



Maine Human Rights Commission

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April 4, 2014

INVESTIGATOR'S REPORT E12-0600

██████████ (Topsham)

v.

██████████ (Brunswick; Lexington, Massachusetts)

I. Complainant's Complaint:

Complainant ██████████ alleged that Respondent ██████████ d/b/a as ██████████ (██████████) subjected her to an illegal medical inquiry and terminated her employment due to her disability.¹

II. Respondent's Answer:

██████████ stated that its General Manager did not ask Ms. ██████████ about any health condition, and that he terminated her employment because she could not perform the duties of the housekeeping position.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: May 23, 2012.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): December 6, 2012.
- 3) Respondent has 17 employees. Respondent is subject to the Maine Human Rights Act ("MHRA") and the Americans with Disabilities Act, as well as state and federal employment regulations.
- 4) Complainant is represented by ██████████. Respondent is not represented by counsel.

¹ Complainant also alleged that Respondent failed to hire her and discriminated against her in the terms and conditions of her employment. The facts show that Complainant performed work for Respondent, and Respondent's initial response to her complaint states that she was "hired" for a day. Accordingly, a failure to hire claim is not addressed in the report because it is inapplicable to the facts. With regard to Complainant's allegation of discrimination in the terms and conditions of her employment, Complainant only alleges termination as an adverse employment action. Discrimination in the terms and conditions of Complainant's employment because of disability is also inapplicable here, and is not addressed in this report.

- 5) Investigative methods used: A thorough review of the written materials provided by the parties, an Interview with Respondent's General Manager, and a Fact Finding Conference. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

- 1) Complainant provides the following in support of her position:

- a) Ms. [REDACTED] has been diagnosed with physical impairments including spondylolisthesis, diabetes, and scoliosis. These conditions substantially limit Ms. [REDACTED] in major life activities, for example, standing in one place for an extended period of time and lifting.
- b) On May 18, 2012, Ms. [REDACTED] went to [REDACTED] to inquire about any job openings. She filled out an application that day. Ms. [REDACTED] asked General Manager if he had a problem hiring people with disabilities. General Manager asked Ms. [REDACTED] what her disability was. She told him that she had a back problem, but did not think she would have a problem doing the housekeeping job.
- c) On or about May 21, 2012, General Manager called Ms. [REDACTED] and asked her to come in at 10:00 a.m. the next day. On May 22, 2012, Ms. [REDACTED] arrived, expecting a job interview. General Manager gave her an I-9 form and W-4 forms to fill out. Ms. [REDACTED] filled out the paperwork while she was there.
- d) General Manager told Ms. [REDACTED] that he would try her out for a trial period. He took her around the hotel. Ms. [REDACTED] worked that day, training with a male housekeeper in the morning and a female housekeeper in the afternoon. She believed that she was able to perform the duties of the housekeeping position. She was asked to return to work on May 24, 2012.
 - i. While training with the housekeepers, Ms. [REDACTED] had general conversation with them about her situation. She mentioned to one of the housekeepers that she had a back problem and that she was being treated by a doctor for a back problem.
- e) On May 23, 2012, General Manager called Ms. [REDACTED] and told her that [REDACTED] had to let her go because he was concerned about her back. General Manager told her to come in and he would pay her for the time that she had worked. General Manager told Ms. [REDACTED] that because she was not in the system, he would pay her for the time she worked in cash.
- f) On May 24, 2012, Ms. [REDACTED] went to [REDACTED] and General Manager handed her an envelope with cash in it and told her that he was sorry.

- 2) Respondent provides the following in response to Complainant's allegations:

- a) Ms. [REDACTED] was hired for a day in the Housekeeping/Cleaning Room Position. She was given the required paperwork the day she started on the job.
- b) Ms. [REDACTED] also received a copy [REDACTED] employee handbook which indicates that all employees are "employees at will" and that they are probationary employees during the first 90 days on the job.
- c) The housekeeper position is strenuous. Specific physical job requirements include:

