



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

MHRC E15-0408

August 15, 2017

Samuel Monroe Duboise (Portland)

v.

University of Southern Maine/University of Maine Systems¹ (Bangor)

I. Summary of Case:

Complainant, who was a tenured faculty member for Respondent, a system of public post-secondary schools, alleged that Respondent selected him for layoff based on his age and then determined not to recall him to his position both due to age discrimination and in retaliation for his complaint of age discrimination. He also alleged that Respondent's layoff had a disparate impact on older employees. Respondent denied that its layoff involved any discriminatory treatment or impact, or that its decision not to recall Complainant was retaliatory, and provided that its decisions were part of a program restructuring which included the elimination of Complainant's entire academic department, and which was undertaken solely for financial reasons. The Investigator conducted a preliminary investigation, which included reviewing all of the documents submitted by the parties, holding a Fact Finding Conference ("FFC"), and reviewing the parties' responses to supplemental information requests. Based upon all of this information, the Investigator recommends that the Maine Human Rights Commission ("Commission") find Reasonable Grounds to believe that Respondent discriminated against Complainant on the basis of his age (disparate treatment and disparate impact), but No Reasonable Grounds to believe that it retaliated against Complainant for making a claim of age discrimination.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: 10/28/2014 and ongoing.
- 2) Date complaint filed with the Commission: August 17, 2015, with amended complaint filed May 2, 2017.
- 3) Respondent is subject to the employment provisions of the Maine Human Rights Act ("MHRA") and the Age Discrimination in Employment Act ("ADEA"), as well as state and federal employment regulations.

¹ Complainant named University of Southern Maine/University of Maine Systems as the Respondent in his complaint; Respondent provided that its legal name is the University of Maine System, and that the University of Southern Maine is the name of one of its campuses. Although Complainant amended his complaint to add an additional charge, he did not choose to amend his complaint to use the name provided by Respondent. Accordingly, the name used by Complainant has been retained here. When necessary for clarity, Respondent is sometimes referred to as the "System" when discussing Respondent's state-wide operation; the single campus at issue here is referred to as "USM".

- 4) Complainant is represented by Maria Fox, Esq. Respondent is represented by James Thelen, Esq.

III. Development of Facts:

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

Complainant was 65 years old and a longtime tenured faculty member at Respondent's University of Southern Maine ("USM") when Respondent laid him off² along with approximately 25 others; the layoffs targeted and disproportionately impacted older people. In fact, Respondent talked openly about its efforts to get younger faculty to the university, and pressured older faculty to retire before resorting to layoffs. Respondent's claims of financial and program reasons for the layoff were conclusory. Also, Respondent retained younger staffers on the grounds that their grant monies supported continued employment, but this was a pretext, as Complainant brought in substantial outside funding to USM and was still laid off. Many faculty were recalled, but Complainant was not, either because of his age or because of his complaints of age discrimination at the Commission.

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

The sole reason Complainant was selected for layoff was USM's determination that it needed to restructure programs because of rising costs and declining enrollment. Respondent eliminated five USM academic departments to balance its budget. Respondent did try to avoid layoffs by offering retirement incentives to eligible employees, which was not discrimination. Respondent was able to keep some of the faculty in these eliminated departments if their positions were 100% funded through external grant monies, but in Complainant's department, four positions (including Complainant's) had to be eliminated altogether. The layoffs were not targeted to older employees and did not cause a disparate impact based on age. Many professors laid off were not rehired, as is the case for Complainant.

- 3) The Investigator made the following findings of fact:

- a) Complainant worked as a faculty member in USM's Department of Applied Medical Sciences ("Department") for 17 years, achieving tenured status in 2003. By all accounts, Complainant was a highly-respected and productive faculty member at USM.
- b) USM had a proposed budget shortfall of seven million dollars for fiscal year ("FY") 2015. Respondent provided funding from the System's budget stabilization fund, but demanded that USM present a balanced budget for FY 2016. As of August 2014, the projected budget shortfall for FY 2016 was \$16 million. USM's President, Chief Financial Officer ("CFO"), and Provost concluded that they needed to consider a reduction in the number of full-time faculty members to address this shortfall. President directed Provost to reduce faculty costs by six million dollars; to do so, approximately 50 full-time faculty positions would have to be eliminated.³
- c) President and Provost met with the deans of USM's various colleges and chairs of its departments to review every department and every faculty member's generated revenue and costs, in order to determine

² According to Respondent, the applicable union agreement uses the term "retrenchment" rather than "layoff", but this report will use the term layoff for ease of reference.

³ It does not appear from the record that Respondent considered any cost-saving methods other than the elimination of full-time faculty positions.

if they could simply cut faculty members from various departments, or if they needed to cut entire departments, or both. Respondents stated USM made these decisions based first on finances and second on the number of students in the department.

