from his primary care physician ("PCP") stating that he had no work restrictions (see file).
 - e) On January 11, 2012, Complainant took the fitness-for-duty exam ("FTE") with Respondent's chosen medical care provider, and was told that he did not pass. He was told that he should go to his PCP for further evaluation (*See Exhibit A*).
 - f) On January 12, 2012, Complainant was seen by his PCP's office and was given a note stating that he was stable on his current medication regime and was highly functional driving his own car (see file).
 - g) On or around January 16, 2012, Complainant had another FTE, because Respondent referred him for an evaluation of his mental fitness. The medical notes states, "There is no reason why Mr. Clapp cannot continue in his present job as a security guard. [Respondent's medical provider] states in their letter that Mr. Clapp is 'unable to perform essential functions.' There are no specifics addressed to substantiate this statement." (*See Exhibit B*.)
 - h) On January 20, 2012, Respondent contacted the medical provider responsible for the psychiatric FTE and asked for further information regarding Complainant's fitness for duty. The medical notes state, "There are no psychiatric restrictions or limitations for Mr. Clapp. He may return to work at anytime." (*See Exhibit C*.)
 - i) On January 30, 2012, Complainant was given another psychiatric FTE, by another medical professional, at the request of Respondent. The medical notes state that Complainant was alert and oriented, but that given a small "deficit in testing" he should receive a CT scan to rule out "chronic subarachnoid hematoma." The medical notes conclude, "Provided that there is nothing on Brain CT of concern, he should be able to return to work at his usual capacity without restrictions." (*See Exhibit D*.)
 - j) On Friday, February 3, 2012, the results came in from Complainant's CT scan, which did not "demonstrate any bleeding or acute process." The medical documents conclude, "Given the results of his Mental State Exam and Brain CT, he is able to return to work at his usual capacity. Recommend that he return to work." (*See Exhibit E*.)
 - k) On February 9, 2012, Respondent contacted one of Complainant's medical providers, further inquiring about his medical condition. On February 15, 2012 the medical provider responded

stating, "Reading through his job description, I have no reason to believe that there has been a significant change with Mr. Clapp to put restrictions or suggest any changes." (See Exhibit F.)

- 1) Complainant was placed on a leave of absence, effective on or about January 20, 2012, which has been unpaid since the beginning of the third week of leave.
- 2) Complainant provided the following:
 - a) He admittedly had problems getting in and out of his chair, but this would be easily accommodated by giving him a chair with no arms and a pillow to sit on. Also, he could have done his job with the accommodation of a cane when needed. Respondent witnessed his difficulty getting out of a chair after a meeting when he had been sitting for a while, but this did not constitute an evaluation of his ability to perform his job, and did not justify sending him for repeated medical examinations.
 - b) He was fully capable of performing his work as a security guard. His difficulty getting in and out of a chair did not affect this. He believes HR Director perceived him as disabled after watching him get out of a chair, and concluded that he was unable to perform the essential functions of his job. This was not an individualized assessment, and he should not have been required to take a FTE.
 - c) The FTE he was subjected to in order to test his mental capacity was unlawful and a violation of his rights. There was no basis for Respondent to question his mental capacity. The medical provider arranged by Respondent recommended further testing, including a CT scan, despite there being no evidence that he had a mental defect, and no evidence that he was unable to perform his job duties.
 - d) Complainant believes Respondent perceived him as disabled, and because of this and his age, felt he was no longer able to perform the essential functions of his position as a security guard. He believes he was unlawfully discriminated against on the basis of age and disability.
- 3) Respondent provided the following:
 - a) Complainant was not discriminated against on the basis of age or disability. Respondent contracts its employees out to different businesses in need of security work. On December 29, 2011, the client for which Complainant was working called Respondent and stated that Complainant was having difficulty standing and walking, and they were concerned that he could not perform his job duties in a safe manner.
 - b) Human Resources Director met with Complainant on two occasions, and both times observed Complainant having extreme difficulty standing up from a seated position. He was also very unsteady on his feet and almost fell over. Management asked Complainant to report for a FTE at an occupational medical facility. Complainant was put out on leave and was paid for the first two weeks of his absence.
 - c) Complainant failed his FTE when the doctor who evaluated him determined that he could not perform the essential functions of his job. The doctor recommended that Complainant's PCP evaluate him against his job description. Complainant's PCP determined that Complainant return to work without restrictions. Respondent was not satisfied with the evaluation by Complainant's PCP, because it trusted the expertise of the occupational specialist, who was more knowledgeable about the work environment and the essential functions of the position. The occupational specialist

concluded that Complainant was unsteady on his feet. This posed a significant safety risk since Complainant sometimes conducted patrols alone.

