



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: 1-888-557-6690  
[www.maine.gov/nhrc](http://www.maine.gov/nhrc)

Amy M. Sneirson  
Executive Director

John P. Gause  
Commission Counsel

INVESTIGATOR'S REPORT  
E11-0379, -0380, -0381

January 28, 2013

[REDACTED] (Bucksport)

v.

[REDACTED] ([REDACTED])  
and [REDACTED] ([REDACTED])

**I. Complaint:**

Complainant alleges that he was subjected to unlawful discrimination in employment because of his disabilities when he was terminated from his job assignment as a forklift operator at a warehouse.

**II. Respondents' Answer:**

Respondents, which include a warehouse owner and the temporary agency that placed Complainant at work at the warehouse, deny that any discrimination occurred. The warehouse company requested that the staffing agency remove Complainant from his job assignment due to repeated errors with paperwork, improper handling of customers' products, and trust issues relating to use of the company telephone for personal and long distance calls. The temporary agency honored its request.

**III. Jurisdictional Data:**

- 1) Date of alleged discrimination: 11/30/10.
- 2) Date complaint filed with the Maine Human Rights Commission: 7/7/11.
- 3) Respondent [REDACTED] (hereinafter "[REDACTED]" employs less than 15 individuals and is required to abide by the Maine Human Rights Act and state employment regulations. Respondent [REDACTED] Inc. (hereinafter "PSI") employs a number of individuals in excess of the minimum jurisdictional requirements of state and federal employment laws and it is required to abide by the non-discrimination provisions of the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, and state and federal employment regulations.

<sup>1</sup> Although "Maine Staffing Group" was also named as an additional Respondent, it was determined during the investigation that this was not a legal business entity, but rather was simply a marketing name under which the owners of [REDACTED] and several incorporated businesses operate. There was no evidence that [REDACTED] was ever the Complainant's employer or part of any integrated enterprise therewith.

- 4) This preliminary investigation, which included a review of the parties' written submissions, as well as a Fact-Finding Conference, is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds".
- 5) The Complainant is represented by Attorney Lisa J. Butler. Respondent [REDACTED] is represented by Attorney Seth D. Harrow. Respondent PSI is not represented.

#### **IV. Development of Facts:**

- 1) The parties and undisputed issues in this case are as follows:
  - a) Respondent PSI is a personnel employment agency that provides qualified workers to a variety of employers throughout the state, including Respondent [REDACTED] which provides warehousing space and freezer storage at five locations within the state.
  - b) Complainant first applied for employment through PSI in February 2008. In October 20, 2008, he was placed at a job assignment as a forklift operator/warehouseman at [REDACTED]
  - c) Important third parties at [REDACTED] include Mr. "YL," the Complainant's supervisor, and Ms. "DR," the Manager of the warehouse. Ms. "HT" is the Account Manager for Respondent PSI.

#### *Complainant's MHRC Complaint*

- 2) (Complainant, hereinafter "C") After being assigned by PSI as a forklift operator at [REDACTED] I informed my supervisor, YL, that I had asthma.
- 3) (C) On 8/18/2009, YL told me to spray down a building where paper pulp was stored by using bleach diluted with water. I was provided with goggles, a paper face mask, and gloves. However, I became sick, nauseous, and dizzy, and had to use my respirator inhaler more than I should have. Throughout that day I informed YL that I was not feeling well. He told me to go outside to get fresh air and then go back into the building and finish the job. After working from 8:00 AM until 2:30 PM, I told YL that I had a headache and was having difficulty breathing, and needed to go home.
- 4) (C) On 8/19/2009, I returned to work but I still had a headache and nausea, so I informed supervisor YL and [REDACTED] Manager DR that I was sick and could not work. Later that day I told Manager DR that working with the bleach had made me sick. DR said in response, "We should not have put you in that predicament knowing that you had asthma." She then said, "If you put yourself in that predicament again, we will fire you."
- 5) (C) Around March 2010, Manager DR informed me, supervisor YL, and the other warehouse worker, "BV,"<sup>2</sup> that there were too many mistakes with paperwork and that she would begin to write people up for errors. After that, I had supervisor YL check my paperwork and I received no write-ups for paperwork mistakes.
- 6) (C) In September 2010, I began to have problems breathing due to my asthma. On 9/8/2010, I went to Eastern Maine Medical Center for a breathing treatment because I was having an asthma attack.

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<sup>2</sup> BV was also an employee of PSI who had a job assignment as a forklift operator/warehouseman at [REDACTED]

The doctor released me to return to work. On September 27<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup>, I continued to have problems breathing. On 9/29/2010, Manager DR sent me home from work and told me I should call a doctor.

- 7) (C) On 10/4/2010, I went to my doctor, who sent me to Maine Coast Memorial Hospital, where I was admitted for further treatment of my asthma. On 10/6/2010, I returned to work and gave Manager DR a doctor's note which returned me to full duty. DR then said to me, "You need to find another job." When I asked why, DR said, "This is not your kind of job – coming in and out of the freezer, going from hot to cold or vice versa is not good for your asthma or breathing problems. You need to find another job." I said okay and went back to the warehouse. I told supervisor YL about what Manager DR had said and told him I did not want to lose my job. YL told me not to worry about it. I worked October 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> (Friday).
- 8) (C) On 10/11/2010, supervisor YL asked me to train a new employee, "Mr. One," to operate the forklift. That employee told me that he called been called in to work at [REDACTED] on 10/4/2010, the same day that I was hospitalized. On that same day, I asked PSI's Account Manager HT what was going on with my job but she only said that DR had asked PSI for an additional employee. I asked HT if PSI had any other job openings and she told me not to worry.
- 9) (C) After I returned to work in October 2010, Manager DR treated me with great hostility, including yelling at me for temporarily putting a tub or frozen produce in a refrigerator truck so that it would not go bad while we were sorting out how many tubs were to be shipped on that truck.
- 10) (C) On 11/30/2010, Manager DR told me, "We have to let you go. You know why, it is because of your job performance." I asked why, because I had not received any discipline recently, and the only thing I was written up for [personal phone calls] had been corrected in July 2010. I also asked why I was being fired when another employee had repeatedly been written up for mistakes in paperwork.
- 11) (C) After [REDACTED] terminated me, despite my requests, PSI did not offer me other employment. I believe that the true reason why Respondents terminated my employment was because of my disability (asthma), my record of a disability, and the fact that the Respondents regarded me as having a disability. Furthermore, I believe the Respondents retaliated against me for exercising my right to the accommodation to my disability of taking leave from work. I also believe Respondents retaliated against me for objecting to retaliatory treatment, including objecting to Respondents replacing me with another employee.

