



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

MHRC No: E14-0603

January 21, 2016

Douglas C. Hiserodt (Orrs Island)

v.

Lakonia Greek Products LLC (Saco)

I. Complainant's Complaint:

Complainant Douglas C. Hiserodt alleged that Respondent Lakonia Greek Products LLC discriminated against him based on his disability or perceived disability by failing to provide a reasonable accommodation, making an illegal inquiry related to his disability, and, ultimately, terminating his employment.

II. Respondent's Answer:

Respondent stated that it did not discriminate against Complainant. Respondent terminated Complainant's employment because he was unable to perform an essential function of the job.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: April 24, 2014 through May 10, 2014.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): November 4, 2014.
- 3) Respondent is believed to have at least 15 employees¹ and is subject to the Maine Human Rights Act ("MHRA"), Americans with Disabilities Act ("ADA"), as well as state and federal employment regulations.
- 4) Complainant is represented by Kristin Aiello, Esq. Respondent is represented by Kelsey Libby, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, request for additional information, and a Fact Finding Conference ("FFC"). This investigation is believed to be

¹ Respondent claims it has only 9 employees in its supplemental response to a request for information. Respondent's website lists 13 employees on the page titled "Lakonia's Family". This list of employees does not include four additional sales representatives employed by Respondent. In addition, Respondent noted that approximately four individuals are seasonally employed to process the olive harvest in Greece. Respondent alleged that these individuals are not part of the business, yet two individuals who manage cultivation and harvest of olives and assisting with the harvest of olives and herbs are listed under "Lakonia's Family". For these reasons it is deemed that Respondent has at least 15 employees for the purposes of the complaint filed with the Commission.

sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

- 1) The parties in this case are as follows:
 - a) Complainant worked for Respondent as a Sales Representative from late April/early May 2014 through May 10, 2014.
 - b) Respondent is a small family-run business that sells specialty food products in its shop and at events.
- 2) Complainant provided the following in support of his position:
 - a) Complainant has a disability [REDACTED] under the MHRA that requires ongoing medical treatment, including [REDACTED]² Complainant's disability substantially limits his major bodily functions. Complainant felt that Respondent regarded him as disabled. Complainant uses a handicap placard on his rearview mirror in his vehicle.
 - b) On April 14, 2014, Complainant applied for Respondent's sales representative job in the Brunswick area. Complainant was excited about the job because of his prior employment experience as a sales representative at similar events. The job advertisement indicated that a sales representative would setup and breakdown from shows and that "this is a very physical job where you are constantly lifting heavy boxes, etc., so if you have a bad back or injuries, please do not apply". Complainant would not have applied for the job if he did not believe he met the qualifications outlined in the advertisement.
 - c) On April 24, 2014, Respondent's president ("President") interviewed Complainant and he brought his resume and references. President mentioned that she was hiring for a second sales representative position that required more travel to different tradeshows and events. Complainant discussed his medical conditions and disclosed that he needed [REDACTED] treatment and that he needed two weeks' advance notice to schedule treatment in other locations if he was outside of his local area. Complainant requested the Brunswick farmer's market position that he applied for as an accommodation, since it would be easier to manage with his treatment schedule, however Complainant was willing to do either job. President indicated that she had someone else in mind for the Brunswick area position. President discussed the details of the job, including travel and procedures for the fairs, festivals, and sales.
 - d) At the end of the interview, President followed Complainant out to see what kind of vehicle he drove for loading product in his car. Complainant believed that he was parked in a handicapped spot.
 - e) President offered Complainant the traveling sales representative job and he was thrilled.
 - f) Respondent sent an email to Complaint on May 7, 2014, asking if he had restrictions other than the need for advance notice for scheduling. Complainant did not respond to President's email message because he did not have any restrictions.

² Complainant provided documentation related to his disability. The documentation reflects that Complainant had no lifting restrictions. Respondent does not dispute that Complainant has a disability.