- d) From March of 2011 to March of 2012, 45.39% of Respondents local employees were over the age of 40, and 8 employees were over the age of 70. This does not support Complainant's claim of age discrimination.

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.

Disability: Unlawful Medical Examination

- 2) The MHRA provides that it is unlawful to "discriminate against a qualified individual with a disability because of the disability of the individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment." 5 M.R.S. § 4572(2)(A). This prohibition against discrimination includes medical inquiries and medical examinations. *Id.* at § 4572(2)(A).
- 3) In particular, an employer "may not require a medical examination and may not make inquiries of an employee as to whether the employee is an individual with a disability or as to the nature or severity of the disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity." *Id.* at § 4572(2)(D).
- 4) The MHRA defines "qualified individual with a disability" as "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." *Id.* at § 4553(8-D). A "physical or mental disability" includes being regarded as disabled or having a record of being disabled. *Id.* at § 4553-A(1).
- 5) Complainant is a qualified individual with a disability. His employer plainly regarded him as disabled – it placed him on an extended unpaid leave of absence because it did not believe he could perform the functions of his position. Yet, the evidence demonstrates that Complainant was able to perform the essential functions of his position in the opinion of three of the four medical professionals who examined him. Complainant had been performing those functions for 15 years, and his most recent performance review gave him the highest possible ranking.
- 6) Respondent required that Complainant undergo multiple medical examinations, including two evaluations of his mental fitness. Based on the evidence presented, Respondent has not demonstrated that those examinations were job-related and consistent with business necessity, with reasoning as follows:
 - a) Respondent's actions here were based upon Complainant's unsteadiness on his feet and difficulty getting out of a chair. While it may have been justified in inquiring about Complainant's ability to perform the essential functions of the position of security guard based on these factors, *see* 5 M.R.S. § 4572(2)(E), its questions were answered two days later, when Complainant's PCP provided a note stating that Complainant had no medical restrictions.

- b) Despite the medical information from Complainant's physician, Respondent required that Complainant's FTE be examined by its chosen doctor. This medical examination was not justified by business necessity, since Complainant's doctor had already informed Respondent that Complainant had no work restrictions.
 - c) The two mental evaluations required by Respondent also cannot be justified by business necessity. These examinations are particularly egregious, since Respondents had no evidence whatsoever calling Complainant's mental status into question.
- 7) Disability discrimination (unlawful medical examination) is found.

Disability Discrimination – Terms and Conditions of Employment

- 8) Complainant also alleges that he was put on unpaid leave because Respondent perceived him as disabled.
- 9) The MHRA provides, in part, that it is unlawful, based on physical or mental disability, 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).
- 10) The phrase “terms, conditions or privileges of employment” is broad and not limited to discrimination that has an economic or tangible impact. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (interpreting Title VII of the Civil Rights Act of 1964); *King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). “An employee has suffered an adverse employment action when the employee has been deprived either of ‘something of consequence’ as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld ‘an accouterment of the employment relationship, say, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.’” *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20 (citations omitted). An abusive reprimand may also be actionable. *See King*, 611 A.2d at 82 (telling an employee who had requested a smoke-free environment as a reasonable accommodation that “she should look for another job if she couldn't stand the smoke”).
- 11) 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).
- 12) 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).
- 13) 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.

- 14) 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 has established a prima-facie case by showing that his employer perceived him to be disabled, he was able to perform the essential functions of his position, and he was placed on an extended unpaid medical leave despite the multiple medical opinions supporting his ability to perform the essential functions of his position.
- 16) Respondent has asserted that it removed Complainant from his position because it did not believe he could perform the essential functions of his position, relying on a medical opinion from its chosen medical provider.
- 17) In the final analysis, Complainant has established that Respondent's reason is pretext, and that the reason for his placement on unpaid leave was disability discrimination. As discussed above, Complainant provided medical documentation supporting his ability to perform the essential functions of his position, but Respondent nonetheless insisted that he undergo a fitness for duty examination. Then, Respondent required that Complainant undergo two mental examinations, despite the complete lack of evidence of any mental impairment. Three of the four doctors who examined Complainant released him for duty without any restrictions.
- 18) It is important to note that Respondent never discussed potential accommodations for Complainant's perceived disability, when their concern appeared to be his unsteadiness on his feet and difficulty getting out of a chair after an extended period of sitting. Instead, Respondent did not allow Complainant to work, did not pay him, and insisted that his mental acuity was in doubt.
- 19) Disability discrimination (terms and conditions of employment) is found.

