Memo

Date: March 31, 2008

To: Patricia E. Ryan, Executive Director

From: John P. Gause, Commission Counsel

Re: [redacted] Thomas R. Deranti v. Southern Maine Medical Center

E07-0641

Respondent, [redacted] has asked that this case be administratively dismissed. For the following reasons, I recommend that the request be denied.

The complaint alleges public accommodations discrimination in that Respondent has restricted Complainant's OB/GYN surgical privileges because of Complainant's disability, obstructive sleep apnea. Respondent requests dismissal because Complainant asked that the case be dual-filed with the EEOC, as a result of which we docketed the case as an employment claim. Moreover, Respondent states that it is not a "place of public accommodation" even if the complaint were treated as a public accommodations claim.

As you know, complaints can be administratively dismissed if the Commission lacks jurisdiction, if there is a failure to substantiate the complaint of discrimination, if the complaint is not filed within six months of the date of alleged discrimination, or if complainant fails to proceed or accept reasonable settlement offs. MHRC Procedural Rule § 2.02(H).

The fact that Complainant requested that his complaint be dual-filed with the EEOC (and we therefore deemed the case an employment case), when in fact the claim is for public accommodations discrimination, is not a basis for dismissal. The statement of particulars attached to the complaint alleges a "public accommodations" violation, not an employment violation. *See, e.g.*, ¶ 3 ([redacted] is a hospital and a place of public accommodation under state and federal law. I believe that [redacted] has discriminated against me in violation of state and federal law by denying me full and equal enjoyment of a public accommodation based on my disability. . . ."). We should simply revise the processing of this complaint to reflect that it is a public accommodations claim.

With respect to whether Respondent is a "place of public accommodation" for purposes of this claim, I think that it is one. The MHRA, in part, makes it unlawful "[f]or any public accommodation . . . to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of . . . physical or mental disability . . . any of the accommodations, advantages,

facilities, goods, services or privileges of public accommodation. . . ." 5 M.R.S.A. § 4592(1). The Act defines "place of public accommodation," in part, as "a facility, operated by a public or private entity, whose operations fall within at least one of the following categories . . . hospital. . . ." 5 M.R.S.A. § 4553(8)(F). The Act defines "person," in part, as "one or more individuals." 5 M.R.S.A. § 4553(7). Thus, the plain terms of the act cover a hospital (a "place of public accommodation") denying staff privileges (". . . facilities, goods, services or privileges. . .") to a doctor ("person"). *See Haynes v. Neshewat*, 729 N.W.2d 488, 493-494 (Mich. 2007) (public accommodations provision of Michigan Civil Rights Act); *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113, 122 (3rd Cir. 1998) (Title III of ADA); *Hetz v. Aurora Medical Center of Manitowoc County*, 2007 WL 1753428, 11 (E.D.Wis. 2007) (same).

Respondent states that it is not covered because the definition of "place of public accommodation" applies only to patients and other members of the general public who seek the services and goods of the hospital and not to physician medical privileges. Respondent states that Complainant did not pay the hospital anything for the privileges and was not a client or customer of the hospital. It cites section 4592(4), which states that "[f]or purposes of this subsection, the term 'individual' or 'class of individuals' refers to the clients or customers of the covered public accommodation that enters into a contractual, licensing or other arrangement." 5 M.R.S.A. § 4592(4) (emphasis added). That language does not mean that Complainant must be a "client or customer," however, because the definition in section 4592(4) clearly limits itself to *subsection* 4592(4), and Complainant's claim is not necessarily brought pursuant to that subsection. *See* discussion of § 4592(1) above; *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d at 119 ("the phrase 'clients or customers,' . . . is not a general circumscription") (interpreting ADA).

Respondent also cites a part of the definition of "place of public accommodation," which includes, "[a]ny establishment that in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public." 5 M.R.S.A. § 4553(8)(N). Respondent extrapolates from this that a hospital is only covered to the extent that it offers its goods, services, privileges, etc., to the general public, not with respect to those privileges not offered to the general public.

This argument would hold more sway under the old definition. The Act defined "place of public accommodation" before 1995 as "any establishment which in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public; and it includes, but is not limited to . . . hospitals. . . ." 5 M.R.S.A. § 4553(8) (1992). Under this former definition, the Law Court held that the services of an establishment that are not offered to the general public are not covered by the Act. *See Maine Human Rights Com. v. Le Club Calumet*, 609 A.2d 285, 287 (Me. 1992). The 1995 amendments, however, restructured the definition to read, "a facility, operated by a public or private entity, whose operations fall within at least one of the following categories . . . hospital. . . ." 5 M.R.S.A. § 4553(8)(F). The language quoted by Respondent appears at the end of the listed categories and is preceded by the conjunction

"and," which does not support a limitation on the whole definition that the general public be served. *See* 5 M.R.S.A. § 4553(8)(M).

Respondent cites two cases in support of its argument, *Bauer v. Muscular Dystrophy Ass'n, Inc.*, 268 F.Supp.2d 1281, 1282 (D.Kan. 2003), *aff'd on other grounds*, 427 F.3d 1326, and *Haynes v. Oakwook Healthcare, Inc.*, 2005 WL 1489599, No. 249848 (Mich. App. June 23, 2005).

In *Bauer*, the United Stated District Court for the District of Kansas held that volunteers at a camp were not covered by Title III of the ADA. Rather, the court held that Title III was "most reasonably construed to mean the goods, services and facilities offered to customers or patrons of the public accommodation, not to individuals who work at the facility, whether those workers be paid employees, independent contractors, or unpaid volunteers." *Bauer v. Muscular Dystrophy Ass'n*, 268 F. Supp. 2d at 1291. The court based its conclusion on an inference it drew from the US Supreme Court's decision in *Pga Tour, Inc. v. Martin*, 532 U.S. 661, 681 (2001), the historical underpinnings of public accommodations laws, and the danger of otherwise conflating Titles I & III of the ADA. *See* 268 F. Supp. 2d at 1292. In *Martin*, however, the Court explicitly declined to decide whether Title III only applies to clients or customers. *See Martin*, 532 U.S. at 679. The Court did dispel the notion that its holding would extend Title III to all employees of a place of public accommodation, *id.* at 680, n. 33, but the present claim is not brought by one of Respondent's employees. With respect to an argument based on historical underpinnings, here, the plain language of the statute controls. *See Haynes v. Neshewat*, 729 N.W.2d at 494. Finally, with respect to the danger of the public accommodations provisions of the MHRA overtaking the employment provisions, that is eliminated if the public accommodations provisions are not construed to apply to employment, as was done with respect to the ADA by the Third Circuit in *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d at 122.

Respondent's reliance on *Haynes* is misplaced, as that mid-level Michigan appellate decision was reversed on appeal to the Michigan Supreme Court. *See Haynes v. Neshewat*, 729 N.W.2d at 495.