



Maine Human Rights Commission

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January 24, 2014

INVESTIGATOR'S REPORT

E12-0251

0265

[REDACTED]

(Lewiston)

v.

[REDACTED]

d/b/a

[REDACTED]

(Brunswick)

I. Complaint:

Complainant alleges that the Respondent discriminated against him due to disability and/or because it perceived him to be disabled when it failed to hire him for an available position.¹

II. Respondent's Answer:

Respondent denies that any discrimination occurred and states that Complainant was not hired because he was unable to meet the scheduling demands of the position.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: 4/13/2012.
- 2) Date complaint filed with the Maine Human Rights Commission ("MHRC"): 6/4/2012.
- 3) Respondent Project Staffing, Inc. ("PSI") is an "employment agency" as defined in the Maine Human Rights Act ("MHRA"), *see* 5 M.R.S. § 4553(5), and is required to abide by the MHRA's nondiscrimination provisions, the Americans with Disabilities Act, and state and federal employment regulations.
- 4) This preliminary investigation, which included a review of the parties' written submissions and an Issues and Resolution 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 [REDACTED]. Respondent is represented by Attorney [REDACTED].

¹Complainant indicated on his MHRC complaint form that he was making a claim of retaliation in addition to his claim of disability discrimination. Since Complainant provided no evidence in support of his retaliation claim, it has not been investigated further.

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 Lepage Bakeries (“Country Kitchen”) in Lewiston.
 - b) Complainant first applied for employment through PSI on or about 4/6/2012 for available positions at Country Kitchen.
 - c) Important third parties include “DN,” Account Manager for Respondent PSI.

Complainant's MHRC Claims:

- 2) Complainant learned that positions were available at Country Kitchen’s bakery through PSI, and applied for a position on or about 4/6/2012, hoping to obtain a full-time, long-term position with the bakery.
- 3) On or about 4/11/2012, PSI’s Account Manager DN contacted Complainant to set up a meeting with her to take a tour of the bakery. The two met the following day and toured the bakery. After the tour ended, DN met with the bakery manager about Complainant. Later that day, DN left a telephone message for Complainant which indicated that she wanted to speak with him about an “immediate start” at the bakery.
- 4) Complainant met with DN later that same day to accept the bakery position. DN told Complainant that it was very likely that the position would turn into a permanent job with the bakery.
- 5) During this meeting, DN questioned Complainant about his availability for scheduling purposes. He told DN that he was available for any scheduling, but that he needed one day each month to see his doctor and refill his prescriptions. DN then asked Complainant what his medications were for. He replied that he took pain relievers just before bedtime to address a lower back condition. DN also asked about, and Complainant described, his back condition. DN asked Complainant to identify the specific medications that he was taking, and Complainant told her that he was taking Oxycodone and Tramadol. DN then commented that she “knew” that those particular medications were addictive.
- 6) DN then stated that the bakery job would require Complainant to work for 12 hours on his feet, standing on concrete floors, and told Complainant that she did not believe that he was the “right fit” for the job. Complainant informed DN that he had a doctor’s note explaining that his back condition would not affect his ability to do the job, but DN responded “that won’t matter.” DN ended the meeting by telling Complainant to call her the next day.
- 7) When Complainant called DN the next day, on or about 4/13/2012, she told him that there was no job for him at the bakery. Complainant again stated that none of his prescribed medications would affect his ability to do his job, since he took them only at night before going to sleep. Nevertheless, Complainant was not given the job that he had been offered the day before because of his back condition and/or because he was taking prescription medication as treatment for that medical condition.