Age discrimination

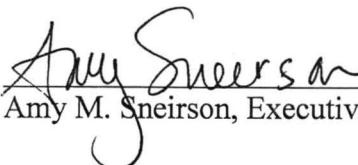
- 20) Complainant also alleges that he was sent for unlawful medical examinations and placed on unpaid leave due to his age.
- 21) The MHRA provides, in part, that it is unlawful, based on age, to "fail or refuse to hire or otherwise discriminate . . . [or] discharge an employee or discriminate with 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).
- 22) 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).

- 23) 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).
- 24) 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.
- 25) 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.
- 26) Here, Complainant fails to establish a prima-facie case of age discrimination because he could not show that he was put out on medical leave under circumstances giving rise to an inference of age discrimination. There is no evidence linking his age to his leave or request for a FTE.
- 27) In addition, 45% of Respondent's local workforce is over the age of 40. While not conclusive, this fact supports the conclusion that Respondent's actions here were not motivated by Complainant's age.

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 Respondent discriminated against Complainant on the basis of disability by subjecting him to less favorable terms and conditions of employment and subjecting him to unlawful medical examinations;
- 2) Conciliation on these claims should be attempted in accordance with 5 M.R.S. § 4612(3);
- 3) There are **No Reasonable Grounds** to believe that Respondent discriminated against Complainant on the basis of age by subjecting him to less favorable terms and conditions of employment; and
- 4) The age discrimination claim should be dismissed in accordance with 5 M.R.S. § 4612(2).


Amy M. Sneirson, Executive Director

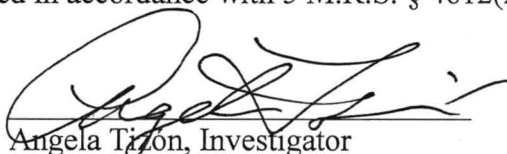

Angela Tizon, Investigator

Exhibit A

January 12, 2012

[Redacted]

[Redacted]

Delivered by: U.S. Mail UPS Overnight/2 Day In person

Re: Reasonable Accommodation Process

Dear [Redacted]

On January 11, 2012 you were seen at [Redacted] for a fit for duty exam at the request of the Portland Branch office following concerns for your well being at the client site. The results of that exam stated that you were unable to perform the essential functions of the job, have medical restrictions, and recommended further evaluation by your Primary Care Provider, Pain Clinic Specialist and Psychiatry. In order to engage in the interactive process, we are providing you with the following job-related information:

- X Job description
- X Post orders

At the suggestion of Dr. [Redacted] please review this information with your Primary Care Provider to determine whether or not you are able to perform the essential functions of your position, with or without an accommodation. If your health care provider determines that you have work-related restrictions or require an accommodation, please have him/her provide a statement advising what the restrictions may be, the expected duration of those restrictions and what accommodation may be appropriate to enable you to perform the essential functions of your job.

Please return with your health care provider's evaluation, so that we may begin an interactive discussion to seek an appropriate accommodation that may suit your abilities and allow you to perform the essential functions of your position.

In the interim:

X You will not be allowed to remain in an assignment due to safety concerns and/or job availability.

Please also note that effective Friday, January 20, 2012 you will be placed on an unpaid personal leave of absence pending the outcome of this interactive process. Please contact me if you have any questions about this process.

Sincerely,

[Redacted]
h
HR Specialist

[Redacted] Security
Services USA, Inc.
550 Forest Avenue
Portland, ME 04101

Tel 207-773-3332
Fax 207-773-3144
www.[Redacted].com



M.D.

February 15, 2012

HR Manager
Southern ME/NH

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE:

[REDACTED]
[REDACTED]
[REDACTED]

Dear Ms.

I am in receipt of your letter dated February 9th, 2012. Mr. [REDACTED] has been a patient of mine. He has had no significant change in his functional status. He continues to be able to walk and do his activities as before. He did have some problems with his thumb which has no bearing on how he functions. He continues to drive. He has not demonstrated any risks for falls or need of assistive devices.

He has seen other doctors including psychiatrists that he sees regularly.

If you have any questions about psychiatry you can direct them to Dr. [REDACTED] with the patient's permission.

Reading through his job description I have no reason to believe that there has been a significant change with Mr. Clapp to put restrictions or suggest any changes.

Sincerely,

A, M.D.

[REDACTED] [REDACTED]