*Respondent [REDACTED] Answer to Complainant's MHRC Complaint*

- 12) (Respondent [REDACTED] The Complainant was never an employee of [REDACTED] he was only an employee of [REDACTED] placed at our warehouse from October 2008 through November 2010.
- 13) ([REDACTED] denies it ever engaged in any unlawful discrimination against the Complainant. Instead, after a lengthy period in which his job performance on such important duties as customer product (including food) and paperwork was subpar, among other problems, such as poor listening skills and constant use of the company phone as if it were his own, despite warnings about this, [REDACTED] decided to request that PSI no longer assign the Complainant to work at the

warehouse. Prior to that decision being reached, [REDACTED] had multiple conversations with the Complainant about his job performance not meeting expectations.

- 14) [REDACTED] The basic issue with Complainant boiled down to trust and his willingness and ability to do the job as he was instructed. It is very difficult to train someone to take care of our customers' products. It is a day-by-day process. The buildup of trust is a huge factor in this process. Security is also an issue in the warehouse business.
- 15) [REDACTED] The beginning of the end of our relationship with the Complainant was when he was caught stealing long distance minutes of the company phone for his personal use, after he had been spoken to about this being wrong. That destroyed our trust of him. This was in May, June and July 2010.
- 16) [REDACTED] The final straw as far as performance occurred on 8/9/2010, when the Complainant placed Wyman's blueberry totes<sup>3</sup> incorrectly in the freezer. Instead of stacking the totes as he had been trained, 3 totes of blueberries were lost all over the floor and on other customers' products in the freezer. Due to very strict training, this had never happened before in the freezer.
- 17) [REDACTED] At that time, [REDACTED] and PSI started working together to find a qualified replacement for the Complainant. But this was not a process that could be rushed, due to the many components of the job, and because it was our busy season and it would have been extremely difficult to start a brand new person. However, the decision was made. PSI made it very clear that it was our right to replace him, as he was not our employee.
- 18) [REDACTED] When the Complainant left a customer's frozen product on the dock in October 2010 (as referred to in his MHRC complaint), it simply reinforced our previous decision that the Complainant did not fit in with our long term plans and we requested that PSI no longer assign him to us.
- 19) [REDACTED] In response to the other allegations found in the Complainant's MHRC complaint, he never informed supervisor YL that he had asthma, although he did say he occasionally required the use of an inhaler. His job application with PSI (shared with us) indicated no physical or mental impairments that would interfere with his ability to perform the job. [REDACTED] never received a note from PSI or from the Complainant's doctor indicating that he had asthma or needed any accommodation, aside from once in November 2008 when temporary light duty was requested (and granted) due to illness.
- 20) [REDACTED] With regard to the bleach cleaning incident, not knowing about any particular restrictions or requests for accommodation, the Complainant was asked to perform this task with supervisor YL. He was given goggles and a sprayer of very diluted bleach. He was given as many breaks as he desired and he never told YL that he needed to leave or could not perform the job. Our records indicate that the Complainant left at his usual time on that day.
- 21) [REDACTED] The Complainant did indicate that he was sick the next day (8/19/2009) and claimed it was related to the work he had done on the prior day. He was asked by Manager DR to get checked by his doctor and PSI was also informed of this situation since he was their employee. We agree that

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<sup>3</sup> A tote is a box of frozen, raw blueberries weighing approximately 1150 pounds each.

the Complainant was told by DR that it was his responsibility to let his supervisor know when he could not perform a task assigned to him so that [REDACTED] could find an alternative task for him to do. The Complainant was always granted the time he needed away from work and there were never any repercussions for him missing work.

- 22) [REDACTED] In response to the Complainant's claim that he and other warehouse employees were warned about the number of errors in paperwork in March 2010, we agree that we take paperwork errors very seriously and that this had to be addressed with the Complainant on multiple occasions.
- 23) [REDACTED] We disagree that Manager DR ever made the 10/6/2010 comments attributed to her by the Complainant ("You need to find another job... coming in and out of freezer not good for your asthma or breathing problems..."). He was granted all the time he needed away from work and the manager's only concerns were if the Complainant could do the essential functions of the job and be safe. Supervisor YL also does not recall any conversation with the Complainant around that same time when he said he did not want to lose his job and YL allegedly told him "not to worry about it."
- 24) [REDACTED] We also disagree that Manager DR ever treated the Complainant with hostility although he was reprimanded around this time for leaving a customer's truckload of frozen product on the dock to melt since it endangered the food. This was a serious error and [REDACTED] had strict policies in place for the safe handling of food. The Complainant should not have allowed this to happen given the number of months he had been performing the task.
- 25) [REDACTED] When the Complainant was terminated (11/30/2010), he had been informed that his work performance had been subpar for several months. He had been told on many occasions to stop using the company telephone as his personal phone, including making long distance calls (written warning attached as "Exhibit A"). An 11/22/10 letter ("Exhibit B") from Manager DR to Account Manager HT details reasons why [REDACTED] decided to no longer use the Complainant as an employee.

*Respondent [REDACTED] Answer to Complainant's MHRC Complaint*

- 26) (Respondent PSI) The Complainant was hired to work as a forklift operator on 10/20/2008. During his interview he was made aware of the list of duties<sup>4</sup> required for the position. It was never disclosed on his job application that he had any physical or mental impairments that would prevent him from doing this job.
- 27) (PSI) When we became aware of the asthma condition or breathing issue in September 2010, we were never asked to accommodate him in any way nor did the Complainant indicate that this condition would prevent him from performing his forklift duties at [REDACTED]. After being disciplined and seeing no improvement, [REDACTED] decided it was time to end Complainant's assignment.
- 28) (PSI) The following is a brief chronology<sup>5</sup> of the Complainant's PSI work assignment at [REDACTED]

<sup>4</sup> Prior forklift experience required with current or prior certification, sit-down/stand-up fork truck, reach truck and picker preferred, move/lift up to 75 pounds, ability to work in freezer area and not be sensitive to cold temperatures.

<sup>5</sup> Direct quotes from the chronology are indicated as such with quotation marks. Other entries provided are merely summaries.

Nov. 08 – Doctor’s note for 2 weeks light duty due to illness. No specifics regarding what illness.

4/30/2009 – Email from [REDACTED] Manager DR regarding the Complainant and a friend taking scrap wood from warehouse. He was given a verbal warning and told next time it would be termination. Note put in PSI file regarding incident just in case another incident occurred.

8/18/2009 - Manager DR called PSI regarding Complainant not feeling well after using diluted bleach yesterday. Complainant also called PSI to report not feeling well. It was discussed that maybe he was not feeling well because he had become dehydrated on the prior day. The Complainant thought it was a hot weather issue more than anything. It was also suggested that if he was not feeling better and needed to see a physician, to do so, and let us know.

