Memo

Date: October 4, 2010

To: Barb Lelli, Chief Investigator

From: John Gause, Commission Counsel

Re: ED/PA10-0305, v.

You asked whether the complaint should be administratively dismissed on the grounds that (1) the Maine Human Rights Act education provisions do not cover national origin discrimination claims relating to high school athletics or (2) that the claim is not ripe. For the following reasons, the complaint should not be dismissed on either basis.

Administrative dismissal is appropriate when the Commission lacks jurisdiction or if there is a failure to substantiate a complaint of discrimination. *See* Procedural Rule § 2.02(H)(1, 2).

Complainant alleges that Respondent is engaging in intentional and disparate impact discrimination against him on the basis of national origin, and retaliating against him for pursuing a Maine Human Rights Act complaint in court, by pressuring Complainant's former high school, , to surrender the championship title that Complainant and his teammates won during the 2009-2010 school year. Complainant, who is , transferred to as a sophomore. While Complainant was a senior at Respondent had sought to prevent him from playing in the Spring 2010 basketball playoffs based on the "Eight Semesters Rule" in its bylaws. Pursuant to that rule, after a student starts high school (wherever he may be), he is only eligible to play sports for eight consecutive semesters. Because the Australian school calendar runs from January through December, Complainant had started high school as a freshman in Australia in January, and the eight consecutive semesters had expired in January 2010, prior to the baskeball playoffs. Complainant obtained a temporary restraining order from the Superior Court allowing him to play in the playoffs based on its finding that the "Eight Semesters Rule" had a discriminatory impact on the basis of national origin. After Complainant and his teammates won the championship, Respondent learned that Complainant had completed three semesters of high school while in Australia and had played basketball during each semester. Respondent then abandoned its enforcement of the "Eight Semesters Rule" because Complainant had been ineligible under the "Four Seasons of Competition Rule," also in its bylaws. Under that rule, a student cannot play in more than four seasons of the same sport, regardless of the number of semesters since the student commenced high school. A season is counted if the student plays in one game during the season. Although the record so far does not reflect exactly what Respondent did, it is clear that Respondent met with on June 11, 2010 to discuss the implications of the newly discovered information that Faithful was ineligible under the Four Seasons of Competition Rule. The meeting ended with stating that the school would reflect upon the situation and would "do the right thing."

Respondent's August 9, 2010 submission at 9. At this point, Respondent has not initiated formal action against to have it forfeit the championship.

Complainant relies on the first category of national origin education discrimination protection, which, in part, makes it unlawful to "[e]xclude a person from participation in, deny a person the benefits of, or subject a person to, discrimination in any academic, extracurricular, research, occupational training or other program or activity. . . ." 5 M.R.S.A. § 4602(3)(A).[1] Respondent claims that the absence of a specific statutory proscription relating to discrimination in "athletic programs" on the basis of national origin, unlike the existence of that specific coverage for sex, physical or mental disability, and sexual orientation discrimination, means that the MHRA does not cover discrimination on the basis of national origin in athletic programs. Respondent's August 9, 2010 submission at 10-11; *compare* 5 M.R.S.A. § 4602(3) *with* 5 M.R.S.A. § 4602(1, 2, 4). Respondent claims that interpreting "extracurricular" to include athletics would render superfluous the specific inclusion of "athletic programs" with respect to discrimination on the basis of sex, physical or mental disability, and sexual orientation. The Law Court has held that "nothing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible." *Struck v. Hackett*, 668 A.2d 411, 417 (Me. 1995).