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- g) President asked Complainant to train with a sales representative ("Trainer") at a craft fair in New Hampshire on Mother's Day weekend. Respondent arranged for overnight lodging.
- h) On Saturday, May 10, 2014, Complainant arrived for training. He secured parking (with his handicap placard in place) and waited for Trainer after locating the site for their display.
- i) After Trainer arrived, they worked to unload her vehicle and set up the display, moving the boxes and products together. Complainant did not tell Trainer that he could not lift the heavier items. They used a hand truck for the heavier items. Even Trainer did not carry the heavier items from her vehicle directly to the booth site. Complainant offered to help Trainer unpack her vehicle, but she said she had it packed in a certain way. As they worked, Complainant's medical condition came up in conversation and Trainer discussed her background as pharmacy technician. Trainer asked Complainant about his medical conditions and he disclosed them. Trainer opined that Complainant's medical conditions were "pretty serious". Complainant replied that his conditions were managed medically and that he was fine.
- j) Trainer asked Complainant how his [REDACTED] was going and Complainant explained his [REDACTED] process, mentioning that he usually scheduled his [REDACTED] for late in the day because he was wiped out afterwards. Complainant stated that he was on a [REDACTED] list. Trainer asked what caused his [REDACTED] failure and Complainant replied that he thought it was caused by [REDACTED] and stress from a prior job working in a correctional facility. Trainer appeared uncomfortable. Trainer asked if President knew about his medical issues; Complainant stated that he had previously disclosed his medical issues to President. Trainer stated that she did not believe that President knew the extent of Complainant's medical health issues and questioned whether the job was right for Complainant. Complainant said he was right for the job as it was similar to other prior retail work he performed that required heavy lifting and moving merchandise. Complainant felt uneasy with Trainer's invasive questions.
- k) Complainant and Trainer worked in the booth, with Trainer leaving a few times to go shopping.³ Complainant successfully operated the booth in Trainer's absence, having to turn a few customers away since he did not have the appropriate tools to process credit card payments. Trainer told Complainant to tell customers that he was Greek because they would sell more products that way.⁴ At the end of the day Trainer and Complainant secured the tent and parted for the evening. Trainer told Complainant he did a good job. Complainant returned to his hotel room for the night.
- l) Trainer called President with concerns about Complainant's medical condition and Complainant's ability to do the job based on his medical concerns. Based on that phone call, President decided to terminate Complainant's employment because she believed he was not qualified to do the job based on his medical condition.
- m) Later that night, close to 9:00 p.m., President called Complainant and told him that Respondent no longer needed Complainant's services and that she was discharging him. Complainant asked why and President told him it was because of his of his "significant health issues". President did not ask

³ Respondent provided that Trainer's time away from the tent was to observe Complainant's ability to do the job, not for the specific intent to go shopping. This was a routine training technique.

⁴ *Investigator Note:* President denied training its employees to lie to customers about being Greek. At the FFC, Trainer indicated that she was trained to say that the family has olive groves in Greece, not that she means that she personally is part of the family. That is how she trained new sales representatives. President, at the FFC, said she never told employees to say they are Greek to enhance sales. President did not train Trainer to say she is Greek.

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Complainant if he had any lifting restrictions during the call. Complainant assured President that he could do the job, and asked if there was other work that he could do for Respondent; President did not respond. Complainant left the next morning.

- n) Complainant contacted President to ask about other work in the company and to provide information regarding his address for his paycheck.
- o) Respondent did not speak to any of Complainant's medical providers about any restrictions he had (none) or engage in the interactive process with Complainant. Respondent did not contact Complainant's former employer to inquire about his ability to perform his former retail sales job.
- p) Complainant did not say he could not do the sale representative job alone. Complainant mentioned his brother as a possible hire for a particular event he thought would be good for the company. Complainant did not indicate that he wanted his brother's assistance as a reasonable accommodation.
- q) Complainant felt that Respondent made false assumptions about his disability and its impact on his ability to perform the sales representative job.
- r) Complainant argued that Respondent's advertisement suggested its bias against people with injuries and that the language of the advertisement would deter people from applying for the job.⁵ Complainant felt that Respondent's bias supported his discrimination claim.