9/28/2009 – off for personal reasons.<sup>6</sup>

3/3/2010 – Talk Manager DR who stated that the Complainant was not working up to standards. The warehouse works at a very fast pace and a lot of mistakes were being made by the Complainant and DR had to take care of these mistakes being made with their customers. “[DR] will monitor the situation the situation and keep us notified. But at this time, they are not considering any new hires.”

7/27/2010 - Written Warning given to the Complainant by [REDACTED] due to multiple calls made by the Complainant to Las Vegas, his doctor, and to DHHS, on the company telephone while at work. Manager DR stated that this was the second time the Complainant used the company phone without permission, as he had been spoken to months ago by DR because of other phone charges he made to Las Vegas (where he had family). The Complainant was told that if he disregarded [REDACTED] telephone policy again, he would be terminated. PSI Account Manager HT discussed this situation and the seriousness of it with the Complainant.

9/8/2010 – “[Complainant] had a doctor’s appointment and came in 2 hours late. [Manager DR] contacted me and said [Complainant]’s wife called C’s wife called [REDACTED] at 6:45 a.m. to let her know he was in the hospital because of trouble breathing and was having a breathing treatment. The doctor released him to go back to work on light duty. She [DR] expressed her frustration with him because he refuses to take better care of himself, but that is not her responsibility. [Complainant] was asking her what she thought he should do about his health issues, but that was up to him to keep himself healthy. We also discussed her frustration level with him with continued absenteeism and performance issues, but we can’t fault the guy for having ongoing health issues or dismiss him because of that, but if it comes down to performance issues, that is reason for dismissal.”

9/28/2010 – “[REDACTED] Manager DR] called me to say that she was considering adding another forklift operator on at [REDACTED]. She asked me to keep our conversation confidential, but she really needed someone who was a good worker, fork truck certified and friendly. I told her I would start looking for a good forklift operator for future employment at [REDACTED].”

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<sup>6</sup> The Complainant indicated in his MHRC charge that Manager DR sent him home from work on 9/29/2009.

9/29/2010 – “[Complainant] came into work but appeared weak and had severe breathing difficulties according to [Manager DR] so she suggested he go home for the day. He brought in a doctor’s note but she said he was in rough shape and could barely breathe just walking from his car into the office. She also said that he wanted to work today, but clearly he should not be working due to his breathing issues. She asked [Complainant] to call her the next morning to let her know how he was feeling. She was genuinely concerned for his health and did not want him to feel any worse by trying to work that day. We received a call from [Complainant] to let us know he was out sick.” DR received a call doctor’s note and forwarded it to me stating that [Complainant] was unable to work on 9/28/10 but had no further restrictions to take any additional time off due to illness.”

9/30/2010 – Message from DR to HT stating [Complainant] called her late yesterday to say that he was being admitted to Maine Coast Memorial Hospital.

10/1/2010 – DR called HT regarding [Complainant] is home, using oxygen, and has to stay in all weekend. He said the doctor said he could return to work on 10/4 but DR suggested he not return to work until his doctor sees him again and clears him, so he is not expected back to work until 10/4/2010.

10/1/2010 – [Complainant] called regarding how nice and supportive Manager DR has been regarding his condition and time off and that DR assured him he still had a job. I asked DR about this conversation and she said she never assured him of continued employment. Apparently [Complainant] was in a panic after DR sent him home because he was too sick to work on 9/28/2009 and she told him they could not use him that day because of his condition. Complainant went into a panic and said he could not lose his job and RR told him he could not work as sick as he was until he felt better, not that he was getting fired that day.

10/4 & 5/2010 – [Complainant] was out sick. Went to doctor’s appointment and was told he could return to work on 10/6/2010.

10/5/2010 – Supervisor YL has his step-son fill out an application at PSI for forklift operator position [REDACTED]. The stepson said YL told him to apply because the Complainant was being let go on Wednesday (10/6). I contacted Manager DR immediately to ask if they were going to let the Complainant go on Wednesday. DR said that said that [Complainant]’s last day was NOT on Wednesday and had no idea why YL’s kid would say that and she was going to have a talk with YL to straighten things out.

10/6/2010 – [Complainant] returned to work. DR called again asking if we had any good candidates come in with forklift experience. Told her I would call if any good candidates came in.

10/20/2010– We had [Mr. One] work at [REDACTED] as a forklift operator at DR’s request from 10/12/09 until 10/20. On 10/20/2010, I had a conversation with DR about Mr. One and she said he was not as experienced as she needed and he would not be able to stay at [REDACTED]. His last day of work was today and she asked me to look for an additional good candidate for a forklift position at [REDACTED].

10/25/2010 – I sent “Mr. Two” for an interview with DR. She thought he was a good candidate for the job and had lots of forklift experience. She said she would give him a two week trial to see how he did once he started.

11/9/2010 – “[DR] sent an email stating she was considering letting [Complainant] go because his work has not improved and performance has continued to be a disappointment. She said [Mr. Two] was doing really good job and she said he was exactly what they needed for the position and wanted to continue to work at [REDACTED]. She also said say owners wanted to keep [Complainant] on for a while even though she felt his performance had not improved.”

11/22/2010 – “I had a conversation with DR that [Complainant] was going to be let go due to insubordination. She said she’d been trying over several months to get [Complainant] improve but he still makes serious errors concerning paperwork for customers after being told to be more accurate. She said he continues to listen poorly to instructions and make errors that could be avoidable. His lack of improvement and inaccuracy has continued and he will be let go at the end of the month on 11/30/10 but she would have further discussions prior to his dismissal because the owners often change their minds when it comes to keeping people, but she would let us know when their final decision was made.”

11/23/20 – “[DR] wanted to have a discussion with [Complainant] herself to let him go but I told her that it was my responsibility as his direct employer to have that conversation with him about being let go. She said she had a relationship with him but would do things ‘by the book’ and let me handle it if that’s what I preferred.”

11/30/2010 – “[Complainant] was let go from [REDACTED] by [DR] personally. After [Complainant]’s conversation with [DR], he went to [REDACTED] Building 5 to get his things and mentioned to [supervisor YL] that he thought he was fired for missing time from work and his last hospital visits. [DR] said she’d never mentioned his health and this was not a factor in her decision. [DR] also reminded me that he’d been working at [REDACTED] for 2 years without being brought on as direct hire because she had had several talks to (sic) him about job performance and never mentioned anything about health issues. He was let go specifically because he was not stepping up or improving or doing what needed to be done and he continued to perform poorly. She also explained that with such a small crew working at [REDACTED] everyone needed to perform well to get the job done and get it done right.”

