



Maine Human Rights Commission
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INVESTIGATOR'S REPORT
E12-0188

February 28, 2014

[REDACTED] (Madison, ME)

v.

[REDACTED] (New Albany, OH)

I. Complainant's Complaint:

Complainant [REDACTED] alleged that Respondent [REDACTED] (hereinafter "[REDACTED]") violated the Maine Human Rights Act ("MHRA") by discriminating against her on the basis of her pregnancy by failing to schedule her at work and ultimately terminating her employment, failing to promote her, and removing her from the group of store employees who also modeled for the store's promotional materials (known as the "Cast").

II. Respondent's Answer:

Respondent states denies discrimination, and asserts that Complainant limited her own availability, and failed to either show up or call in as scheduled on three occasions. Respondent attempted to reach out to Complainant, but she did not respond, which left Respondent with no choice but to terminate her employment.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: October 11, 2011.
- 2) Date complaint filed with the Maine Human Rights Commission: March 8, 2012.
- 3) Respondent employs more than 500 employees and is subject to the MHRA, Title VII of the Civil Rights Act, as well as state and federal employment regulations.
- 4) Respondent is represented by [REDACTED] and [REDACTED]. Complainant is represented by [REDACTED] and [REDACTED].
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution Conference ("IRC"). 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 and Issues:

- 1) The parties and issues in this case are as follows:
 - a) Complainant worked for the [REDACTED] store at the Bangor Mall from February 2010 until March 2012, when her employment was terminated. Between the end of October 2011 and her termination date, Complainant worked only one shift, on Black Friday 2011.
 - b) Respondent is a national retailer of casual clothing and accessories focusing on consumers aged 18 to 22.
 - c) Complainant alleged that Respondent discriminated against her on the basis of her pregnancy by removing her from the Cast, refusing to schedule her to work and ultimately terminating her employment, and failing to place her in its Manager in Training ("MIT") program, despite having repeatedly assured her that she would be placed in the program after her college graduation.
 - d) Respondent denies discrimination, and states that it was unaware of Complainant's pregnancy at the time the MIT decision was made. Respondent states that it did not schedule Complainant to work because she was unreliable, and that it terminated her employment after she failed to respond to inquiries about her continuing interest in working for [REDACTED]
- 2) Complainant provides the following:
 - a) Complainant began to work as a member of the [REDACTED] sales staff (a "Model" in [REDACTED] parlance) at Respondent's store in the Bangor Mall in February 2010. She was also a full-time student at the University of Maine at Orono. After Complainant was hired, she was chosen to be a part of "the Cast," which meant that she modeled for Respondent's promotional materials.
 - b) Complainant became pregnant in September 2011. Her boyfriend, who also worked for Respondent, left early on the day Complainant learned she was pregnant; when Manager PY, called to ask him why he had left, he informed her that Complainant was pregnant.
 - c) Complainant spoke with several people at work - including fellow employees, the store manager, and two assistant managers - about her pregnancy, and about her desire to continue working.
 - d) In October 2011, Complainant posted a photo of her ultrasound on Facebook. She was Facebook friends with her managers at [REDACTED] at least some of whom saw the picture. On October 25, 2011, one of the store managers commented on Complainant's Facebook wall that Complainant was the "cutest little pregnant woman ever".
 - e) Prior to becoming pregnant, Complainant had reduced the number of hours she was able to work each week at [REDACTED]. Like the many other student employees at the store, once Complainant's classes began, she had limited availability; in Complainant's case, she was available for two days each week for a four hour shift. Complainant had been working more

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often during the summer months because she did not have to schedule work around her classes. She also had more availability during her breaks from school.