3) Respondent provided the following in response to Complainant's allegations:

- a) In the Spring of 2014, President placed two advertisements on Craigslist for a sales representative. The job descriptions were identical; the difference in the positions was that one was dedicated for the Brunswick farmers' market and the other was a traveling position for events in New England. The Brunswick farmers' market advertisement indicated that the applicant "must be able to lift heavy boxes, set-up and break down on their own". The traveling sales representative advertisement indicated that applicants must set-up and break down for shows and that "this is a very physical job where you are constantly lifting heavy boxes, etc [*sic*], so if you have a bad back or injuries, please do not apply". Heavy lifting was an essential function of the single-person job. President put the information into the advertisement to "weed out" people who cannot do the job.
- b) On April 14, 2014, Complainant responded to the Brunswick farmers' market advertisement, where he described his job experience, said that Respondent's job "appeared to fit the bill", and said that he was retired and looking for a part-time job. President requested a resume and cover letter; neither was forthcoming.
- c) On April 24, 2014, President interviewed Complainant. President explained the job in detail, including the requirement for reliable transportation that would be able to hold Respondent's products, setting-up and breaking down the booth, and selling to customers. In addition, President explained how physically laborious the job was based on the heft of the boxes of product containing olive oil, olives, and other items. President explained the job similarly to all applicants for the sales representative job, including

⁵ Complainant did not allege that this advertisement states a discriminatory preference, *see* 5 M.R.S. § 4572(1)(D)(4), and this issue is therefore not addressed in this report.

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asking if they can lift up to 50 pounds to their waist level.⁶ During the interview, Complainant said he was familiar with the job requirements based on his previous job experience and that he was willing to take either available position. President did not offer the job to Complainant that day; she does not hire people on the spot. Complainant did not discuss or disclose any information about his medical history during the interview.⁷

- d) President felt good about Complainant after his interview because of his previous experience in the same line of work. President hired a different individual for the Brunswick farmers' market. President called Complainant and offered him the traveling job because she thought he would do well at the shows. After thinking about it, Complainant called President back and accepted the traveling sales representative job. President informed Complainant that there was a two to three month trial period for all new sales representatives to evaluate their sales performance. President asked Complainant to train the next weekend. Complainant said because of his [REDACTED] he needed two weeks' notice to arrange for treatment. Complainant explained his [REDACTED] schedule. As an accommodation, President agreed to provide two weeks' notice and set his training up for a different date. Complainant did not provide any other information about his medical condition or any limitations on his ability to perform the job.
- e) On May 7, 2014, President emailed Complainant telling him it was good to have him on board, that President had been unaware of his illness, and confirming that she would provide two weeks' notice for scheduling purposes. She also asked about any additional needs or limitations that Complainant had. President was concerned about the possible negative impact the job may have on Complainant's health. President provided the details for the upcoming training session.⁸
- f) On May 10, 2014, Complainant met Trainer at the event site at 7:30 A.M. to allow time for the two hours of set-up required for the booth. The set-up involved hauling the gear (folding tables, 40 to 50 pound tent, and bins) and products (boxes weighing up to 40 pounds) to the designated space. Complainant had a shocked look on his face when he saw the back of Trainer's vehicle packed with the products and items to transport. Trainer asked Complainant to start hauling the product to the designated site. Complainant told Trainer that he could not lift the heavier items and explained that he was on [REDACTED]. Trainer, "having had some medical background, was aware of the seriousness of [REDACTED]". Trainer questioned if Complainant had informed President about the limitations of his medical condition and Complainant indicated that he had done so.⁹
- g) Trainer asked Complainant to carry only the items he could handle. At the FFC, Trainer said she told Complainant to "listen to his body" and expressed that she was an overly cautious person; President

⁶ President explains the physical requirements of the job because many people quit shortly after their hire since "most applicants don't know what they are getting into until they go through a training and actually experience what is involved".

⁷ *Investigator Note:* During the FFC, President stated that she first heard about [REDACTED] in Complainant's interview.

⁸ President typically prefers to train new hires on her own; however, she was not available for this particular show. She, instead, had Trainer train Complainant. At the FFC, President stated that Trainer trained a variety of individuals over about a one year period for the sales representative position. Trainer was the only person that she trusted, other than herself, to do the job. Trainer, at the FFC, said she only trained two individuals (Complainant and the person hired for the Brunswick farmers' market) over a period of a few months.

⁹ At the FFC, Trainer indicated she had limited knowledge about the seriousness of Complainant's medical issues and concerns.