11/30/2010 – “[Complainant] called to inform me that [DR] had let him go and the reason she gave him. He asked if there were any jobs for him at that time, but unfortunately, we had no jobs to offer him at that time.”<sup>7</sup>

12/13/2010 – “I received a call from [Complainant] because he didn’t receive his last paycheck. He had not submitted his timecard. I called [DR] and she authorized his time and we cut him his last paycheck. At that time, he seemed to be in good spirits and didn’t go into any detail about being let go by [REDACTED].”

29)(PSI) Complainant was given several verbal reprimand notices and one written notice directly from Manager DR. He was given a verbal warning for taking scrap wood on 4/30/2009. In March 2010

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<sup>7</sup> Respondent PSI indicated that late Fall is their slowest time of year.



DR had a conversation with him about his work performance and him not working up to standards and making a lot of mistakes with customers. In July 2010, he was given a written warning for using the company phone for personal calls. In September 2010, he was verbally reminded that he also needed to call PSI (and not just [REDACTED] when he is taking a day off, is late, or is leaving early. PSI has no records of disciplinary action given to others in the same job classification in the past two years.

- 30) (PSI) In sum, we were never aware the Complainant had any breathing difficulties until September 2009. However, even at that time, he never requested any accommodation nor did he indicate his breathing difficulties would interfere with his ability to perform his job duties. Lastly, although the Complainant claimed in his MHRC complaint that "despite [his] requests" he was not offered any other employment by Respondent PSI, he never contacted PSI about further employment beyond the day his assignment with [REDACTED] ended. It was his responsibility to check in with PSI from time to time to indicate his availability, which he did not.

*Complainant's Reply*

- 31) (C) The response of PSI confirms that [REDACTED] Manager [DR] articulated on 9/8/2010 that she was motivated to terminate the Complainant's employment because he was out of work due to his disability, asthma. PSI's account of events from that day forward until the date of Complainant's termination on 11/30/2010 make clear that Respondents had decided to hire another employee by 9/28/2010. Respondents' claims that he was terminated due to performance issues will likely be found to be pretextual, inaccurate, and lacking corroborating evidence.
- 32) (C) [REDACTED] makes multiple false statements regarding the Complainant's conduct at work. He did every task requested of him. The only discipline he ever received was on 7/27/2009, for making calls to numbers that he did not realize were long distance. After he was notified of this, he never made any more calls. [REDACTED] claim that this was a trust shattering event is belied by the fact that they continued to employ Complainant for another five months after this event.
- 33) (C) [REDACTED] also claims that the "final straw" was on 8/9/2010, when the cover on a tote of blueberries cracked causing a stack of containers to fall. However, it was defective cover on a tote, and not any error on Complainant's part, which caused the spill. [REDACTED] took no disciplinary action against the Complainant at the time nor did it report this event as an issue to PSI at the time. Further, [REDACTED] continued to employ the Complainant for more than three months thereafter, and they did not start working to find a replacement for the Complainant until 9/28/2010.
- 34) (C) As to [REDACTED] claim that the Complainant left frozen food product on the dock to melt in October 2010, he did not leave it on the dock, but rather put it in a truck to keep it cool. [REDACTED] also never reported that incident as an issue to PSI nor did it list the event as a ground for termination in the 11/22/2010 termination letter from Manager DR to Account Manager HT.
- 35) (C) [REDACTED] claim that the Complainant made too many paperwork errors is also false, as he always had his supervisor YL check his paperwork prior to turning it in. Again, [REDACTED] did not discipline the Complainant for this or raise it as an issue with PSI.
- 36) (C) Despite [REDACTED] claim to the contrary, the Complainant did inform supervisor YL that he had asthma. The Complainant also repeatedly notified [REDACTED] he had breathing problems. It is not disputed that this condition constitutes a disability.

- 37)(C) PSI's response reveals the causal connection between the Complainant's requests for leave and [REDACTED] adverse actions toward him. He was hospitalized on 8/8/2010 and that same day [REDACTED] manager discussed terminating his employment with PSI. The fact that PSI (Account Manager HT) warned [REDACTED] the termination would need to be for performance grounds speaks volumes.
- 38)(C) The Complainant next requested leave from work on 9/28/2010. On that same day [REDACTED] Manager made a confidential request (of PSI) that it seek a replacement forklift operator, which further supports an inference that [REDACTED] was motivated by animus toward the Complainant because of his disability and use of medical leave.
- 39)(C) PSI also admits that as of 10/5/2010, [REDACTED] had informed an applicant that the Complainant would soon be terminated. Both Respondents' claim that this information was incorrect will not withstand scrutiny.
- 40)(C) The Complainant also disputes PSI's account of his conversation with them concerning his termination by [REDACTED]. After the Complainant called HT to inform her of this, she said that she had just gotten off the phone with Manager DR. The Complainant asked HT if there were any job openings and HT responded, "No. The best thing for you to do is to go find a job on your own. I have to go." Then she hung up the phone. Based upon PSI's hostile response, the Complainant followed PSI's directive and looked elsewhere for employment.

*Fact-Finding Conference*

- 41)(Complainant) I did not disclose that I had asthma at the time I was hired by [REDACTED] but did bring this to my supervisor's attention about a week later. At the very beginning I was making about 10-15 paperwork errors per week but later I had supervisor YL check it beforehand. The other forklift operator, BV, was also spoken to about making paperwork errors but I do not know if this occurred more often than with me. I do not know if BV had YL check his paperwork for errors as I did. We were told as of March 2010 that our jobs could be in jeopardy if errors continued. After I was warned about making long distance calls in July 2010, I always checked with my supervisor before making any calls. My brother would also visit [REDACTED] on occasion and use the company phone without my knowledge or permission. Regarding taking scrap wood (April 2009), I had asked supervisor YL for permission to take some on the prior day, which he granted, but I forgot to ask him again on the next day when I was completing grabbing the wood. I never received any other verbal or written warnings. I had no idea what the normal time frame was for being directly hired by [REDACTED] rather than working as a PSI employee but when I did ask supervisor YL or Manager DR about this, they said it was not in the budget. I agree that the other forklift operator who was placed by PSI at [REDACTED] around the same time as I began was brought on as a direct employee of [REDACTED] after about six months. I do not know why they chose him instead of me but maybe it was because I did not have vehicle at first. On the day I become nauseous from using the bleach to clean (August 2009), I believe I told supervisor YL that it was an asthma issue. I did not have any other issues with my disability until September 2010, when I needed to go to the hospital for a breathing treatment on 9/8/2010. Later that month, on 9/29/2010, I came to work and at the beginning of the day Manager DR sent me home saying, "You cannot breathe; go home and get yourself better." I agree that I was not physically capable of working that day. In October 2010 I was asked to train a new forklift operator, which had never occurred before. When I asked why I was told they were "trying out new people." That person (Mr. One) only lasted two to three weeks as he was very slow

doing the job. Shortly afterwards, another forklift operator, Mr. Two, was trained by me and supervisor YL, who said again they were trying out new people. The blueberry tote stack ended up collapsing because the left hand corner of one of the tote lids broke while they were stacked five high. I have no idea what the loss of customer product would have totaled from that incident. When I was accused on another occasion of leaving a customer's product on the dock, I only placed it in a truck temporarily until we could sort out how much needed to be shipped. There was no damage to the product. I agree that fall is the busiest season for [REDACTED] due to harvesting and that blueberries are a significant portion of the warehouse's business.