Here, however, interpreting "extracurricular" to include athletics does not render the term "athletic programs" in the other categories superfluous. As Complainant points out, different coverage is used for "athletic programs" than for "extracurricular" activities in those categories. *Compare, e.g.,* 5 M.R.S.A. § 4601(1)(A) ("It is unlawful educational discrimination in violation of this Act, on the basis of sex, to . . . [e]xclude a person from participation in, deny a person the benefits of, or subject a person to, discrimination in any academic, extracurricular, research, occupational training or other program or activity") (emphasis added) *with* 5 M.R.S.A. § 4601(1)(B) ("Deny a person equal opportunity in athletic programs") (emphasis added). Because denying a person an "equal opportunity" in a program is not necessarily the same thing as excluding him from participation in, denying him the benefits of, or subjecting him to discrimination in the program, the inclusion of specific protection for "athletic programs" in the categories of sex, physical or mental disability, and sexual orientation is not superfluous even if the term "extracurricular" includes athletics.

Respondent also claims that the legislative history evidences legislative intent that national origin discrimination protection not extend to high school athletics. The cited legislative history reflects that the original bill adding national origin protection in education contained language making it unlawful to "[d]eny a person equal opportunity in athletic programs," but that language was deleted because it was "not necessarily related to discrimination in education. . . ." Exhibit F to Respondent's August 9, 2010 submission. Resorting to legislative history is only appropriate, however, when the plain language of the statute is ambiguous, and here the language is unambiguous. *See Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730, 733 ("When a statute is not ambiguous, we will interpret the statute directly, without applying rules of construction or examining legislative history or agency interpretation."). The MHRA makes it "unlawful education discrimination" to, on the basis of national origin, "[e]xclude a person from participation in, deny a person the benefits of, or subject a

[1] Although not asserted by Complainant, his allegations are covered by the "unlawful public accommodations" section of the Act as well. *See* 5 M.R.S.A. § 4592.

person to, discrimination in any academic, extracurricular, research, occupational training or other program or activity. . . ." 5 M.R.S.A. § 4602(3)(A) (emphasis added). The common meaning of the term "extracurricular" is as follows: "not falling within the scope of a regular curriculum; *specifically* : of or relating to officially or semiofficially approved and usually organized student activities (as athletics) connected with school and usually carrying no academic credit <*extracurricular* sports>." Merrium-Webster Online Dictionary (emphasis added); *Bangs v. Town of Wells*, 2000 ME 186, ¶ 19, n.9, 760 A.2d 632, 637, n.9 (Me.,2000) ("In construing a statutory term that is undefined in the statute itself, our primary obligation is to determine its plain meaning. We often rely on the definitions provided in dictionaries in making this determination."); 1 M.R.S.A. § 72(3) ("Words and phrases shall be construed according to the common meaning of the language.").

With respect to "ripeness," the Law Court has held that "a case is ripe when there exists a genuine controversy between the parties that presents a concrete, certain, and immediate legal problem." *Johnson v. City of Augusta*, 2006 ME 92, ¶ 7, 902 A.2d 855, 857 (quotations omitted). The complaint adequately alleges a violation of the Maine Human Rights Act and is therefore "ripe." Under the Act, "[u]nlawful discrimination" includes attempting to incite another to do any act of unlawful discrimination. *See* 5 M.R.S.A. § 4553(10)(D) ("'Unlawful discrimination' includes . . . "inciting . . . another to do any of such types of unlawful discrimination . . .; attempting to do any act of unlawful discrimination. . . ."). Here, despite the fact that Respondent has not yet initiated formal action against , Complainant asserts that it has pressured under its bylaws to surrender the championship and that its bylaws have a disparate impact on Complainant's national origin. Complainant submits an affidavit from the Director of Athletics at , which states that Respondent "now claims that [Complainant] is also ineligible under a different rule; the Four Seasons of Competition Rule. . . ." Exhibit D to Complainant's August 31, 2010 submission at Exhibit D, ¶ 12. Under Respondent's forfeiture rule, "[t]he use of an ineligible player by a school in any interscholastic competition game shall result in a forfeiture of that context." Respondent's August 9, 2010 submission at Exhibit A, Article II, Section 1. Complainant adequately alleges that Respondent has attempted to incite Cheverus to engage in unlawful discrimination under the Act.

For these reasons, the complaint should not be administratively dismissed.

Cc: Patricia Ryan, Executive Director