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described Trainer as a worrier. Trainer assessed that Complainant was not capable of performing the job within the first half-hour of training. Trainer did not ask Complainant if he had any lifting restrictions. Over the course of the day, Trainer and Complainant engaged in casual conversation about their past experiences.

- h) After observing the set-up and tasks required, Complainant told Trainer that he was not able to do the job by himself and that he tires as the day goes on. Complainant suggested to Trainer that they hire his brother to help set-up and break down. Trainer knew that Complainant's suggestion was not possible.
- i) After the show, Trainer called President from the site just before six o'clock in the evening.¹⁰ Trainer described what happened that day, including that Complainant could not do the heavy lifting or set-up/breakdown on his own. President was caught off guard based on the details that she and Complainant discussed in the interview. "There was no point in training and paying [Complainant] a second day for a job he could not do, which he had admitted the first day."
- j) Complainant emailed President just after 7:00 P.M. that evening expressing that he had a good day with Trainer and suggesting that he team up with his brother to do events and split the income. That was not acceptable, as President made it clear it was one-person job. President was dismayed that Complainant was not honest with her about his abilities.
- k) President spoke to Trainer again that evening just before 9:00 P.M.
- l) After receiving Complainant's email, President called Complainant just after 9:00 P.M.¹¹ and expressed her disappointment that Complainant did not disclose his limitations. Complainant apologized for the confusion. Complainant did not say that he could not lift the required items, and President did not ask. President told Complainant that she felt misled. Complainant asked if there were any other positions available in the company; President said there was not at that time.
- m) On May 11, 2014, Complainant called Trainer and left a message for her that he had too many medical things going on and expressed that he hoped that President would find a spot for him in the future.¹²
- n) President was the sole decision maker in the hiring and discharge decisions. After hearing from Trainer about Complainant's performance on the first day, President did not believe that Complainant was capable of performing an essential function of the job, heavy lifting, with or without a reasonable accommodation.¹³ President felt deceived.

¹⁰ At the FFC, Trainer said it was not unusual to call President after a day of training to report what she observed during the day. President indicated that Trainer does not usually call her that quickly after a training session.

¹¹ *Investigator Note:* At the FFC, President indicated that she called Complainant within an hour of talking with Trainer after the end of the first day. President provided her phone records for the day that showed that she called, spoke with, or missed a call from Trainer three times before she spoke with Complainant. The phone call with Complainant was not within an hour of Trainer's call just before 6:00 P.M.

¹² *Investigator Note:* President reported that she retained the voicemail message and could provide a copy if necessary. At the FFC, President indicated that in the excitement of getting a new phone a few months ago, Trainer lost the message. It was not transcribed or saved in any format. There were no contemporaneous notes about the contents of the message to verify Complainant's alleged statement.

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- o) Respondent did not hire anyone, specifically, to replace Complainant. Respondent continued to have employees attend shows and events in New England.
- p) President felt that she did not discriminate against Complainant because she did not withdraw his job offer after she learned of his medical condition and appointments. She believed they were just scheduling issues. There was no reasonable accommodation possible related to heavy lifting in the single-person job of the traveling sales representative.
- q) Respondent argued that Trainer's casual conversation with Complainant on the first day about his medical conditions was as a co-worker, not as an employer. Trainer's "questions merely sought information about [Complainant's] ability to do the job", and as such were job-related and consistent with business necessity.

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.
- 2) Pursuant to the MHRA, it is unlawful for an employer to discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment because of physical or mental disability. See 5 M.R.S. § 4572(1)(A).
- 3) Complainant alleged that Respondent Lakonia Greek Products LLC discriminated against him based on his disability or perceived disability by failing to provide a reasonable accommodation, making an illegal inquiry related to his disability, and, ultimately, terminating his employment. Respondent stated that it did not discriminate against Complainant. Respondent terminated Complainant's employment because he was unable to perform an essential function of the job.

Reasonable Accommodation Claim

- 4) Pursuant to the MHRA, unlawful discrimination includes "[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), 4572(2).
- 5) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. See *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that he is a "qualified individual with a disability" within the meaning of the

¹³ *Investigator Note:* During the FFC, President indicated that she did not ask Complainant if he had any lifting restrictions during her call to terminate his employment. She did not seek any additional information from Complainant's medical providers. President decided, based on the information Trainer provided about Complainant's medical conditions and Trainer's assessment of Complainant's capabilities, to terminate Complainant's employment. President did not believe that a doctor's note would make a difference based on what Trainer actually observed, saying that no doctor can override what you cannot do at the job site. Trainer's word was more important than a doctor's.