42) [REDACTED] Manager DR – I have been [REDACTED] for 24 years. The two owners make all hiring and firing decisions for the company and we often use staffing agencies due to seasonal increases in business. We hired the Complainant and another forklift operator, BV, around the same time in 2008. Supervisor YL later raised two issues with the Complainant's performance: his paperwork, and that he delayed in doing tasks that YL asked him to do. The Complainant did later have YL check his documents but errors still occurred about once a month. BV also made such errors, at about the same rate as the Complainant. I spoke to BV about his errors as well. In early Summer 2010, the owners asked me why there were so many company calls to Las Vegas. I investigated and saw the calls went to the Complainant's father there. The Complainant claimed at the time that he had not made any calls but he did not mention his brother may have done so at the time. There were also long distance calls to Ellsworth and DHHS. I agree that was the end of the phone issue. I did go to the owners in August 2010 after the blueberry totes were destroyed in August 2010. Both I and supervisor YL agree that the reason why the totes had fallen was because they had not been stacked properly by the Complainant as he had been trained. The owners did not want to give the Complainant a written warning about this at the time because it was the first serious error of this kind that he had made. The customer was very upset about the incident and I wanted to terminate the Complainant but the owners thought talking to him was enough. The October incident, when the Complainant left frozen product out on the dock, unfortunately, involved the same company. I discussed termination with the owners again but they said to wait. By late November business dropped due to the end of the harvest season. The Complainant was never hired as a direct employee by [REDACTED] even after two years because of his job performance. The other forklift operator, BV, did become a direct hire although I am not certain precisely when. [REDACTED] does have a progressive discipline policy but steps may be skipped for certain offenses. I do admit that I told the Complainant in August 2009 that he would be terminated if he again failed to make his supervisor aware that due to his disability he could not perform an assigned task.

43) PSI Account Manager HT – We had been sending temporary employees of PSI over to [REDACTED] for about a year. Sometimes we as the staffing agency are asked to administer discipline while other times the location where the employee is placed will do so. I do recall that on 9/28/2010, Manager DR from [REDACTED] told me they wanted to add staff. I also recall that on 10/5/2010, an individual who claimed to be ([REDACTED] supervisor YL's stepson applied for employment through PSI and said he had been told by YL that the Complainant would be let go the following day (10/6/2010), but Manager DR told me that this was not accurate and that no termination date had been set for him. November 9<sup>th</sup> was actually the first time I was aware a termination was possibly imminent. On 11/22/2010, I was told by DR that the Complainant was being let go for "insubordination," which she explained related to accuracy in details issue. On the day the Complainant was terminated by DR, I did talk to him. However, even when he called about his last check on 12/12/2010, the Complainant never asked for any further assignments. It is not unusual that employees who have been placed at one business will not work out for one reason or another but that does not mean that

the employee could not have been successfully placed elsewhere if positions were available. The Complainant was never told he could not continue to apply for positions with PSI. I was aware that the Complainant had gone in for a breathing treatment at some time but he never mentioned that it was related to an acute condition or that it was chronic. I agree that there are some differences between the chronology regarding the Complainant's period of employment that was submitted and the "Official Personnel Record." I am not sure whether I may have used the latter document to draft the chronology. I do agree that I told Manager DR that she could not dismiss the Complainant for health issues but could do so for performance issues.

- 44) [REDACTED] supervisor YL – I have been in the warehouse for eight years, with three as supervisor. Including myself, there are normally three warehouse employees who all perform the same type of duties. I did make Manager DR aware of a couple of early performance issues with the Complainant, including that he needed to stay on task and complete projects on time. With respect to the blueberry tote stack collapsing, by looking at the damage it was obvious that it was due to the fact that the Complainant had been moving too fast while trying to stack these, causing them to fall. I do not have a stepson, although I do have two children, a boy and a girl. I was never aware that the Complainant was going to be terminated until the day it happened, or maybe the day or so before. There may have been other talk in the office in the past about the Complainant possibly being terminated but I do not recall who was involved or when. I did not have any input into the termination decision. In October 2010, we did ask for more forklift operators because of an increase in business at that time of year.

#### **V. Analysis and Conclusions**

- 1) The Maine Human Rights Act requires the Commission in this investigation to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B).
- 2) The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action. More particularly, "reasonable grounds" exists when there is enough admissible evidence, or there is reason to believe that formal litigation discovery will lead to enough admissible evidence, so that there is at least an even chance of Complainant proving in court that unlawful discrimination occurred. Complainant must prove unlawful discrimination in a civil action by a "fair preponderance of the evidence." 5 M.R.S.A. § 4631.

#### *Disability Discrimination*

- 3) The Maine Human Rights Act provides, in part, as follows: "It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of . . . physical or mental disability...[or] . . .to... discriminate with respect to . . .hire, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S.A. § 4572(1) (A).
- 4) Here, there is a preliminary question of whether [REDACTED] and/or [REDACTED] were Complainant's "employer" for purposes of the Maine Human Rights Act.
- 5) The "joint employer" concept "assumes in the first instance that companies are what they appear to be—independent legal entities that have merely historically chosen to handle jointly important aspects of their employer-employee relationship." *Id.* (quotations omitted). Thus, because the entities are legally independent, "a finding that two companies are an employee's 'joint employers' only affects

each employer's liability to the employee for their *own* actions, not for each other's actions." *Torres-Negron v. Merck & Company, Inc.*, 488 F.3d at 41.

