



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT MHRC Case No. PA16-0450 August 21, 2018

**Brandon Gross (Warren)**

v.

**SOM/MDOC/ Maine Correctional Center<sup>1</sup> (Augusta)**

### **I. Summary of Case:**

Complainant, who is incarcerated at Respondent's facility, alleged that Respondent discriminated against him due to his disability when it denied his request for a reasonable modification to its policies. He further alleged that Respondent retaliated against him for filing this complaint. Respondent, a state agency operating correctional facilities, denied discrimination and retaliation, and asserted that Complainant is not a qualified person with a disability. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and requesting additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that Respondent unlawfully discriminated against Complainant based on his disability by denying him a reasonable modification, but no reasonable grounds to believe that Respondent retaliated against Complainant for engaging in protected activity.

### **II. Jurisdictional Data:**

- 1) Dates of alleged discrimination: March 4, 2016 to present.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): October 19, 2016.
- 3) Respondent is a public entity subject to the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act, and state and federal public entity/accommodation regulations.
- 4) Complainant is not represented by counsel. Respondent is represented by James Fortin, Esq.

### **III. Development of Facts:**

- 1) Complainant provided the following in support of his claims:

Complainant has been incarcerated in Respondent's facilities since November 24, 2015. Complainant

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<sup>1</sup> Complainant named "SOM/MDOC/Maine Correctional Center" as the Respondent in his complaint; Respondent provided that it is the "Maine Department of Corrections", a state agency which operates the Maine Correctional Center. Because Complainant has not amended his complaint, the name he used has been retained.

was housed at the Maine Correctional Center until January 19, 2018, when he was transferred to a minimum-security facility. Complainant has [REDACTED], [REDACTED], and was recently [REDACTED], [REDACTED], [REDACTED], [REDACTED]. Complainant requested a placard for his cell stating that he had [REDACTED], [REDACTED]. This request was not granted for several months and then, after being granted, was later taken away. Complainant missed "count"<sup>2</sup> because of his [REDACTED] and was disciplined for it; the discipline included cell restrictions and delaying his transfer to a minimum-security facility.<sup>3</sup> Respondent finally granted him a modification, but then removed it and transferred him to a new facility in retaliation for filing this complaint.

2) Respondent provided the following in support of its position:

Complainant only brought up his [REDACTED] after he was disciplined as an after-the-fact excuse for missing count. Complainant agreed to informal resolution of the disciplinary matters. The discipline for missing count did not impede his transfer to a minimum-security facility. Complainant was not granted a reasonable modification because Respondent did not believe that he had a disability.

3) The Investigator made the following findings of fact:

- a) Complainant was confined to the Maine Correctional Center on November 24, 2015. At that time, Respondent performed an admission medical screening. At the screening, Complainant made no mention of [REDACTED] directly, but mentioned a [REDACTED].
- b) Respondent provides medical services to inmates through a third-party contractor ("Contractor"). Respondent stated that it has no formal policy for how to address conflicting medical opinions by Contractor's various providers. It does have a policy stating that "[w]hen the health care authority is other than a physician, final medical judgment rests with a single designated licensed responsible physician." No such individual was identified during this investigation.
- c) On January 6, 2016, Complainant filled out two medical request slips; one addressed to "medical" the other addressed to "dentist." Both slips referenced that he could not [REDACTED], [REDACTED], [REDACTED].
- d) On February 19, 2016, Complainant filled out a sick call slip citing multiple issues, including that [REDACTED], [REDACTED], [REDACTED]. Complainant was seen by a registered nurse. Respondent did not provide a record from this visit. Complainant recalls asking to be seen by a "specialist" for his [REDACTED] and requesting a [REDACTED] sign for his cell door.
- e) On March 4, 2016, Complainant was written up for being asleep during count. The resolution was a loss of privileges for five days. On April 3, 2016, Complainant was written up again for the same reason and was given the same discipline.
- f) On March 28, 2016, Complainant filled out another sick call slip again citing multiple issues, including that [REDACTED], [REDACTED], [REDACTED]. Complainant was seen by a registered nurse for this request on April 30, 2016. Respondent did not provide a record for this visit. Complainant recalls asking to see a "physician" and requesting to get a sign for his door.