Respondent's Answer to Complainant's MHRC Complaint

- 8) Complainant completed PSI's application for employment at Country Kitchen on 4/6/2012. PSI reviewed the application and called Complainant to arrange for a tour of the bakery to see if he was still interested in working there. After the tour, DN called and left a message for Complainant about an assignment at Country Kitchen.
- 9) Complainant came to the PSI office to discuss the available position with DN. It was during this discussion that Complainant indicated that he would not be available on one day each month because he had to go out of town for medications. DN asked Complainant if this errand could be handled during non-working hours or on his day off, and he said "no." DN determined that Complainant was not eligible for the temporary assignment at Country Kitchen due to his inability to meet the bakery's scheduling needs.
- 10) Respondent made similar decision recently involving another applicant who accepted an assignment at the bakery. The offer of employment to this applicant was rescinded after he informed PSI that he would need a week off following his first week on the job.
- 11) The job Complainant applied for was a temporary position which would last through the end of August, not a temp-to-hire position. The position was filled by a returning former college student on 4/14/2012.
- 12) Since Complainant said he could not work the required schedule, it is irrelevant whether he was or was not able to perform the required job duties. It did not matter that he had a doctor's note stating that he could perform the job functions, because he could not meet the schedule.
- 13) Complainant applied specifically for a position at Country Kitchen, and did not get the job because he could not meet the bakery's scheduling needs. This determination was made before Complainant disclosed any disability.
- 14) Country Kitchen is a highly automated facility run with the minimum staff required. Every associate is needed, so scheduling needs are crucial. Requesting a personal day off from a position before even starting work is not acceptable. The ability to meet the schedule is an essential requirement of the job. The job offer would never have been made if Complainant had disclosed his need for a day off each month during the job interview, tour of the bakery, or subsequent telephone conversation.

Complainant's Reply to Respondent's Answers

- 15) After the Complainant received message from DN about an immediate start at the bakery, he went to Respondent's office to prepare for his first shift, which was scheduled for 8:00 the next morning. He watched videos about the bakery's operations and he received a folder with a parking pass and key card for entering the facility. Up to that point in time, there had been no discussion about Complainant's work schedule, except that his first shift would be the next day and that the shifts were from 8:00 AM to 8:00 PM. Complainant was not told which days of the week that he would work or how many days of the week he would be working.

- 16) At that point, in an effort to be forthright, Complainant told DN that he would need to pick up his prescription on one of his days off each month. He did not tell DN that he needed a day off in order to do this. But even if he had, this would have been a request for a reasonable accommodation. Complainant did not ask for a day off because other people were authorized to pick up his prescription from his doctor for him, and he could then fill it at the pharmacy outside of his work hours.
- 17) Complainant disclosed his need to take prescription medications. DN asked him what the prescriptions were for and replied that he took Oxycodone and Tramadol at night. DN responded that she knew those prescriptions were addictive because her mother who had cancer had taken them. She also commented, "who was to say that the pills were not still be in [his] system in the morning."
- 18) After making these comments, and with Complainant present, DN called an unknown party and asked someone about those specific prescription drugs. DN then ended the call and received a call back about five minutes later. Once DN hung up, she told Complainant, "we have to make a decision," and asked him to call her in the morning. Complainant then asked whether he should still report to work at 8:00 the next morning as earlier discussed, and DN said, "no." It was during the call the next morning that DN told Complainant the job was not the right fit for him because standing on a concrete floor for the entire shift would cause him pain.
- 19) At no point during that conversation did DN mention any scheduling concerns. DN did tell Complainant that if anything opened up in the next few weeks she would give him a call, although to date, Respondent has not contacted the Complainant at all.

Issues and Resolution Conference ("IRC")

- 20) Complainant offered the following additional information at the IRC:
 - a) He has been under a doctor's care for three or four years for back pain related to a prior surgery.
 - b) He has never been under any work restrictions.
 - c) He decided to disclose that he needed to refill his prescription once a month to DN because, even though it could normally be taken care of on his day off, or taken care of by others, he wanted DN to be aware of the issue just in case that was not possible and the necessary day fell on a work day. He agreed that he could have filled his prescription at any time once someone obtained it from his doctor.
 - d) He applied for one other position with PSI about a year ago. They never contacted him about his application.²

- 21) Account Manager DN offered the following additional information at the IRC:

² Complainant has alleged that this was an additional discriminatory action by Respondent. A second MHRC Charge addressing the more recent allegation of discrimination is being processed separately.