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- i. Being able to walk a total of 8 hours.
 - ii. Lifting 30-40 pounds.
 - iii. Being able to carry 20-35 pounds up to a distance of 200 feet.
 - iv. Being able to bend, squat, crawl, climb, reach above shoulder level, kneel, grasp, push, and pull.
- d) Ms. [REDACTED] initially indicated that she would return the paperwork the morning after she received it. Ms. [REDACTED] arrived the following morning and indicated that she was unable to perform the tasks associated with the job she was hired for; as a result, her employment was terminated.
- i. In a final submission, Respondent stated that after working for four and half hours the day she was hired, Ms. [REDACTED] went to the front desk and told General Manager that she was having difficulty making the beds and she had trouble bending over. The submission also stated that Ms. [REDACTED] said she was sore and asked to go home.
- e) Ms. [REDACTED] was paid for the services she performed.
- f) General Manager provided the following information regarding his interactions with Ms. [REDACTED]
- i. General Manager believed that his initial contact with Ms. [REDACTED] was when she came to the hotel asking if there were job openings. General Manager needed to hire a housekeeper at the time and needed someone quickly.
 - ii. General Manager did not conduct a formal interview with Ms. [REDACTED]. He walked her through the hotel and explained what the responsibilities of a Housekeeper would be.
 - iii. That same day, Ms. [REDACTED] spent time with another housekeeper who had been employed with [REDACTED] [REDACTED] for a year and a half. She was there for approximately four and a half hours.
 - iv. After Ms. [REDACTED] spent time with the housekeeper, she approached General Manager at the front desk and told him that she had a sore back, and also told him that she was having trouble making beds because she had trouble bending over.
 - v. General Manager started to wonder whether Ms. [REDACTED] was qualified for the job since the Housekeeper position requires constant bending over and reaching into tubs.
 - vi. After Ms. [REDACTED] left, General Manager spoke with the housekeeper she worked with that day. The housekeeper told General Manager that Ms. [REDACTED] had told him that she was under a doctor's care and taking Vicodin. The housekeeper also told General Manager that Ms. [REDACTED] told him that she was sleeping on a box spring because she did not have a mattress.
 - vii. General Manager decided that for Ms. [REDACTED] safety she could not continue in the housekeeper position. He called Ms. [REDACTED] and told her to come in the next day. When she arrived, General Manager told her that they were going to "call it a day." He paid her for the work she completed through petty cash.
 - viii. Ms. [REDACTED] did not complete a job application with [REDACTED]
 - ix. General Manager did not ask Ms. [REDACTED] what her disability was.

V. Analysis:

- 1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

Illegal Medical Inquiry

- 2) The MHRA, 5 M.R.S. §§ 4575(2)(B) & (D), states:

A covered entity may not discriminate against a qualified individual with a disability because of the disability of the individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment. A qualified individual with a disability, by reason of that disability, may not be excluded from participation in or be denied the benefits of the services, programs or activities of a public covered entity, or be subjected to discrimination by any such covered entity relating to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment...

A. [omitted]

B. Except as provided in paragraph C, a covered entity may not conduct a medical examination or make inquiries of a job applicant as to whether the applicant is an individual with a disability or as to the nature or severity of the disability. A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

C. [omitted]

D. A covered entity may not require a medical examination and may not make inquiries of an employee as to whether the employee is an individual with a disability or as to the nature or severity of the disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity.

- 3) The MHRA, 5 M.R.S. § 4572(D)(1) & § 4572(2)(D), states "It is unlawful discrimination... For any employer..., prior to employment ...to [e]licit or attempt to elicit information directly or indirectly pertaining... physical or mental disability".
- 4) Complainant here alleged that Respondent violated the MHRA by asking her what her disabilities were when she applied for a job. Respondent stated that it never asked Complainant about any health condition and did not ask her what her disabilities were.
- 5) Whether or not General Manager asked Complainant what her disability was is disputed. However, General Manager did hire Complainant after the alleged inquiry was made. Complainant was terminated shortly after she was hired, and one of the reasons Respondent presented was due to concerns about her back problem.
- 6) If General Manager had not asked about Complainant's disability, and rather knew only that Complainant's back was sore after her first day in the position of housekeeper, it seems unlikely that he would have concluded that he needed to terminate her employment for her own safety. This suggests that he knew she

had something more than a temporary sore back, which supports Complainant's allegation that he had asked her about her disability.

- 7) Respondent neither argued nor proved that the inquiry was job-related and consistent with business necessity
- 8) Under the circumstances of this case, Complainant has at least an even chance of prevailing in court on her claim that she was submitted to an unlawful inquiry. It is her word against General Manager's, Respondent has given somewhat differing explanations for her termination from employment, and the circumstances support an inference in Complainant's favor.
- 9) Disability discrimination based on an unlawful medical inquiry is found.