- f) Complainant had been working at Respondent's store since February 2010, and had always reduced her availability during the school year. There were many other students working there who had similarly limited availability, working only one or two four-hour shifts each week.
- g) Complainant was part of the Cast for about a year and a half, and during this time she observed that anyone chosen for the Cast was included in all of the Cast work unless they left employment entirely. Complainant was part of Cast photo shoots in September and October 2011. Her pregnancy became public knowledge in mid-October. In late October, she was excluded from a Cast photo shoot – she was not invited to participate, and only learned about the photo shoot because another employee told her about it.
- h) Not too long after posting her ultrasound to Facebook, Complainant noticed a sudden decrease in her hours, and asked Manager MD the reason for the change. Manager MD responded that they would “do what they could” to schedule her, but provided her with no reason for her reduction in hours.
- i) Complainant was scheduled for approximately four hours of work during the month of October. She was not scheduled to work at all after October 29, 2011. Complainant's coworkers continued to receive four hour shifts, but she did not, although she repeatedly requested that she be scheduled to work.
- j) Complainant worked only one more shift at [REDACTED] after October 29, when she was called in to work on Black Friday. During that shift, Manager MD commented that she was concerned for Complainant, mentioning her pregnancy.
- k) Before Complainant's pregnancy, she frequently spoke to people at work, including her managers, about her anticipated promotion to the MIT program. Respondent “practically promised” the position to her, and spoke to her frequently about the logistics, indicating that the position was hers.
- l) In November 2011, Complainant interviewed for the MIT position with Manager PY. She explained that she would be available for the MIT position beginning on December 13, after she graduated from college.
- m) Complainant received a phone call about three weeks after the interview from Manager PY, who stated she needed to consult with the regional manager about Complainant's need to start in mid-December. Manager PY said that she would call Complainant when she had more information, but Complainant did not hear from Manager PY about the position again.
- n) At the end of December 2011, Complainant learned that the MIT position had been given to someone who was not already an employee at [REDACTED]. Complainant was told that Manager PY had said that she was not hired because [REDACTED] wanted the trainee to start before mid-January, and because of concerns that Complainant's maternity leave would affect the back-to-school season in July and August of 2012.

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- o) Complainant never discussed maternity with any manager at [REDACTED] and did not mention it in her interview. In addition, she had made clear she could begin working in the position as of December 13, 2011.
 - p) Complainant denies that she neither called nor showed up for work during October and November 2011. There is no documentation of these incidents because they did not happen. Complainant explained that Respondent would schedule employees for "call-in shifts": this meant that the employee was expected to call in before the shift to see if she was needed. If the schedule showed her on a shift but she did not work it, it was because she called in and was told she was not needed.
 - q) Complainant never heard from Respondent about the termination of her employment, and no one at [REDACTED] contacted her to see if she was still interested in working there. Complainant had been logging into her online employee account regularly to see if she had been scheduled to work, but she was never given any hours. Ultimately, she contacted an attorney, who requested her personnel file from [REDACTED] shortly after asking for her personnel information, she tried to log into her account again, and discovered that it had been disabled. Respondent never tried to reach out to Complainant.
- 3) Respondent provides:
- a) Complainant began working for Respondent in February 2010.
 - b) Complainant did not call and did not show up to work on October 14, October 20, and November 17 of 2011.¹ This was one of the reasons that she was not being scheduled as often as she had been in the past.
 - c) Complainant already had an unsatisfactory performance note for failure to arrive for a shift on June 15, 2010.
 - d) After November 17, 2011, Complainant was no longer considered for call-in shifts.
 - e) Respondent never knew that Complainant was pregnant.
 - f) Complainant changed her availability, and Respondent could no longer schedule her for her normal four-hour shifts.
 - g) In the interview for the MIT position, Complainant stated that she would not be able to work until after the holiday season. Complainant was not selected for the MIT position because she was not available to work before mid-January, and because she had already self-limited her availability in the store to two specific four-hour shifts.
 - h) Complainant told Manager MD that she would increase her available hours, but Complainant never followed through on this.

¹ As noted above, *see* Paragraph 2(p), Complainant denies this allegation. When asked at the IRC why it had no documentation of these "no call/no show" incidents, Respondent stated that management forgot to record them.

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- i) In March 2012, Respondent reached out to Complainant to ask if she wished to continue her employment. Complainant did not respond, and her employment was terminated as a result.
- j) Respondent noted that [REDACTED] employs pregnant women "all over the world."

V. Analysis:

- 1) The Maine Human Rights Act 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 Maine Human Rights Act provides, in part, that it is "unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because . . . sex . . . 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).
- 3) The term "sex" includes "pregnancy and medical conditions which result from pregnancy". 5 M.R.S. § 4572-A(1).
- 4) 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).
- 5) Here, Complainant alleges that she suffered multiple adverse employment actions based on her pregnancy, including a reduction in her hours, being removed from the Cast, not being selected for the MIT position, and the termination of her employment. Respondent denies discrimination, and states that Complainant reduced her availability, failed to show up for scheduled shifts, and failed to respond to its inquiry as to whether she wanted to continue working.
- 6) 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).
- 7) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that she (1) was a member of a protected class, (2) was qualified for the position she 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). With regard to the failure to promote her to the MIT position, Complainant must show that she met the minimum qualifications for the position, and was rejected. *City of Auburn*, 408 A.2d at 1263. With regard to her termination, she must show that the employer 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.