- a) She has worked for Respondent PSI for 23 years. The company has supplied staffing help to Country Kitchen bakery for about 16 years, especially during the summer.
- b) She did not know if there is a section in Respondent's policy book prohibiting discrimination against individuals with disabilities or advising them how to request reasonable accommodation for disabilities. There are the required posters about discrimination in the office.
- c) Respondent's Employee Manual submitted to the MHRC provides in section 1.1 that it is an equal opportunity employer and that hires applicants "*without regard to race, religion, color, national origin, sex, sexual orientation, or age.*" This section also states that decisions regarding employment are based solely upon an individual's qualifications, with reference to the skills and abilities of the position for which the individual is being considered.
- d) She stated that Respondent does not have a problem with employees taking time off for doctor's appointments, whether or not those appointments are disability related.
- e) At some point, DN did ask the Complainant if there was any time off he needed in the next few months. Complainant said, "I need one day off per month. I have to go out of town to get my drugs." DN asked him if he could pick up his drugs in town, or have someone else pick them up. Complainant said no, that he had to do it once per month.
- f) DN did not recall Complainant disclosing that he had back condition or whether he told her what his medications were for. She also does not recall if Complainant disclosed to her the specific medications he was taking. DN also did not recall if she told the Complainant that she was familiar with the two medications he was taking because her mother had taken them, although she did confirm that her mother had cancer and took Oxycodone. DN did not recall whether Complainant disclosed that he only took the pills at night or if she asked him how he would know if they were no longer in his system in the morning. DN denies making a telephone call to anyone to ask about Complainant's medications during their final meeting. She does not recall how that meeting ended, or whether the Complainant offered to provide a doctor's note indicating that he was able to do the job.
- g) DN did not recall whether she told Complainant that the job was not the "right fit" for him because of the long shifts standing on concrete floors. She also did not recall whether she discussed scheduling concerns with him during that same phone call.
- h) DN confirmed that if an employee is not placed in a position with one company, Respondent continues to look for other opportunities for that person. DN did not recall whether the Complainant ever contacted her or PSI about any other positions after this incident.

V. Analysis and Conclusions

- 1) The MHRA requires the MHRC in this investigation to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The MHRC interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

³ It is also notable that Respondent's written response to the MHRC complaint contained outright denials for many facts that DN stated she could not recall.

- 2) The MHRA provides, in part that “[i]t is unlawful employment discrimination . . . for any employer to fail or refuse to hire or otherwise discriminate against any applicant because of . . . physical or mental disability.” 5 M.R.S. § 4572(1)(A).
- 3) The MHRA, 5 M.R.S. § 4553-A, defines “physical or mental disability,” in relevant part, as follows:
1. **Physical or Mental Disability, defined.** Physical or mental disability” means:
 - A. A physical or mental impairment that:
 - (1) Substantially limits one or more of a person’s major life activities;
 - (2) Significantly impairs physical or mental health; or
 - (3) Requires special education, vocational rehabilitation or related services;
 - B. Without regard to severity unless otherwise indicated: absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn’s disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson’s disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury;
 - C. With respect to an individual, having a record of any of the conditions in paragraph A or B; or
 - D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A or B.
- 4) The MHRA defines discrimination to include “[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity.” 5 M.R.S. §4553(2)(E).
- 5) Complainant here alleges that he was not selected for an open position because of his disability and/or perceived disability. Respondent denies any discrimination, and states that Complainant was not selected because he was unable to meet the scheduling requirements for the open position.
- 6) 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).
- 7) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that he belongs to a protected class, he applied for and met the minimum objective qualifications for the job sought, and he was rejected. *City of Auburn*, 408 A.2d at 1263.
- 8) 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.