<sup>2</sup> "Count" appears to be a formal head count of the inmates.

<sup>3</sup> Complainant eventually was transferred to a minimum-security facility, and claimed that the transfer was in retaliation for making this complaint.

- g) On May 23, 2016, Complainant was written up for being in the bathroom during a count. The discipline was loss of recreation privileges for three days.
- h) On May 28, 2016, Complainant was written up for being asleep during count. Complainant recalls telling the officer about his attempts to get a sign for his door. Complainant received two days room restriction.
- i) On May 31, 2016, Complainant was again written up for missing count and, because it was his fifth time, he was referred to a formal hearing set for June 22, 2016. At the hearing, Complainant explained that he [REDACTED].
- j) On May 31, 2016, Complainant met with caseworker, who made a [REDACTED] note. The note provided that Complainant stated that [REDACTED], and stated that his discipline was due to his [REDACTED]. He also provided that [REDACTED]. The caseworker followed up with other providers about apparent inconsistencies in how medical had addressed Complainant's [REDACTED]. The assistant director of nursing ("Assistant DON") reported that nursing had conducted a [REDACTED] and found his [REDACTED] normal, but suggested he submit a sick call request solely for [REDACTED] if he wanted it addressed more directly.
- k) On June 2, 2016, Complainant again filled out a sick call slip asking to be seen for [REDACTED].
- l) On June 5, 2016, Complainant saw a registered nurse who noted that Complainant did not seem to have an issue [REDACTED] her while talking face-to-face, and that he might have [REDACTED]. She noted she would refer him to a "provider."
- m) On June 14, 2016, Complainant filled out a sick call slip requesting a sign for his door for his [REDACTED]. On June 15, a licensed practicing nurse reviewed the request and wrote that the "provider"<sup>4</sup> did not believe that the patient meets the requirements for the sign, so the request was denied.
- n) On June 29, 2016, Complainant saw a nurse practitioner who noticed [REDACTED]. Her note also reflects a [REDACTED]. She made a note for security to address Complainant directly for instructions due to [REDACTED]. Assistant DON signed another note dated July 3, 2016, stating that Complainant needed to be addressed directly due to "[REDACTED]". This information was also put in his record as a current alert.
- o) On July 29, 2016, Respondent gave Complainant a sign for his cell door stating that the occupant was [REDACTED] and needed to be woken for the 6AM count.<sup>5</sup>
- p) On October 19, 2016, Complainant filed this complaint.
- q) On December 3, 2016, Respondent discontinued Complainant's modification because it believed he did not have a [REDACTED]. Respondent provided a progress note dated September 7, 2016, in which a nurse wrote that he had met with a [REDACTED] the prior week and she had [REDACTED]. Respondent did not provide a note from the meeting with the [REDACTED], nor did it provide any medical records dated between June 29, 2016, and February 15, 2018.

<sup>4</sup> It is unclear who the "provider" was.

<sup>5</sup> Samples of these signs are shown in Exhibit A.

- r) Despite the differences in diagnosis of Complainant's alleged [REDACTED] by various nurses, there is no record of a physician seeing Complainant during his time at the Maine Correctional Center.
- s) On January 19, 2018, Respondent transferred Complainant to Bolduc Correctional Facility, a minimum-security facility.
- t) On February 15, 2018, Complainant saw a doctor (Contractor's Regional Medical Director) who diagnosed him with [REDACTED]. It appears that the diagnosis was based on Complainant's self-reported symptoms. [REDACTED]. It appears that Complainant was again given a [REDACTED] sign for his cell door.