- d) On September 11 and 18, 2014, Provost emailed all USM faculty information about the deficit, necessity for staff/faculty cuts and/or program changes; the emails provided information on the criteria to be used to assess reductions, and asked for input.
- e) Documents produced during the investigation show that during this same period, Provost made statements indicating Respondent's desire to hire a more youthful faculty. These statements included:
 - i. In September 2014, when speaking publicly about the challenges facing USM, Provost commented: "The new university will be far more dynamic, far more interdisciplinary, far more attractive to young faculty. . . . We have to get to the point where we are hiring a lot of young faculty and that will come because we have a lot of faculty who are nearing the end of their careers. And if we are successful (and I believe that we will be) we will bend that curve upward and we will start to attract students and bring in new faculty. I think that we will. With Portland as a destination we will be among the most desirable universities for young faculty."⁴
 - ii. Also in September 2014, Provost wrote to USM's faculty, noting that he would know by mid-October how many faculty members would choose to retire, and then would consider layoffs. He wrote that "the thing that weighs heavily on my mind is the very real possibility of having to layoff [*sic*] mid-career faculty and staff – and perhaps ending their academic careers."
 - iii. At a September 22, 2014 public meeting of Respondent's Board of Trustees, USM provided an update about its challenges and its strategies to meet them. Here, USM noted that in addition to financial savings, there would be other, nonfinancial benefits to "extensive retirement" including "rebuilding programs with longer term potential faculty".
- f) On October 6, 2014, Provost sent USM faculty a nine-page single-spaced discussion of proposed changes to USM programs, faculty and staff. The discussion provided detailed explanations for each proposed change, including specific positions impacted, program realignments, class sizes and graduation rates, and revenue sources. The discussion noted that 100 faculty members eligible for retirement could take advantage of retirement incentives, which would assist in addressing the budget deficit. Provost noted that those considering voluntary retirement had until October 20, 2014 to choose that option, and that notice would be provided to faculty being laid off the following day.
- g) The record reflects that faculty members felt pressured to retire. Heads of departments were told they had to choose a certain number of faculty in any given department for layoff, or entire departments could be cut. Two faculty members who agreed to retire provided statements that their choices were not entirely voluntary because of the pressure they felt to "save" their younger colleagues from potential career-ending layoffs.

⁴ At the FFC, Provost denied having said that it was USM's intent to reduce the number of older faculty members and bring in younger faculty members, saying "those words were never spoken". Provost did recall saying that older faculty members were approaching retirement and that it was anticipated there would be younger faculty members, but characterized this as a description, not a preference. Provost noted that that "history had proven him right", as new faculty has come in. He did not know if the new faculty was younger, but Respondent typically hires at the lecturer level, and those at that level tend to be younger. Provost also stated that he had discussed hiring junior faculty members, and conceded that while answering questions during this meeting he used the term "vital" to mean "young".

- h) After the retirement incentive period ended, approximately 25 full-time faculty members needed to be laid off to achieve the savings benchmark identified by Respondents.
- i) Provost's October 6th email discussed the planned elimination of Department. Provost's email noted that the Department offered a graduate degree with a small number of majors, and had "robust funded research but direct costs far exceed[ing] revenue from tuition and the indirect [sic] from research". At the FFC, Provost provided additional explanation:
 - i. The Department was one of those marked for elimination, solely due to its small size. Department had only five faculty members, and very few students (approximately 32), who were part-time graduate students.
 - ii. USM was paying faculty salaries that were offset by indirect income from funded research, but costs far exceeded revenue.
 - iii. Provost said the issue was the small number of students in the Department, and the Department needing to be subsidized with grant monies.
 - iv. The review panel looking at the proposed elimination did note that the Department was unique because Complainant had originally secured external funding, but those funds had dried up. While Respondent knew more funding might be secured, it needed to take action immediately.
- j) Before it proceeded with the layoff plan, Respondent conducted a "thorough statistical analysis" of affected employees to ensure that the layoffs did not adversely impact faculty based on age or gender. This analysis was performed by then-Assistant Director of HR/Director of Equity and Diversity at USM ("Assistant HR"). Assistant HR had a background in human resources, including diversity training, but she had no statistical background or training.⁵
- k) Respondent provided statistical analyses showing age and gender impact in each individual program impacted by the layoffs, rather than compared to a larger group. So, for example, the age adverse impact analysis for the Department of Economics shows five total faculty, all of whom were over the age of 40. Two were laid off, and three retained, leading Respondents to conclude that those two layoffs had no age-based adverse impact.
- l) Similarly, when Respondents did look at the layoffs as a whole, they looked only at the impacted programs, not at the faculty as a whole. There were 91 employees in the impacted programs, all but three of whom were over the age of 40; 25 employees were laid off, and 12 retired. Respondent retained all three employees under 40, but the analysis showed no statistically-significant impact when looking at this small sample size. Respondent did not analyze any impact on the faculty as a whole. It also did not analyze impact within the over-40 population (for example, those over 60 versus those over 40).
- m) On October 28, 2014, Respondent notified Complainant that the Department and his position were being "discontinued" as of December 31, 2014, and that he would be laid off at the end of the Fall 2014 semester.
- n) Complainant's union representative filed an internal grievance with Respondent on January 30, 2015 on behalf of all 25 laid-off staffers. Among other things, the grievance noted apparent age discrimination.
- o) Complainant filed his Commission complaint on August 12, 2015. He also filed a related wage-and-hour lawsuit.