Disability Discrimination – Termination

- 10) The MHRA provides, in relevant part, that it is unlawful to terminate an employee because of physical or mental disability and that it is unlawful to fail or refuse to hire an applicant or otherwise discriminate against an employee on the basis of sex in the terms and conditions of employment. See 5 M.R.S. § 4572(1)(A).
- 11) The MHRA, 5 M.R.S.A. § 4553-A(1)(A)(2), defines "physical or mental disability," in relevant part, as a physical or mental impairment that "substantially impairs physical or mental health." The definition also includes being regarded as having such an impairment. 5 M.R.S.A. § 4553-A(1)(D).
- 12) 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).
- 13) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) she belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her 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 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261.
- 14) 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. Department 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 her 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.

- 15) In order to prevail, Complainant must show that she 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.
- 16) Here, Complainant has established a prima-facie case of disability discrimination. Complainant has alleged that she has several back conditions and that she informed employer that she had back problems. It is clear that Respondent regarded Complainant as having a disability, since it believed that she could not work as a housekeeper because of her back condition. Respondent took an adverse employment decision against her by terminating her employment, and Respondent continued to have a need for her work to be performed. Complainant also has alleged that she was able to perform her job satisfactorily, and did so on the one day she was allowed to work.
- 17) Respondent has articulated a legitimate, nondiscriminatory reason for its decision to terminate Complainant, namely that Complainant stated that she was unable to perform the tasks of the housekeeping job and was terminated.²
- 18) At the final stage of the analysis, Complainant has shown that her perceived disability was a deciding factor in Respondent's decision to terminate her employment:
 - a) General Manager stated that he was aware of Complainant's back problems. General Manager made the decision to terminate Complainant's employment after four and a half hours of work. General Manager stated that Complainant told him that she was having trouble making beds because she had trouble bending over, and stated that the male housekeeper who Complainant worked with told him that Complainant stated that she was being treated for back problems. General Manager made the determination that Complainant was not able to perform the job without talking with Complainant regarding any alleged issues she was having in completing the job duties of the housekeeper position.
 - b) Respondent provided three differing statements related to Complainant's termination. In a submission initially filed with the Commission, Respondent stated that it terminated Complainant's employment after she allegedly stated that she was unable to perform the tasks of the housekeeping position, which Complainant denied. General Manager himself stated that he made the decision to terminate Complainant's employment for her own safety due to her back condition after 4.5 hours of work and talking with the male housekeeper. In a final submission to the Commission, Respondent stated that after four and a half hours of work Ms. ██████ asked General Manager if she could go home because she was sore. These changing reasons cast doubt on Respondent's stated reason for terminating Complainant's employment.
 - c) The only witness to the exchange other than Complainant was General Manager. His statement does not support the Respondent's position that it was Complainant who said she could not perform the functions of her position. Rather, according to General Manager, he decided that he would terminate Complainant's employment for her own safety. While General Manager seems to have meant well, his action appears to have been based on stereotypes about individuals with disabilities.

² Respondent's General Manager said that he was concerned about Complainant's safety due to her back, and decided to "call it a day" with regard to her employment.

- d) Complainant has at least an even chance of showing that Respondent perceived her to be disabled, and terminated her employment as a result. Respondent was aware of her back problems and ongoing treatment she was receiving, fired her after only 4.5 hours of work, and has provided inconsistent explanations for its actions. While one of the reasons given by General Manager for why he terminated Complainant's employment was for her own safety, the safety defense does not enter this analysis as Respondent stated that it did not inquire about Complainant's health condition and did not make an individualized assessment of Complainant's disability and the requirements of the job.
- e) Based on these facts, Complainant has at least an even chance of prevailing in court regarding her disability claim.

19) Discrimination based on disability in violation of the MHRA is found.

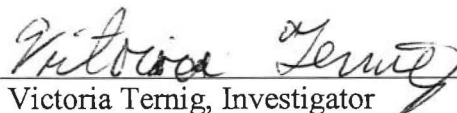
VI. Recommendation:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

1. There are **Reasonable Grounds** to believe that Respondent [REDACTED] made an illegal medical inquiry to Complainant [REDACTED] in violation of the Maine Human Rights Act;
2. There are **Reasonable Grounds** to believe that Respondent [REDACTED] d/b/a [REDACTED] terminated Complainant [REDACTED] employment because of her perceived disability in violation of the Maine Human Rights Act; and
3. Conciliation should be attempted in accordance with 5 M.R.S. § 4612.



Amy M. Sneirson, Executive Director



Victoria Ternig, Investigator