- 6) "Whether joint employer status exists is essentially a factual question." *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153 at 163. The Law Court has not yet weighed in on the test for a "joint employer," but the common-law test to determine whether there is an employee-employer as opposed to an independent contractor relationship considers the following factors:
- (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.
- Taylor v. Kennedy*, 1998 ME 234, ¶ 8, 719 A.2d 525 (Me. 1998) (quoting *Murray's Case*, 130 Me. 181, 186, 154 A. 352, 354 (1931)).
- 7) Control is the most important factor, which "includes the rights both to employ and to discharge subordinates and the power to control and direct the details of the work." *Legassie v. Bangor Publ. Co.*, 1999 ME 180, ¶ 6, 741 A.2d 442. Federal courts interpreting federal anti-discrimination statutes similarly focus on control over an important aspect of employment in determining employer status. See, e.g., *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 448, 123 S.Ct. 1673, 1679 (2003) (ADA definition) ("At common law the relevant factors defining the master-servant relationship focus on the master's control over the servant."); *Lopez v. Massachusetts*, 588 F.3d 69, 85 (1<sup>st</sup> Cir. 2009) (quoting guidelines in the EEOC's Compliance Manual); *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 16-17 (1<sup>st</sup> Cir. 1994) (ADA).
- 8) The factors used to determine the necessary control for "joint employer" status in the context of the National Labor Relations Act include the following: "supervision of the employees' day-to-day activities; authority to hire, fire, or discipline employees; authority to promulgate work rules, conditions of employment, and work assignments; participation in the collective bargaining process; ultimate power over changes in employer compensation, benefits and overtime; and authority over the number of employees." *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 163 (1<sup>st</sup> Cir. 1995). These factors have been extended to claims under Title VII and the Maine Human Rights Act. See *Bloom v. Crook*, 78 F.Supp.2d 1, 3 (D.Me. 1999). Eliminating the factors that apply only in the context of NLRA claims, the relevant inquiry in determining necessary control for "joint employer" status in this context is thus: "(1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits and hours; (2) day-to-day supervision of employees, including employee discipline; and (3) control of employee records, including payroll, insurance, taxes and the like." *Zarnoski v. Hearst Business Communications, Inc.*, 1996 WL 11301, \*8. "[A]ctual control is a factor to be considered when deciding the 'joint employer' issue, but the authority or power to control is also highly relevant." *Virgo v. Riviera Beach Assocs.*, 30 F.3d 1350, 1361 (11th Cir. 1994).
- 9) Here, there is sufficient evidence under the Commission's "reasonable grounds" standard to conclude that [REDACTED] and [REDACTED] were Complainant's joint employers. [REDACTED] is a

temporary staffing agency that, in part, hired and lined up workers, including Complainant, to fulfill [REDACTED] staffing needs. Once placed on [REDACTED] job site, Complainant was supervised on a daily basis by [REDACTED] made the decision to terminate Complainant's assignment at its facility, thereby terminating Complainant's employment with [REDACTED]. The termination of that assignment/employment did not necessarily operate to terminate Complainant's employment with [REDACTED] which ordinarily would assign its temporary workers to other available job sites depending on availability. Certain employee records (payroll, taxes) were presumably in the exclusive control of [REDACTED]. [REDACTED] maintained other records (disciplinary notices) regarding Complainant. While all of the factors are certainly not present for [REDACTED] and [REDACTED] to each be considered an "employer," there is sufficient information present to conclude that Complainant would be able to make the necessary showing in court.

- 10) Moreover, even if [REDACTED] were not found to be Complainant's "employer," the Maine Human Rights Act provides that "'unlawful discrimination' includes . . . Unlawful employment discrimination as defined and limited by subchapter III . . . [and] compelling . . . another to do any of such types of unlawful discrimination. . . ." 5 M.R.S.A. § 4553(10)(D). It is "'unlawful employment discrimination' . . . for any employer . . . to discharge an employee or discriminate with respect to . . . transfer . . . , terms [or] conditions" because of disability. 5 M.R.S.A. § 4572(1)(A). Therefore, [REDACTED] could be held liable for compelling [REDACTED] to engage in unlawful disability discrimination against Complainant even if [REDACTED] were not Complainant's employer.
- 11) Turning to the issue of whether unlawful discrimination occurred, 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).
- 12) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) he belonged to a protected class, (2) he performed his job satisfactorily, (3) his employer took an adverse employment decision against him, and (4) his employer continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1<sup>st</sup> Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1<sup>st</sup> Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261.
- 13) 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. Dept. 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 his 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.

- 14) In order to prevail, Complainant must show that he 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.
- 15) The MHRA does not prohibit an employer or employment agency from discharging an individual with a physical or mental disability when the employer can show that the employee, "because of the physical or mental disability, is unable to perform the duties [of his job]." 5 M.R.S.A. § 4573-A(1-B). The defense requires an individualized assessment of the relationship between an employee's physical or mental disability and the specific legitimate requirements of the job. *See Higgins v. Maine C. R. Co.*, 471 A.2d 288, 290 (Me. 1984); *Maine Human Rights Com. v. Canadian Pacific, Ltd.*, 458 A.2d 1225, 1234 (Me. 1983). The defense imposes upon the employer/employment agency the burden of establishing that it had a factual basis to believe that, to a reasonable probability, the employee's physical or mental disability renders him unable to perform the duties of the job. *See Canadian Pacific, Ltd.*, 458 A.2d at 1234.
- 16) In this case, the Complainant alleged he was subjected to unlawful discrimination in employment because of his disability when he was terminated from his position as a forklift operator.
- 17) It is uncertain whether the Complainant's medical condition, asthma, would be considered a "disability" under the Maine Human Rights Act. The Complainant alleges that he disclosed that he had asthma to his [REDACTED] supervisor YL a week or so after he was first assigned there, while [REDACTED] recalls that the Complainant's disclosure to YL was only that he occasionally required the use of an inhaler. It is undisputed that the Complainant did not disclose any disability, or request any related accommodation, when he applied for work with PSI, or when he interviewed for the forklift operator position at [REDACTED]. It also does not appear that any of the doctor's notes and/or return to work slips includes any reference to asthma, or even breathing difficulties in general. Instead, the little information that the Respondents were provided about the Complainant's underlying medical condition came directly from the Complainant, or his wife. Therefore, it is also questionable whether this information may reasonably be considered a "record" of a disability under the MHRA. However, the Complainant has submitted sufficient evidence to establish that at the very least he may have been "regarded as having or likely to develop" a disability.
- 18) Complainant has also established that his employer and the employment agency took an adverse employment decision against him, and that his employer and the employment agency continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed.
- 19) Complainant alleged that he "performed his job satisfactorily," and it does appear to be true that he performed his fork lift duties more or less adequately. There was no disciplinary action or performance concern raised immediately prior to his termination. [REDACTED] strongly disagrees with this point, as noted below.
- 20) With the prima-facie case met, the burden turns to Respondents, who collectively provided a legitimate nondiscriminatory reason for Complainant's termination: that he made repeated errors with paperwork and improperly handled customers' products, and that trust issues arose due to his use of the company telephone for personal and long distance calls. While the Complainant may have been generally adequate as a forklift operator, clearly he was far from an ideal employee from [REDACTED] standpoint.