- 9) 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.
- 10) In this case, the Complainant has established a prima-facie case of disability discrimination. Complainant has alleged, and Respondent has not disputed, that his back condition is a disability which substantially limits his ability to sleep. It is also evident from the record that PSI regarded him as disabled. DN asked about his medications, and made the assumption that his underlying back condition rendered him unsuitable for the position because of the requirement that he stand for extended periods on a concrete floor. Complainant also established that he applied for and met the qualifications for the bakery position, and that he was not hired for the position.
- 11) The Respondent has articulated legitimate nondiscriminatory reasons for its employment actions, specifically that the Complainant indicated that he could not work the required schedule for the position.
- 12) In the final analysis, Complainant has established that it is at least as likely as not – the MHRC's "reasonable grounds" standard – that PSI did not hire him because of its perception about limitations posed by his disability, with reasoning as follows:
 - a) It is undisputed that Complainant was considered suitable for the open position before any discussion of his medications.
 - b) It is also undisputed that the Complainant was informed that he was not suitable for the position *after* a discussion took place wherein he disclosed that he needed to refill his prescription medications one day each month.
 - c) At the IRC, DN stated that she "did not recall" many portions of the conversation that Complainant claims ensued in response to that disclosure. Specifically, she did not recall whether the Complainant mentioned that he had a back condition, or if he identified either of the two prescription medications that he was taking. However, DN also had no explanation as to how the Complainant would know that DN's mother had cancer or that she had been prescribed Oxycodone if that portion of the conversation never took place. DN also did not recall if she asked the Complainant how he knew the drugs would be out of his system by morning if he took them at bedtime. DN also did not recall if the Complainant ever offered to provide a doctor's note to prove that he had the ability to perform the necessary job duties. Lastly, DN also stated that she did not recall if she told the Complainant that the job was not a good fit for him because of the extensive standing involved. In contrast, the Complainant provided specific details of this conversation with DN.³
 - d) Respondent's explanation for why Complainant was not hired - that he needed one day off per month to go out of town for medications - is not found to be credible. DN stated at the IRC that days off for doctor's appointments, even those not related to disabilities, were not a problem. If that was the case,

then it is difficult to see how the Complainant's once-a-month need to see his doctor for necessary pain medication would be considered grounds for refusing to hire him.

- e) Respondent's explanation makes even less sense if, as Complainant indicated, he did not even require a day off every month, since he could normally perform this task on his day off, or have it performed by a family member who was authorized to do this on his behalf.
- f) To the extent that Complainant may have needed time off from work to see his doctor to fill his prescription, his request for time off would have been a request for a reasonable accommodation for his disability.⁴ Again, if Respondent routinely granted time off for doctor's appointments to other employees, as DN has stated, then the most likely explanation for why Respondent would not do so in the Complainant's case was because of assumptions made about Complainant's disability and the medications he needed to take because of his disability.
- g) The fact that DN had personal familiarity with the narcotic drug Oxycodone also makes it more likely that she might hesitate to hire Complainant. If DN had genuine concerns about Complainant's abilities, she could have inquired whether he could perform the essential functions of the position, with or without reasonable accommodation. The Respondent in fact declined to accept Complainant's offer to provide a note from his doctor addressing that precise concern.
- h) The fact that Respondent's employee handbook does not expressly prohibit discrimination on the basis of disability, while it does expressly identify other protected classes, and further does not include a process for requesting reasonable accommodations for disabilities, also suggests that the Respondent may not favor hiring employees with disabilities.

13) In sum, the Complainant was found to be credible in his claim that the job offer was withdrawn in response to his self-disclosure to DN that he was taking prescription pain medication for his disability. Respondent's claim that the offer was withdrawn due to Complainant's refusal to "run this errand" on his day off is not found to be credible. Respondent, by its own admission, routinely granted other employees time off for doctor's appointments; even if it did not, Complainant's request would appear to be a reasonable accommodation under the law.

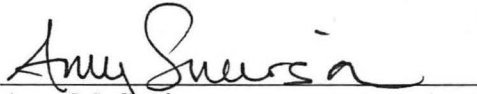
14) Discrimination on the basis of physical disability is found in this case.

VI. Recommendations

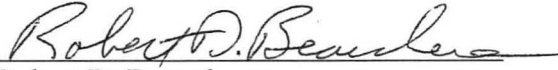
Based upon the information contained herein, the following recommendations are made to the MHRC:

1. There are **REASONABLE GROUNDS** to believe that Complainant [REDACTED] was subjected to unlawful disability discrimination (job offer withdrawn) in employment by Respondent Project Staffing Inc., d/b/a [REDACTED] and;
2. That conciliation should be attempted in keeping with 5 M.R.S. § 4612.

⁴ Because Complainant was not hired after disclosing his medical condition, he never had the need to request an accommodation from his employer. Accordingly, there is no separate claim for failure to make reasonable accommodations for his disability.



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