Memo

Date: July 10, 2012

To: Amy Sneirson, Executive Director

From: John Gause, Commission Counsel

Re: E12-0103, Steven Keaton v. State of Maine, Governor Paul LePage

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The Chief Investigator has recommended that this complaint be administratively dismissed. Complainant has objected to the request for dismissal. A complaint may be administratively dismissed by the Executive Director for failure to substantiate the complaint of discrimination. *See* 94-348 C.M.R. ch. 2, §2.02(H)(2). I agree that the complaint should be administratively dismissed for a failure to substantiate.

Complainant had worked for the State of Maine for more than 25 years when he alleges a new state law forced him to retire early at age 54 or face the loss of paid health insurance premiums during his retirement. The new law was signed by Governor LePage on June 20, 2011. Complainant was eligible under the former law to retire any time after 25 years of service and receive a pension and 100% state-paid health insurance premiums throughout retirement. Under the new law, employees who retire prior to their normal retirement age (age 62 for Complainant) do not become eligible for fully paid health insurance premiums until they reach normal retirement age. Respondent's June 6, 2012 submission at page 3. The new law gave existing employees (including Complainant) who were eligible for early retirement based on years of service the option of retiring prior to January 1, 2012, in which case they would still receive the state-paid health insurance premiums throughout retirement. Those who exercised this option had their pension benefit reduced, however, as a consequence of retiring before normal retirement age (as is the case with all early retirees). Complainant alleges that

he exercised the early retirement option in order to receive the paid health insurance premiums but that he lost 42 percent of his pension benefit as a result. He alleges that the law discriminated against him on the bases of age and retaliation.

The complaint alleges no facts arguably supporting a retaliation claim. He does not assert, for example, that the law was enacted because he exercised his rights under the Maine Human Rights Act ("MHRA"). That claim should therefore be dismissed. With respect to age discrimination, the complaint alleges, in part, that the new law "was an attempt by the administration to force people into retirement." This suggests a claim for intentional age discrimination, but there has been nothing submitted (Complainant has responded to the request for dismissal, Respondent has answered, and Complainant has replied) to support this claim. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613 (1993) ("an employer does not violate the [federal Age Discrimination in Employment Act] just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service") (intentional discrimination claim). Rather, Complainant states: "My claim is that the law change taking away an employees [sp] benefits passed by the Legislature and signed by the Governor disproportionally affected people over the age of 40." Complainant's June 21, 2012 submission. This is a claim that the new law had a "disparate impact" on older workers.

The MHRA makes it unlawful for an employer, because of age, "to 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). Unlawful discrimination can be established by proof that an employment practice has a "disparate impact" on members of a protected group. *See Maine Human Rights Com. v. City of Auburn*, 408 A.2d 1253, 1264 (Me. 1979); 94-348 C.M.R. ch. 3, § 3.02(A)(2)(c). "A Complainant makes a prima facie showing of disparate impact where an employment practice is facially neutral but

in fact affects more harshly one group than another." *See Maine Human Rights Com. v. Department of Corrections*, 474 A.2d 860, 865-866 (Me. 1984). Statistical evidence is the primary method of establishing a disparate impact. *See City of Auburn*, 408 A.2d at 1264. "Proof of disparate impact upon one group supports an inference of unlawful discrimination against a particular plaintiff who is a member of that group." *Id.* Overall, Complainant must show that the challenged practice has both an adverse impact on a protected class in general and on the Complainant in particular. *See Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 110 F.3d 2, 4 (1st Cir. 1997). To establish this type of claim, Complainant must show more than an adverse impact on Complainant in particular. *See Bramble v. American Postal Workers Union, AFL-CIO Providence Local*, 135 F.3d 21, 26 (1st Cir. 1998); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 121 (3rd Cir. 1983).

Here, Complainant has failed to substantiate a prima-facie showing of disparate impact because he has not shown that the new law affects one age group more harshly than another. Rather, all state employees, regardless of age or years of service, lost the benefit of receiving state-paid health insurance during early retirement. The fact that some workers (those who had accumulated 25 or more years of service) were already eligible for the previous benefit when the new law was enacted does not mean that those employees were treated more harshly than those who were not yet eligible but would be in the future. When the latter employees accumulated the necessary years of service to retire early, they too would not receive fully paid health insurance premiums during early retirement.

Complainant asserts that "[e]mployees under the age of forty affected by this law change would not have reached the age of retirement (25 years of service) so therefore did not have to make a decision as in my case that forced a person to retire in order to guarantee a health insurance benefit upon retirement before their normal retirement age." Complainant's June 21, 2012 submission. It is

true that only employees between the ages of 43 and 60, 62, or 65[1] had the option of taking early retirement before January 1, 2012 and still receiving the 100% state-paid health insurance premiums. Rather than affecting people in this age group more harshly than others, however, the law *benefited* this age group by giving them an option that younger workers did not have. Although Complainant views the consequence of his exercising the option negatively (his pension benefit was reduced), he was not required to exercise the option. Had he not voluntarily chosen to retire early and accept the paid health insurance premiums, he would have been treated the same as younger state employees who were not given the option of retiring before January 1, 2012.

Because Complainant has not established a prima-facie case of age discrimination, the complaint should be administratively dismissed for failure to substantiate pursuant to 94-348 C.M.R. ch. 2, §2.02(H)(2).

[1] Employees who started working for the state at age 18 or older would be 43 or older when they accumulated 25 years of service. The normal retirement ages, after which the state pays 100% of health insurance premiums during retirement under both the former and the new laws, are 60, 62, and 65.