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

February 20, 2015

INVESTIGATOR'S REPORT
E14-0140

[redacted] **(South Paris)**

v.

[redacted] **(Norway)**

I. Complaint:

Complainant [redacted] alleges that Respondent [redacted] discriminated against her on the basis of sex (pregnancy) in the terms and conditions of employment by placing her on involuntary maternity leave, resulting in a loss of pay and her separation from employment under different terms and conditions than other employees.

II. Respondent's Answer:

Respondent denied discrimination and alleged that Complainant was removed from the work schedule because she was too close to her pregnancy due date and because Respondent was concerned for her safety and had not received medical documents from Complainant stating that she could work without restrictions.

III. Jurisdictional Data:

1) Date of alleged discrimination: December 27, 2013.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): March 21, 2014.

3) Respondent employed 15 people at the time this Complaint was filed, and is subject to the Maine Human Rights Act ("MHRA"), Title VII of the Civil Rights Act of 1964, as amended, and state and federal employment regulations.[1]

4) The parties in this case are not represented by counsel.

---

[1] Respondent ceased operations on February 17, 2014, and no longer has employees.

5) Investigative methods used: A thorough review of the materials submitted by the parties, and interviews. 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:

   a) Complainant worked for Respondent as a waitress from the summer of 2011 until December 27, 2013. She was pregnant at the time she was placed on leave and separated from employment.

   b) Respondent operated the restaurant at which Complainant worked. The restaurant closed on February 17, 2014, and all remaining employees were laid off.

   c) "Owner" owned and managed the restaurant. Owner was Complainant's supervisor and was responsible for removing Complainant from the work schedule.

2) Complainant provided the following:

   a) On or around June of 2013, Complainant informed Owner that she was pregnant. She gave him a medical document that same week with her projected due date of January 30, 2014.

   b) Complainant experienced morning sickness at night and asked Owner at one point to give her morning shifts, which Owner accommodated. Since she was accommodated, her pregnancy never affected the quality of her work. Owner never told her that there was a problem with her work.

   c) Complainant told Owner at one point that she had a pregnancy related blood-clotting condition, and that she was fine for now but that if her condition worsened she would have to give herself an injection every night to control the clotting. Owner told her that if it got worse he wanted to know about it. He did not ask for medical documents and Complainant did not feel they were relevant, as this was unrelated to her work.

   d) One time she fell and hit her head in an accident unrelated to her pregnancy, and Owner took her to the emergency room. This was not while she was working. Another time she was feeling extreme cramping at work during a shift and went to the emergency room because she was worried that she was in preterm labor. She was told at the hospital that she had minor intestinal issues that were unrelated to her pregnancy.

   e) Toward the middle of her pregnancy a lab technician had made a mistake reading one of her ultrasounds and she was confused about her pregnancy due date. Complainant shared this information with her coworkers. Owner questioned her if her due date had changed, but she stated that it had not. Owner told her he had never received paperwork stating her due date, and she reminded him that she had given him this information in June. He told her that he must have misplaced it, and never asked for it again.

   f) On December 27, 2013, Complainant was approximately 35 weeks pregnant. On that day she called Respondent to inquire about her hours for the upcoming work week. Owner told her that she was removed from the upcoming schedule because she was getting too close to her due date and that he

needed to cut some hours because he could not afford to keep all of the employees on the schedule. Complainant asked Owner if she would ever be back on the schedule, and he stated that he would see. She never heard back from him.

g) A few weeks later, when it was known that the restaurant was closing permanently, Complainant went to see Owner in person and asked if she was going to be eligible for unemployment benefits, since all of the employees who were scheduled to work were eligible. Owner told her that she was not laid off like the others, since she was on maternity leave. Complainant protested that she should have been the one to decide when to stop working, and that it was not legal for Owner to decide when her maternity leave would commence. Owner responded that and he had every right to remove her from the work schedule when he did because she was too close to her due date.

h) Complainant believes that Respondent discriminated against her by subjecting her to less favorable terms and conditions of employment (removed from the schedule, separated from employment, told she was not eligible for unemployment benefits) due to her pregnancy.[2]

3) Respondent (Owner) provided the following:

a) Owner did not discriminate against Complainant on the basis of pregnancy. Owner removed Complainant from the schedule because he believed that she was approaching her due date soon, and he had not been provided with any medical documentation confirming her due date or whether or not she had any work restrictions. If Complainant had provided this medical documentation clearing her to work, she would have been placed back on the schedule.

b) Owner has no written policy regarding maternity leave, but in the past he had always been provided with a letter from a doctor stating a pregnant employee's due date. Owner asked Complainant to provide him with this information several times, but she failed to provide it. Complainant did verbally tell him her due date, but the date changed and he was unable to keep track of it without proper documentation.