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MHRA; (2) that Respondent, despite knowing of Complainant's physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent's failure to do so affected the terms, conditions, or privileges of Complainant's employment. *See id.*

- 6) The term "qualified individual with a disability" means "an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." 5 M.R.S. § 4553(8-D). Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . ." 5 M.R.S. § 4553(9-A)
- 7) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable [him] to perform the essential functions of [his] job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." *See Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm'n Reg. 3.08(D)(1) (July 17, 1999). The term "undue hardship" means "an action requiring undue financial or administrative hardship." 5 M.R.S. § 4553(9-B).
- 8) Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.
- 9) Complainant has not shown that Respondent denied him a reasonable accommodation.
 - a) Complainant is a qualified individual with a disability. Respondent does not dispute that Complainant has a disability; his [REDACTED] is a disability *per se*. 5 M.R.S. § 4553-A(1)(B). He also showed that he could perform the essential functions of his position, with or without reasonable accommodations. He was able to perform his job to the extent requested by Respondent on his first day of training. The record reflects that Complainant had no restrictions other than his request for two weeks' advance notice of his work schedule.
 - b) The record reflects that Complainant requested two weeks' advance notice for scheduling and that Respondent granted this request. Complainant also indicated that he considered the request to work at the Brunswick farmers' market to be an accommodation, yet he does not dispute that he told President that he would take either job.
- 10) Complainant did not establish that Respondent denied him a reasonable accommodation for his disability.

Illegal Inquiry Claim

- 11) Pursuant to 5 M.R.S. § 4572(D), an employer "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".
- 12) The Commission's employment regulations provide that: "a covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions". The

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regulation further states that any medical information about an employee must be treated as confidential, except that “[s]upervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations”. Me. Hum. Rights Comm’n Reg. Ch. 3, §13(C) (September 24, 2014).

- 13) Complainant stated that Trainer asked him questions about his medical history throughout their first day working together. Trainer indicated she knew about the seriousness of his medical conditions based on her past work experience. Complainant felt uncomfortable about the questions. Trainer asked if President knew about his medical issues and he responded that she did. After this query, Trainer and Complainant discussed his medical health throughout the day.
- 14) Respondent provided two explanations: (a) that the conversation was merely a casual conversation between coworkers and that Trainer was not a “covered entity”; or, in the alternative, that (b) the inquiries were job-related to ascertain Complainant’s ability to perform the job.
- a) Taking these in turn, Complainant’s recollection of the day was that he had casual conversation about a variety of topics with Trainer. Complainant did not feel that the questions about his medical health were in the nature of a casual conversation. The record reflects that Trainer’s role was not one of a coworker, but as a trainer. Respondent provided that Trainer had no ability to hire or discharge Complainant. Instead, however, Trainer’s report to President was the sole reason why Complainant was discharged. So while Trainer may not have been vested with the authority to discharge Complainant directly, it was her direct observation of him and her immediate report (calling President while still at the job site) that informed the discharge decision. Her inquiries are attributable to Respondent.
- b) The inquiries were job-related queries about Complainant’s disability and its impact on his ability to perform the job, whether the information was obtained via casual conversation or not. The record supports that the information was job-related, as Trainer asked whether President had the information, and made conclusions and recommendations about Complainant’s continued employment based on the information he provided. The information was solicited because Trainer did not think Complainant could perform the job, as he was allegedly having trouble with lifting. Trainer called President immediately after securing the booth for the night while at the site, and not later in the day, to tell President about her concerns for Complainant’s ability to do the job.
- c) The information sought was job-related and consistent with business necessity. Respondent relied on its sales people to work alone, and Complainant therefore needed to be able to lift heavy items on his own. Trainer sought information about Complainant’s condition for the purpose of evaluating a new employee, and whether he would be able to perform the essential functions of the position.

15) Discrimination on the basis of illegal inquiry is not found.

Termination Claim

- 16) The MHRA provides that it is unlawful to discharge an employee because of physical or mental disability. See 5 M.R.S. § 4572(1)(A).
- 17) 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).

