Memo

Date: June 6, 2006

To: Patricia Ryan, Executive Director

From: John Gause, Commission Counsel

Re: [redacted]
E06-0072

Respondent, [redacted] ("[redacted]"), has requested administrative dismissal based on lack of jurisdiction. Specifically, [redacted] alleges that it was not Complainant's "employer" within the meaning of the MHRA. For the following reasons, I recommend that the request be DENIED and that we conduct an investigation into whether [redacted] and [redacted] ("[redacted]") constitute a "single employer."

[redacted] argues first that it does not meet the MHRA definition of "employer" because it is not located in Maine and does not employ anyone in Maine. *See* 5 M.R.S.A. § 4553(4) (defining "employer" in those terms). It next argues that no employment relationship exists (such as being on the payroll) between [redacted] and Complainant; rather, it argues that Complainant is employed by [redacted].

Complainant does not dispute that she was not directly employed by [redacted] but alleges that [redacted] and [redacted] are a "single employer" for purposes of the MHRA. She cites a First Circuit Court of Appeals decision, *Romano v. U-Haul International*, 233 F.3d 655 (1st Cir. 2000), which discussed the "integrated enterprise test" for determining single employer status under Title VII of the Civil Rights Act of 1964 and the MHRA. Pursuant to the "integrated enterprise test," two entities may be treated as one after examining four factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *See id.* at 662. [redacted] apparently concedes the application of the "integrated enterprise test" for "single employer" status under the MHRA. *See* Respondent's May 23, 2006 letter, page 4.

There are no Law Court decisions applying the "integrated enterprise" test. The new EEOC Compliance Manual, § 2-III(B)(1)(a)(iii), accurately describes the test as follows:

Special Issues Regarding Multiple Entities

(a) Integrated Enterprises

If an employer does not have the minimum number of employees to meet the statutory requirement, it is still covered if it is part of an "integrated enterprise" that, overall, meets the requirement. An integrated enterprise is one in which the operations of two or more employers are considered so intertwined that they can be considered the single employer of the charging

party. The separate entities that form an integrated enterprise are treated as a single employer for purposes of both coverage and liability. If a charge is filed against one of the entities, relief can be obtained from any of the entities that form part of the integrated enterprise.

The factors to be considered in determining whether separate entities should be treated as an integrated enterprise are:

The degree of interrelation between the operations

- *Sharing of management services such as check writing, preparation of mutual policy manuals, contract negotiations, and completion of business licenses*
- *Sharing of payroll and insurance programs*
- *Sharing of services of managers and personnel*
- *Sharing use of office space, equipment, and storage*
- *Operating the entities as a single unit*

The degree to which the entities share common management

- *Whether the same individuals manage or supervise the different entities*
- *Whether the entities have common officers and boards of directors*

Centralized control of labor relations

- *Whether there is a centralized source of authority for development of personnel policy*
- *Whether one entity maintains personnel records and screens and tests applicants for employment*
- *Whether the entities share a personnel (human resources) department and whether inter-company transfers and promotions of personnel are common*
- *Whether the same persons make the employment decisions for both entities*

The degree of common ownership or financial control over the entities

- *Whether the same person or persons own or control the different entities*
- *Whether the same persons serve as officers and/or directors of the different entities*
- *Whether one company owns the majority or all of the shares of the other company.*

The purpose of these factors is to establish the degree of control exercised by one entity over the

operation of another entity. All of the factors should be considered in assessing whether separate entities constitute an integrated enterprise, but it is not necessary that all factors be present, nor is the presence of any single factor dispositive. The primary focus should be on centralized control of labor relations. It should be noted that while this issue often arises where there is a parent-subsidiary relationship, a parent-subsidiary relationship is not required for two companies to be considered an integrated enterprise.

Courts recognize that the most important of the four factors is control of labor relations. *See Romano*, 233 F.3d at 666. The focus with respect to control of labor relations is "on employment decisions, but only to the extent that [a respondent] exerts an amount of participation that is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions." *Id.* In other words, it is not necessary that a respondent be a final decisionmaker with respect to a complainant's hire or termination. *See id.* With respect to day-to-day control of labor relations, "actual 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).

Complainant's charge alleges that [redacted] and [redacted] failed to provide her with a reasonable accommodation (drive long distances only two days per week) and that they terminated her because of her disability and in retaliation for requesting the accommodation. There is no evidence that [redacted] was directly or indirectly with Complainant's request for accommodation or termination. [redacted] has not yet answered the Commission's request for information.

At this stage, I think we need more information to decide whether [redacted] and [redacted] constitute an "integrated enterprise." We know that [redacted] acts through its local councils. ***Blue Book of Basic Documents, found at Exhibit A to [redacted] May 23, 2006 letter (hereinafter "BB"), at pages 23-24.*** We know that [redacted], which employed Complainant, is chartered by [redacted] ***Submission to MHRC, dated April 18, 2006 (hereinafter "[redacted] Submission") at pages 1-2.*** The local councils must act according to their charters. ***BB 10.*** The charters, in turn, subject the local councils to the constitution, bylaws, policies, and standards of the [redacted]. ***BB 28-29.***

[redacted] establishes requirements for local council charters and credentials, administers those requirements through standards, procedures, and interpretations, and may revoke the local council's credentials when the [redacted] deems the local council to have violated the [redacted] standards, procedures, and interpretations. ***BB page 28, 31.***

[redacted] policies govern selection criteria for local council volunteers and employees, including nondiscrimination and affirmative action; require local councils to implement fair personnel policies and procedures, including problem resolution procedures; and make local councils accountable to the [redacted] for the proper exercise of their authority to secure and direct personnel. ***BB page 21-23.***

Local councils are subject to compliance audits by the [redacted] and other procedures for revocation of local charters when they violate [redacted] policies, credential standards, or directives, and they must make reports to the [redacted] ***BB 29, 31.***

[redacted]'s performance appraisal forms are [redacted] forms. [redacted] ***Submission Exbs 15A, 15B, 15C (last page at the bottom right says "[redacted]").***

Although this information suggests sufficient [redacted] control of labor relations (the most important factor), we should find out more about the extent to which this authority to control is exercised as well as more about interrelation of operations, common management, and financial control. If you would like, I will put together an additional request for information relating to the "integrated enterprise" issue. At this time, however, I think it would be premature to dismiss the case against [redacted].