c) Owner also asked Complainant to provide a medical note from her doctor regarding any work restrictions she may have due to her pregnancy. Complainant never stated that she had any work restrictions, but other employees came to Owner and told him that Complainant was stating that she was unable to perform certain tasks such as carrying a large tub of ice cream.

d) Also, given that Complainant had been to the emergency room twice, Owner had concerns for the safety of Complainant and her baby. Owner also felt that Complainant could become unreliable due to her pregnancy-related medical condition. Owner was unaware that the two trips to the emergency room were unrelated to her pregnancy as Complainant never communicated this to him.

e) In the past, Owner has worked with employees to have a plan in place when an employee went out on maternity leave. Owner did not have a plan in place to cover Complainant's job duties during her maternity leave because he did know Complainant's exact due date and he did not have any document stating when it was.

---

[2] Complainant applied for and was granted unemployment benefits on May 18, 2014. Respondent disputed the initial unemployment claim but did not appeal the decision.

f) Owner never terminated Complainant's employment, but just took her off the schedule. Complainant should have known that she could have returned to work after her maternity leave. Owner assumed that Complainant would come back to work after she delivered her baby and her life was more stable.

g) Many pregnant employees have returned to work after maternity leave. No one has ever complained about the way Owner has handled maternity leave.

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 MHRA provides, in part, that "it is unlawful employment discrimination. . . for any employer to . . . because of . . . sex . . . discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S. § 4572(1)(A). The MHRA defines the word "sex" to include pregnancy and medical conditions which result from pregnancy. 5 M.R.S. § 4572-A(1).

3) 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).

4) The Commission's Employment Regulations state that it is unlawful for an employer, except where based on a bona fide occupational qualification, "to treat a pregnant woman who is able to work in a different manner from other persons who are able to work." Me. Hum. Rights Comm'n Reg. Chapter 3, § 11(2)(B & C).

5) Complainant alleges that she was removed from the schedule resulting in a loss of pay and separation from employment on different terms and conditions than other employees because of her pregnancy and perceived pregnancy-related medical conditions.[3] Respondent denies discrimination and alleges that Complainant was removed from the schedule because she was approaching her stated due date, he needed to reduce staff hours, and because Respondent was concerned for her safety and Complainant had not provided medical documentation showing a due date or any work-related restrictions.

---

[3] As noted above, Respondent ceased all operations in February 2014. It is undisputed that Complainant would have lost her job at this time, regardless of her pregnancy. The termination of Complainant's employment is therefore not being analyzed separately, but rather the timing and terms of her discharge are considered as part of her claim that she was discriminated against in the terms and conditions of her employment.

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).

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. 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.

9) 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.

10) Here, Complainant establishes a prima-facie case of sex discrimination by showing that she performed her job satisfactorily (undisputed by Respondent), she was removed from the schedule and placed on involuntary maternity leave, she was pregnant at the time, and Respondent acknowledged that Complainant was removed from the schedule for reasons directly related to her pregnancy.

11) Respondent failed to articulate a legitimate, nondiscriminatory reason for removing Complainant from the schedule. Owner stated that he removed Complainant because he felt that she was too close to her due date and he had concerns about her reliability and safety due to perceptions about her pregnancy. As stated above, this is not a legitimate defense, as it is unlawful for an employer to treat a pregnant woman who is able to work in a manner that is different than any other employee that is able to work. There was no evidence in this case that Complainant was unable to work at the time she was removed from the schedule.

12) Respondent alleged that Complainant did not provide him with medical documents confirming her due date and any work restrictions, but could not articulate why Respondent needed this information. First, Respondent did not dispute that Complainant had verbally told him her due date, and as due dates are always only an approximation, Respondent could not explain why further documentation was needed. Second, Respondent acknowledged that Complainant never stated that she had any work restrictions or that she needed an accommodation. Therefore, Respondent had no reason to require medical documentation from Complainant.

13) Respondent alleged that his concerns for Complainant's safety and reliability were in part a result of Complainant's two visits to the emergency room, one of which did not occur during work. Complainant alleged that these incidents were unrelated to her pregnancy, but regardless of the causes for her trips to the emergency room, Respondent did not have sufficient information to conclude that Complainant could not perform her work duties in a safe manner, and provided no evidence to support this conclusion.

14) Complainant prevails here by showing that, were it not for her pregnancy, she would not have been removed from the schedule which resulted in loss of pay, and her separation from employment under different terms and conditions than other employees.

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 sex (pregnancy) in the terms and conditions of employment; and

2) Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).

Amy M. Sneirson, Executive Director

Angela Tizon, Investigator