- a) Both he and BV, the other forklift operator who PSI had assigned to [REDACTED] made enough repeated mistakes in paperwork that Manager DR warned them in March 2010 that continuing to make such errors could result in their termination. The warning was directed at BV and Complainant and apparently held the same consequences for both. Complainant asserted that from that point forward he had no further issues with paperwork, since he had supervisor YL check his work from then on, but this was disputed by YL and Manager DR, both of whom said errors from Complainant and BV did continue (albeit at a lesser rate than prior to March 2010). In an email dated 3/3/2010 from Manager DR to HT, DR indicated that, “[Complainant] is not working up to standards but neither is [BV].” In an email dated 3/10/2010, DR similarly wrote, “[Complainant] is trying, I just don’t think he has what it takes. But right now he is doing better than [BV].” Respondents did not appear motivated to terminate Complainant as of Spring 2010.
  - b) Complainant’s use of the company telephone for his own personal use (during work hours), even if his brother was inexplicably responsible for making these calls, more than warranted the discipline [REDACTED] imposed. This too was unrelated to Complainant’s breathing difficulties/asthma irritation in August 2009. Although the parties agree that there were no further allegations of theft or misuse of the company telephone after [REDACTED] delivered sternly worded written warnings in July 2010, the incident did raise legitimate trust issues.
  - c) It also does not appear that [REDACTED] unfairly blamed Complainant for the blueberry tote stacking mishap. While the Complainant attributed the damage to a defective lid, both supervisor YL and [REDACTED] Manager DR credibly stated that the damage to the tote and distribution of damaged product around the site of the accident established that it was not a defective lid, but rather the Complainant’s failure to follow procedure that led to the spill, something that had allegedly never occurred at the warehouse prior to that date.
  - d) It is unclear whether the October incident when the Complainant allegedly temporarily stored frozen product in a truck (rather than returning it to the freezer) would have been considered a terminable offense, especially given that it involved damage to the same customer’s product that was damaged in August. However, resolution of this issue is not necessary given that both the Complainant and the Respondents agree that the termination decision was undoubtedly made at some point prior to that incident.
- 21) With respect to Respondent [REDACTED] even though there were documented performance issues, in the final analysis Complainant was able to meet his overall burden to show that the circumstances underlying [REDACTED] articulated reason were not the actual cause of its employment decision. In arriving at this recommendation, the following facts are noted:
- a) The Complainant asserts that the termination decision was made on or about 9/8/10 (when he was admitted to the hospital for a breathing treatment) while the Respondents assert that discussions regarding replacing the Complainant originated the prior March and talks about doing so intensified after the Complainant’s August 2010 incident with the damaged blueberry totes. [REDACTED] is not entirely convincing on this point:
    - i) [REDACTED] has submitted no evidence to support its contention that it was preparing to sever Complainant’s employment there prior to 9/8/2010, even after the legitimate performance issues cited by Respondents (the paperwork errors, warning regarding unauthorized use of the company telephone, and the admitted thousands of dollars of lost blueberries).



- ii) One would assume that if the “final straw” for ██████████ was the August 2010 blueberry incident, that it would have at least sent its agent PSI (Complainant’s technical employer) an email suggesting possible termination at that point. It didn’t do that, or even document any disciplinary action for Complainant. There is no evidence that ██████████ even informed PSI of its concern about that incident. PSI kept a detailed “personnel record” logging communications with ██████████ regarding the Complainant’s employment, with only one entry for the month of August 2010; that entry details the Complainant having being stung by a bee. There is similarly no mention in Complainant’s personnel records leaving frozen product on the dock in October. It is odd that it is not mentioned in PSI’s record or in the termination explanation letter from Manager DR to Account Manager HT, which mentions only paperwork errors, listening poorly to instructions, and the long distance calls as reasons.
- b) What is evident in ██████████ and PSI records is ██████████ alarm at accommodating Complainant’s breathing issues:
- i) On 9/8/2010, the Complainant’s wife called Manager DR at ██████████ and stated that the Complainant was at the hospital “receiving a breathing treatment.” DR stated this in an email to Account Manager HT at PSI, and that the Complainant’s doctor had told him he “had a really bad asthma attack.” From that point onward, both Respondents knew that the Complainant not only had occasional breathing problems, for which he sometimes required an inhaler, but also that he was carried a diagnosis of asthma.
- ii) The email exchange between Manager DR at ██████████ and Account Manager HT on 9/8/2010, and the Respondents’ discussion of how Complainant’s breathing difficulties are impacting his employment, was candid. DR stated that “I am at my wits end with this man. He seems to want me to tell him what to do about his health and I WILL NOT do so. It makes me feel like he does not know enough to keep himself healthy.” In response to this email, HT wrote back, “That’s a tough call, when it is a health issue isn’t it? You can’t really tell someone that you don’t want them to show up to work or that you don’t want them there because of a health issue. I guess you can’t fault the guy if he has ongoing health issues and doesn’t know enough to keep himself healthy. Probably 90% of the population is in that category. But if it does come down to attendance or another unacceptable issue, that’s a big issue....” To that email, Manager DR responded, “...I am having conversations with the owners to replace him. It is definite we will, when is the question. I expected it to calm down now but it hasn’t. It is too difficult to train anyone when it is this busy.”
- iii) Just a few weeks later, toward the end of September 2010, Complainant had additional breathing difficulties. On 9/28/2010, Manager DR sent another email to Account Manager HT, again requesting that she “needs to replace [Complainant] first, and then [BV]. Neither one is working out here.” DR also complained that she had “little privacy” and asked that this request be kept “confidential,” although it unclear from whom. On 9/29/2010, Complainant reported for work only to be sent home by Manager DR because he could barely breathe after his short walk from the parking lot.
- c) The evidence indicates that ██████████ staff had some communication internally about Complainant’s impending termination well before the termination occurred on 11/30/2010. Somehow, in the first week of October, supervisor YL’s child family member was so sure that

Complainant's position would be open that he/she submitted an application for the position. [REDACTED] says that YL did not know that Complainant would be terminated until just before, or the day of, the termination itself (11/30/2010). The implication – that Manager DR at [REDACTED] had in fact made the decision to terminate Complainant long before 11/30/2010 – is clear and [REDACTED] credibility is not burnished by its denials on this point.

