Date: August 7, 1998

To: Commissioners
Maine Human Rights Commission

From: John E. Carnes J.E.C.
Commission Counsel

Subject: Cases Involving Limitations on LTD Benefits For Employees With Mental Disabilities

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At your request, I offer my comments on the issues raised by the parties at the June 29, 1998 Commission Meeting. I invite you to call me prior to the August Meeting if you have questions.

1. ERISA Preemption. ERISA does not preempt the MHRA because: (a) ERISA does not preempt the ADA; (b) the ADA is enforced, in part, by deferring to state FEP agency enforcement of comparable state statutes such as the MHRA; (c) therefore, preemption of the MHRA would unlawfully impede the enforcement and purposes of the ADA.

2. Standing of Former Employees. Because the MHRA and ADA prohibit discrimination in fringe benefits, the legislature must have given former employees standing to raise a challenge to allegedly discriminatory benefit plans. This position is consistent with U.S. Supreme Court interpretation of Title VII. Robinson v. Shell Oil Co., 1175. Ct. 843 (1997).

3. Does the MHRA Prohibit Limitations on LTD Benefits for Employees with Mental Disabilities? This is the primary legal issue in these cases. The MHRA and the ADA prohibit discrimination based on mental disability in the provision of fringe benefits.

Respondents' Arguments. (a) Respondents argue that all entering employees have access to the same LTD plan (with its various conditions and limitations) and, therefore, there is no discrimination between disabled and non-disabled employees. They note that several federal circuit courts of appeal have taken this position, e.g., Ford v. Schering-Plough Corp. (May 22, 1998, 3rd Cir.). (b) The issue is the subject of continuing national debate in Congress, e.g., during passage of the Health Ins. Portability and Accountability Act of 1996, and, therefore, Congress could not have intended a definitive statement in the ADA of 1990.

Complainants' Arguments and EEOC's Position. (a) Although across-the-board limitations on benefits which affect disabled and non-disabled employees alike do not violate the ADA (and MHRA), limitations which affect the disabled only, can violate the ADA. They argue that in this case, the subject group is not all entering employees but employees who are unable to work because of disability. A sub-group, those unable to work because of mental disability, is selected for limited benefits. This is different treatment because of mental disability. (b) Additionally, the two-year limitation acts to terminate the right of mentally disabled employees to reemployment upon recovery. Employees recovering from long-term physical disability have rights of reemployment. (c) Finally, Respondents have filed to meet their burden of showing that they are protected by the "safe harbor" provision of the Acts. Complainants cite Lewis v. Aetna Life Ins. Co. and Kmart (ED Va. 1998) for support.

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"Safe Harbor" Defense. Section 501(c) of the ADA (§4554 of the MHRA) states that it is legal for an employer to observe the terms of a bona fide benefit plan which is based on underwriting risks consistent with state law. Maine law (24-A M.R.S.A. §2159-A) prohibits limitations on the extent of coverage based solely on mental (disability) unless the limitation is based on "sound actuarial evidence."

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In the cases before you, Respondent Liberty Mutual offers a January, 1998, survey conducted by the Health Insurance Association of America. Respondent states that the survey concludes that eliminating a two-year cap would result in a 14.7% premium adjustment. Complainant Trask counters that, even if this is true, such an increase would result in an increase per year of only $1.68 for an employee earning $50,000 per year. Employees earning less than $50,000 per year would have even smaller increased premiums. He argues that this is negligible and cannot be a legal basis for discrimination.

Recommendation: I believe this issue will ultimately be decided by the U.S. Supreme Court. Respondents have on their side the weight of several circuit court decisions. Complainants have on their side the [redacted] Lewis decision and the EEOC, the agency authorized by Congress to enforce the ADA. I believe it is appropriate for the Maine Human Rights Commission to conclude that there are "reasonable grounds' to believe a violation of the law exists, and move the issue along to the courts where it will ultimately be decided.

4. "Other Issues"

A. Insurance Companies as "Employers." There are reasonable grounds to find insurance companies "employers" under the MHRA because the First Circuit Court of Appeals ruled ~~by~~ Carparts that the ADA applies to company "services" as well as physical locations, and that insurance companies administering benefit programs for an employer can be the employer's "agent."

B. Metropolitan Life. I believe that you could find "No Reasonable Grounds" with regard to Respondent in the [redacted] case, [redacted] since [redacted] was no longer operating in the capacity of administrator of the employer's program when Mr. [redacted] was denied benefits on October 31, 1997.

cc: Patricia E. Ryan, Executive Director
Paul D. Pierce, Chief Investigator