#### IV. Analysis:

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

#### *Disability: Denial of a Reasonable Modification*

- 2) The MHRA makes it unlawful for a "qualified individual with a disability, by reason of that disability, [to be] excluded from participation in or [to be] denied the benefits of the services, programs or activities of a public entity, or [to be] subjected to discrimination by any such entity." 5 M.R.S. § 4592 (1)(E).
- 3) To establish a claim pursuant to the public entity provisions of the MHRA, Complainant must establish that, "(1) he is a qualified individual with a disability; (2) he was excluded from participating in or denied the benefits of the public entity's services, programs, or activities, or otherwise discriminated against; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability." *Scott v. Androscoggin County Jail*, 2004 ME 143 ¶ 17, 866 A.2d 88, 93.
- 4) Unlawful discrimination also includes a "failure to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless, in the case of a private entity, the private entity can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations." 5 M.R.S. § 4592(1)(B).
- 5) To establish a denial of reasonable modification by a public accommodation, Complainant must show that:
  - (1) He comes within the protections of the MHRA as a person with a disability;
  - (2) Respondent operates a public accommodation under the MHRA;
  - (3) Respondent has in effect a policy, practice, or procedure that, directly or indirectly because of Complainant's disability, results in Complainant's inability to access Respondent's goods, services, facilities, privileges, advantages or accommodations;
  - (4) Complainant requested a reasonable modification in that policy, practice, or procedure which, if granted, would have afforded him access to the desired goods, services, facilities, privileges, advantages or accommodations;
  - (5) The requested modification—or a modification like it—was necessary to afford that access; and
  - (6) The Respondent nonetheless refused to modify the policy, practice, or procedure.

*See 5 M.R.S. § 4592(1)(B); Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003).

- 6) Here, Complainant has shown that he was denied a reasonable modification for his disability, with reasoning as follows:
- a. There is a significant dispute here as to whether Complainant has a disability within the meaning of the MHRA. “[REDACTED]” is a disability without regard to severity under the MHRA. *See 5 M.R.S. § 4553-A(1)(B)*. On the whole, the record supports a finding that Complainant has [REDACTED], and that he informed Respondent that he [REDACTED] within the first two months of his incarceration.
  - b. Various nurses reached differing conclusions about Complainant’s condition between February and July of 2016. Respondent’s policy makes clear that the ultimate decision-making authority for medical decisions lies with a single designated licensed physician. However, despite the conflicting decisions by various nurses, Complainant did not see a doctor for approximately two years after first requesting medical care because he [REDACTED]. Notably, as soon as Complainant did see a doctor, he was promptly [REDACTED].
  - c. Respondent simply did not follow its own policy. Respondent’s argument for not granting Complainant’s request, and for later taking it away once granted, ultimately boils down to claiming that the Respondent did not believe Complainant had [REDACTED]. Given the conflicting findings by its own care providers, and Respondent’s failure to allow Complainant to see a licensed physician, its decision to deny, then grant, and then revoke, the requested modification is not supported by the record.
  - d. Complainant also established that the requested modification was necessary to afford him access to Respondent’s services. Complainant requested a sign that would alert prison staff to wake him before the morning count. He had accumulated five disciplinary incidents for missing count before receiving this modification, and as a result lost various privileges and lost “good time” (days removed from his sentence). The record reflects that once he received his modification, he did not miss count. Further, the fact that Respondent has granted that modification for this Complainant twice, as well as for other inmates, and has sample versions of the sign tends to suggest that the request is not unreasonable on its face.
- 7) Discrimination on the basis of disability is found.

#### *MHRA Retaliation*

- 8) The MHRA makes it unlawful to “discriminate against any individual because that individual has opposed any act or practice that is unlawful under [the MHRA] or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under [the MHRA].” 5 M.R.S. § 4633(1).
- 9) To establish a prima facie claim of MHRA retaliation, Complainant must show that he engaged in statutorily protected activity, he was a subject to a materially adverse action, and that there was a causal link between the two. *Doyle v. Dep’t of Human Servs.*, 2003 ME 61. The “actions must be harmful to the point that they could well dissuade a reasonable [person] from making or supporting a charge of discrimination.” *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).