- d) Looking at a similarly situated employee for comparison evidence is instructive here. It is apparent that the other forklift operator, BV, was also deficient in paperwork and not held in much higher regard than the Complainant as an employee. However, BV was not terminated as Complainant was. It is also interesting that YL's family member seemingly knew that Complainant was on the verge of being fired (the next day) while BV apparently was not. Since presumably that supervisor YL was aware of BV's deficiencies as well as Complainant's, it is not clear why.
  - e) While it is possible that the idea of terminating Complainant may have been raised at least a month prior to his exacerbation of his breathing problems/asthma in September 2010, the sudden re-introduction the termination decision on the day he was first hospitalized for this (especially in the context of a statement from Manager DR that she did not feel Complainant "does not know enough to keep himself healthy"<sup>8</sup>) suggests that [REDACTED] decision to go ahead with the termination was motivated by the Complainant's disability. This conclusion is reinforced by Manager DR again raising the issue of termination again in her September 28, 2010 email, and requesting that this be kept "confidential." This email was sent during a three day period in which the Complainant was experiencing ongoing breathing problems and the day prior to Manager DR sending the Complainant home from work on 9/29/2010 because he was out of breath just from the short walk from the parking lot to the warehouse. It may be that Complainant was going to be fired anyway as soon as the busy season ended and/or a suitable experienced forklift operator could be found, but [REDACTED] has not shown that it had determined to do either of those. The timing of Respondent [REDACTED] renewed requests for the employment agency to find a replacement suggests that Complainant's near- simultaneous health issues may have at least accelerated [REDACTED] termination decision.
  - f) Given the MHRA's "reasonable ground standard" of at least an even chance of the Complainant proving in court that unlawful discrimination occurred, the fact that [REDACTED] Manager DR sent emails regarding finding a replacement for the Complainant the very day he was reportedly hospitalized for a "breathing treatment" does suggest that the Complainant's health and/or perceived disability was at least a factor in the accelerated termination decision.
- 22) Complainant has met his burden to show that Respondent [REDACTED] discriminated against him in terminating his employment based on his disability or perceived disability.
- 23) With respect to Respondent PSI, Complainant has not met his overall burden to show that the circumstances underlying PSI's articulated reasons were not the actual cause of its employment decision. In arriving at this recommendation, the following facts are noted:

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<sup>8</sup> This is not to suggest that Manager DR's concern for the Complainant's health was not genuine. However, if she had concerns about the Complainant continued ability to perform all essential functions of the forklift operator position due to his asthma/breathing problems, then she could have sent him for a fitness-for-duty exam.

- a) Immediately after PSI became aware that YL's family member applied for Complainant's position because (he said) Complainant was about to be terminated, PSI's Account Manager HT immediately emailed Manager DR at [REDACTED] to ask if the Complainant's last day was the next day (10/6/2010). It seems clear that PSI was caught off-guard by this development. This lack of knowledge on PSI's part suggests that if there was a furtive plan to terminate the Complainant, that they were not participants in the plan, at least at that point in time.
  - b) PSI relied upon [REDACTED] representations as to how the Complainant performed. If [REDACTED] was exaggerating these concerns due to a desire to eliminate the Complainant due to his actual or perceived disability, PSI would presumably have no way of discerning that discriminatory intent on [REDACTED] part.
  - c) While the Complainant has suggested that Respondent PSI's "warning" to [REDACTED] in September 2010 (that they could not let the Complainant go for "health issues") was somehow evidence of a plot between the parties, it is just as likely that PSI was simply providing accurate information to its client that while an employee could be let go for legitimate performance issues, it was not fair to do so for health issues.
- 24) Complainant has not met his burden to show that Respondent PSI discriminated against him in terminating his employment based on his disability or perceived disability.

#### *Retaliation*

- 25) Complainant also alleges that after he requested a reasonable accommodation for his disability, in the form of leave from work, he was subjected to retaliation, including being treated with hostility and eventually termination. Respondents deny the Complainant was subjected to any retaliation.
- 26) The MHRA makes it unlawful for "an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of the MHRA or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under the MHRA." 5 M.R.S.A. § 4572(1)(E). The MHRA further defines unlawful discrimination to include "punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act. . . ." 5 M.R.S.A. § 4553(10)(D).
- 27) The Maine Human Rights Commission regulations provide as follows:

No employer, employment agency or labor organization shall discharge or otherwise discriminate against any employee or applicant because of any action taken by such employee or applicant to exercise their rights under the Maine Human Rights Act or because they assisted in the enforcement of the Act. Such action or assistance includes, but is not limited to: filing a complaint, stating an intent to contact the Commission or to file a complaint, supporting employees who are involved in the complaint process, cooperating with representatives of the Commission during the investigative process, and educating others concerning the coverage of the Maine Human Rights Act.


Me. Hum. Rights Comm'n Reg. 3.12 (July 17, 1999).


- 28) In order to establish a prima-facie case of retaliation, Complainant must show that he engaged in statutorily protected activity, he was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56; *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006). The term "materially adverse action" covers only those employer actions "that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 126 S. Ct. 2405. One method of proving the causal link is if the adverse action happens in "close proximity" to the protected conduct. *See Id.*
- 29) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> Cir. 1995). Respondent must then produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry her overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.*
- 30) In this case, Complainant did establish that [REDACTED] may have retaliated against him for the use of leave related to his actual or perceived disability by terminating him or at least accelerating the termination process. As outlined above, the temporal proximity between the Complainant's request for use of leave and [REDACTED] requests for a replacement leads to an inference of retaliation.
- 31) However, the Complainant did not establish that the "hostility" he perceived at [REDACTED] over his job performance was retaliation. [REDACTED] negative reaction to Complainant's significant damage to customer product was not unwarranted or excessive.
- 32) Complainant also has not established that PSI retaliated against him by not assigning him to other positions after being let go by [REDACTED]
- a) Although his MHRC complaint stated that "despite his requests (emphasis added), [PSI] did not offer me other employment, the Complainant later clarified that the only time he ever requested any further assignment from PSI was on the same day he was terminated, when he was allegedly told by Account Manager HT, "No; the best thing for you to do is to go find a job on your own." This is inconsistent with Complainant's earlier claim that he made more than one request for an new assignment.
  - b) Complainant also failed to provide any evidence at all of a motive by PSI to cease doing business with him with other placements. As a practical matter, it makes little sense that PSI would not seek to place the Complainant in another position considering that they would potentially make money if and when the Complainant was brought on a direct hire by a new employer. The fact that the Complainant may have been told to also seek jobs on his own does not relieve him of his independent obligation to inform PSI that he was ready, willing, and able to work if a suitable position arose.

## VI. Recommendations

Based upon the information contained herein, the following recommendation is made to the Maine Human Rights Commission:

1. That there are **REASONABLE GROUNDS** to believe that the Complainant [REDACTED] [REDACTED] was subjected to unlawful discrimination, as well as unlawful retaliation, by the Respondent [REDACTED] Warehouse Company due to disability when they terminated him;
2. That conciliation of this part of the complaint should be attempted in keeping with 5 M.R.S.A. § 4612(3);
3. That there are **NO REASONABLE GROUNDS** to believe that the Complainant was terminated due to disability, or subjected to retaliation by Respondent [REDACTED] or Respondent [REDACTED] and
4. That those portions of the complaint should be dismissed in keeping with 5 M.R.S.A. § 4612(2).

  
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Amy Sperson  
Executive Director

  
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Robert D. Beauchesne  
Field Investigator