- 8) 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.
- 9) 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.
- 10) 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.
- 11) Complainant has established a prima-facie case of discrimination based on sex (pregnancy). She was a member of a protected class, performed her job satisfactorily, and suffered a number of adverse employment actions. The adverse treatment began almost immediately after Respondent learned of her pregnancy, giving rise to an inference of discrimination.
- 12) Respondent has provided the following nondiscriminatory reasons for the adverse job actions it took: (1) Complainant changed her availability and made it difficult, if not impossible, for Respondent to continue to schedule her; (2) Complainant failed to call in and failed to show up on three occasions in October and November 2011; (3) Complainant was not the right person for the MIT position because she did not have enough availability and could not start working until mid-January; and (4) Complainant failed to respond after Respondent reached out to ask if she was still interested in working.
- 13) In the final analysis, Complainant has been able to demonstrate that these reasons are false, and that the real reason for the adverse actions taken against her was her pregnancy, with reasoning as follows:
 - a. Respondent claimed that it did not know that Complainant was pregnant when it took the adverse employment actions against her. Complainant was able to provide proof that one of her managers was aware of her pregnancy no later than October 25, however, because the manager left a comment about Complainant's pregnancy on her Facebook wall [see MHRC

file]. Respondent's lack of credibility on this most basic issue casts doubt upon its explanations generally.

- b. Respondent did not provide documentation of any of the three instances on which it claimed Complainant did not call in and did not show up to work her shift. When questioned on this issue, Respondent claimed that its managers "forgot" to document the incidents.² It appears unlikely that Respondent would "forget" to document the same issue on three separate occasions. The more likely reason for the lack of documentation is that these incidents did not occur, and that the shifts involved were "call-in shifts", as explained by Complainant.
- c. Complainant credibly explained that her availability was no different than it had been in the past: she was available more often during vacations, and less often during the school year. Respondent employed a number of students, and apparently was able to provide four-hour shifts to other students, as it had provided them to Complainant until her pregnancy – those shifts only became unavailable to Complainant once Respondent learned of her pregnancy.
- d. Respondent's reasons for denying Complainant the MIT position do not appear to be valid. Complainant provided copies of Facebook posts indicating that she was working as a substitute teacher in mid-December and early January. These support her allegation that she told Respondent that she was available to begin the MIT position as of December 13, rather than mid-January, as Respondent alleged. In addition, Complainant's limited availability, which was due to her class schedule, would not have been a factor, as she would have graduated from college in mid-December before starting the MIT position. Moreover, Complainant was credible in explaining that she had been all but promised this position. It appears that the more likely reason for Respondent's decision was Complainant's pregnancy, and Respondent's belief that Complainant would be out on maternity leave during the busy back-to-school season.
- e. Respondent offered no reason for excluding Complainant from the Cast photo session at the end of October. Complainant had been a member of the Cast for more than a year, and was suddenly excluded immediately after her managers learned that she was pregnant, despite having been in a photo shoot earlier that same month. This timing suggests that Respondent did not want Complainant in its promotional materials due to her pregnancy.
- f. Finally, the timing of these adverse events is telling in this case. It appears from all the evidence that as of mid-October 2011, Complainant was considered a valued employee and member of the Cast, with an almost certain position in the MIT program. By October 25, 2011, her managers knew that she was pregnant. Within the course of about a month after that, her hours were reduced and then taken away altogether, she was excluded from a Cast photo shoot, and she was passed over for the MIT position in favor of someone from outside the organization. Complainant's ultimate termination came after months in which she was not scheduled to work at all, and almost immediately after her attorney requested her personnel

² After the deadline for submitting evidence had closed, Respondent provided two tables that allegedly prove that Complainant did not call or show up for her shifts. Apart from the fact that the belated submissions need not be considered, the information provided does not establish that Complainant did not call or show up for her scheduled shifts.


file. These circumstances lead inexorably to the conclusion that these actions would not have been taken but for Complainant's pregnancy.

14) Discrimination on the basis of sex (pregnancy) is found.


VI. RECOMMENDATION:

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

1. There are **Reasonable Grounds** to believe that Respondent [REDACTED] discriminated against Complainant [REDACTED] on the basis of her sex (pregnancy); and
2. Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneirson, Executive Director



Michèle Dion, Investigator