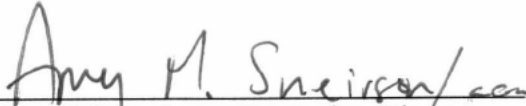
- 10) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in protected activity. See *Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> Cir. 1995). Respondent must then “produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action.” *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. See also *Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, the Complainant must carry her overall burden of proving that “there was, in fact, a causal connection between the protected activity and the adverse action.” *Id.* Complainant must show that he would not have suffered the adverse action but for his protected activity, although the protected activity need not be the only reason for the decision. See *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm’n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).
- 11) Complainant established a prima-facie case by alleging that he filed a Commission complainant in October 2016, and soon thereafter his reasonable modification was taken away; he also claimed that his transfer to another facility was retaliatory. Respondent, in turn, stated that the modification was removed because Complainant did not need it, and that the transfer occurred because Complainant’s security level was downgraded.
- 12) In the final analysis, Complainant has not shown that he was retaliated against based on protected activity, with reasoning as follows:
- a. As an initial matter, Complainant first asserted that the discipline he received from missing count held up his transfer to a minimum-security facility. Later, he claimed that his eventual transfer to such a facility was in retaliation for filing this complaint. Complainant’s contradictory positions are without merit, especially since he did not identify any reason suggesting that he had come to believe that a transfer to a lower security status and facility was detrimental.
  - b. The revocation of Complainant’s modification is suspect because of its proximity to the filing of this complaint. However, it appears more likely that the modification was removed because Respondent believed, accurately or not, that Complainant did not have [REDACTED]. The most recent note in the file before Complainant’s 2018 diagnosis indicated that a [REDACTED] [REDACTED] did not believe Complainant had [REDACTED]. While Respondent should have taken steps to resolve the issue, it appears that doubt about his condition caused the revocation of his modification, not retaliation.

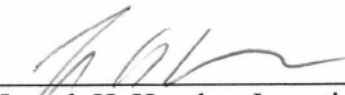
#### **V. Recommendation:**

For the reasons stated above, it is recommended that the Commission issue the following findings:

There are **Reasonable Grounds** to believe that SOM/MDOC/Maine Correctional Center discriminated against Brandon Gross based on his disability (denial of reasonable modification), and this claim should be conciliated in accordance with 5 M.R.S. § 4612(3); and.

There are **No Reasonable Grounds** to believe that SOM/MDOC/Maine Correctional Center retaliated against Brandon Gross based on MHRA-protected activity, and this claim should be dismissed in accordance with 5 M.R.S. § 4612(2).

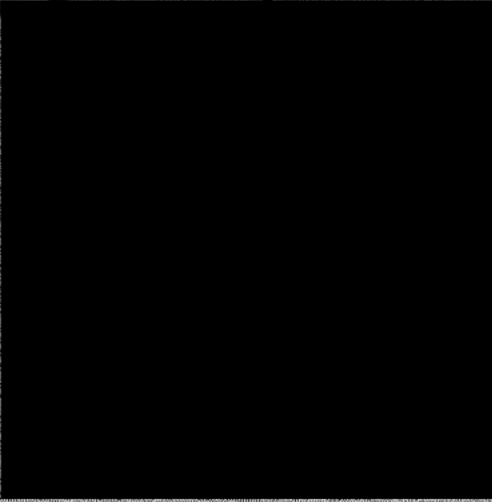
  
Amy M. Sneider, Executive Director

  
Joseph H. Hensley, Investigator

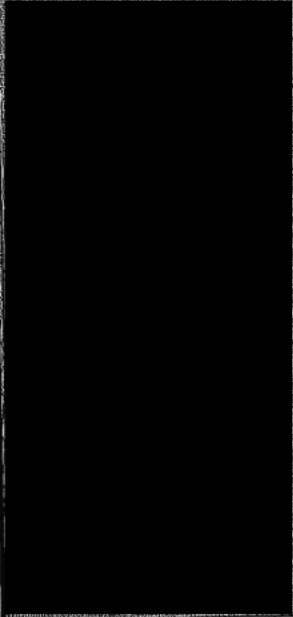
EXHIBIT

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