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- 18) 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 (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.
- 19) 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 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.
- 20) 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.
- 21) Complainant has established his prima-facie case. He belonged to a protected class, he performed his job satisfactorily (to the extent allowed on a training day), his employment was terminated, and Respondent had a continuing need for the work to be performed.
- 22) Respondent has articulated a legitimate, nondiscriminatory reason for discharging Complainant, namely that he was unable to perform an essential function of the job and that Complainant was in his training period.
- 23) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason was false or irrelevant and that unlawful discrimination was the reason for his discharge, with reasoning as follows:
 - a) Respondent argued that Complainant could not perform an essential function of the job – heavy lifting. Complainant denied that he had any lifting restrictions. Complainant provided documentation from his physicians demonstrating that he did not have a lifting restriction. During his first day of training, Trainer did not ask Complainant if he had any restrictions. That evening when President talked to Complainant, she did not ask him if he had any lifting restrictions as she had already made up her mind to discharge him. President indicated at the FFC that what Trainer saw Complainant do was more important than what a doctor's note might say about Complainant's ability to perform the job. President also acknowledged that Trainer was a worrier and overly cautious person.
 - b) Respondent argued that Complainant admitted to Trainer that he was unable to do the job. Complainant denied ever making this statement. President trusted Trainer's opinion and her word on Complainant's performance without requesting or looking into any medical information related to Complainant's ability to do his job.

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- c) There are credibility issues for both parties. Complainant said that he only mentioned that Respondent should hire his brother for a specific task – the New York State fair. The email from Complainant to Respondent about his first day of training delineates these requests as two items and seems to say that Complainant might like to work as a team with his brother. That message does not say that Complainant asked for his brother to be hired because he was unable to do the job on his own. With regard to Respondent, President indicated at the FFC that she called Complainant within an hour of her call with Trainer and denied talking to Complainant as late as 9:00 p.m. President's phone records, however, show that she did not call Complainant until after 9:00 p.m., more than three hours after talking with Trainer for the first time about Complainant's performance and after she received Complainant's email. Trainer's credibility came into question when she denied representing herself as having Greek origin, yet her own testimony at the FFC indicated she did intend to imply that she was a family member. Trainer said that she only trained two individuals over a few months, yet President credibly testified that Trainer assisted her in training new employees for almost a year.
- d) Respondent's advertising for the sales representative positions stated that "this is a very physical job where you are constantly lifting heavy boxes, etc [*sic*], so if you have a bad back or injuries, please do not apply". Respondent does not differentiate between what kind of other injuries applicants may have, whether those are based on a bona fide occupational qualification or not. This statement tends to support that Respondent did not want anyone with injuries – without regard for the nature of the injury – to apply for the position and tends to show a possible discriminatory bias based on disability or perceived disability.
- e) Despite the credibility issues for both parties, it is uncontroverted that President took Trainer's word about her observations of Complainant's abilities and that based on Trainer's observations, and no other information, President discharged Complainant based on the perception that his disability impeded him from performing the essential functions of his job.

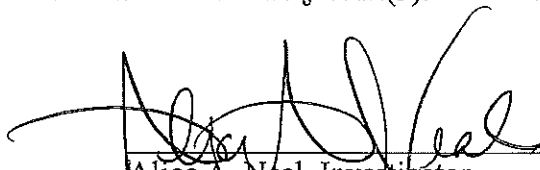
24) Discrimination on the basis of disability or perceived disability is found.

VI. Recommendation:

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

1. There are **No Reasonable Grounds** to believe that Lakonia Greek Products LLC discriminated against Douglas C. Hiserodt on the basis of disability by denying a request for a reasonable accommodation, and the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2);
2. There are **No Reasonable Grounds** to believe that Lakonia Greek Products LLC discriminated against Douglas C. Hiserodt on the basis of disability by subjecting him to an illegal inquiry in violation of the MHRA, and the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2); and
3. There are **REASONABLE GROUNDS** to believe that Lakonia Greek Products LLC discriminated against Douglas C. Hiserodt on the basis of disability or perceived disability when it terminated his employment, and the complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).


Amy M. Sneerson, Executive Director


Alice A. Neal, Investigator