⁵ At the FFC, Assistant HR admitted that Provost's statements about young faculty caused her concern as an HR professional, but the data, process, and approach she used confirmed to her that the process had been fair.

- p) Laid-off faculty members received preference for any positions System-wide for which they were qualified during a two-year period. Some laid-off faculty members came back into other positions, but Complainant was not recalled.⁶
- q) Complainant believed that Respondent's explanation for his layoff was a pretext because he brought in large amounts of grant funds that benefitted USM. Complainant provided that his work brought in millions of dollars of external funding to USM that it used to benefit student outcomes and careers and to improve USM's resources, programs, and community involvement. For example, he obtained National Science Foundation and National Institutes of Health funding to establish electron microscopy resources at USM, which allowed for research and education while providing USM's science community with a resource for nanoscience. Complainant had external funding at the time of his layoff, including some from the National Institutes of Health and from the Bill and Melinda Gates Foundation Grand Challenges. He and his colleagues also had pending grant proposals which could have brought in several million dollars.⁷
- r) Complainant alleged that the failure to recall him to a teaching position was retaliation and/or age discrimination. Complainant provided that those professors recalled either were younger than Complainant or had chosen not to contest their layoffs as Complainant did. Respondent disagreed, and stated that there were no open positions for which Complainant was qualified, and that Complainant failed to identify an open position for which he was qualified and was not considered.
- s) Complainant provided an alternate disparate impact analysis, looking at the change in the full-time faculty as a whole, considering different age groups: under 40; 40-59; and over 60. This analysis showed a significant drop in the number of faculty members over the age of 40, and in particular those over the age of 60, in 2015, which is when the early retirements and layoffs went into effect.

IV. 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.

Age Discrimination - Layoff (Disparate Treatment)

- 2) The MHRA provides, in part, that it is unlawful based on age to terminate employment or "discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment." 5 M.R.S. § 4572(1)(A).
- 3) A mixed-motive analysis applies in cases involving "direct evidence" of unlawful discrimination. *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination. . . ."⁸

⁶ Complainant did some "teach out" work for USM after the layoff, teaching Department courses and seminars and assisting students in the completion of their theses so that USM could complete its commitments to students whose programs were eliminated.

⁷ One of these grant proposals, for three million dollars, would have involved funds and work for students at USM and at another of Respondent's campuses. This is worthy of mentioning, since part of the "vision" presented for USM and the System was to stop thinking of campuses as "silos" and to work together better.

Id. Where this evidence exists, Complainant “need prove only that the discriminatory action was a motivating factor in an adverse employment decision.” *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Doyle*, 2003 ME 61, ¶ 14, n.6, 824 A.2d at 54, n.6. Upon such a showing, in order to avoid liability, Respondent must prove “that it would have taken the same action in the absence of the impermissible motivating factor.” *Id.*; cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276-77, 109 S. Ct. 1775, 1804 (1989) (O'Connor, J., concurring).⁹

- 4) In this case, there is direct evidence of unlawful discriminatory bias based on age:
 - a. In September 2014, when speaking publicly about the challenges facing USM, Provost commented: “The new university will be far more dynamic, far more interdisciplinary, far more attractive to young faculty. So, I think the future looks very good. We have to get to the point where we are hiring a lot of young faculty and that will come because we have a lot of faculty who are nearing the end of their careers. And if we are successful (and I believe that we will be) we will bend that curve upward and we will start to attract students and bring in new faculty. I think that we will. With Portland as a destination we will be among the most desirable universities for young faculty.” This makes plain that just a month before the layoffs were implemented, Respondents were openly looking to bring in young professors.
 - b. Also in September 2014, Provost wrote to USM’s faculty, noting that he would know by mid-October how many faculty members would choose to retire, and then would consider layoffs. He wrote that “[the thing that weighs heavily on my mind is the very real possibility of having to layoff *[sic]* mid-career faculty and staff – and perhaps ending their academic careers.”
 - c. Finally, at a September 22, 2014 public meeting of Respondent’s Board of Trustees, USM provided an update about its challenges and its strategies to meet them. Here, USM listed its “retirement strategy” as an “immediate action[] needed”, and noted that in addition to financial savings, there would be other, nonfinancial benefits to “extensive retirement”. The two benefits listed were restructuring academic programs, and “rebuilding programs with longer term potential faculty”. Again, USM’s stated goal was to have a younger faculty, with more years of teaching still ahead.
- 5) In this case, Complainant has shown that age was a motivating factor in Respondent’s decisions. This is evidenced by the direct evidence that the age of USM’s faculty was important to the school’s leaders as it shaped the layoff decisions. Other evidence showing that age was one of the motivating factors includes the pressure put on older employees to resign in order to avoid layoffs: the record contains several emails from Respondent advocating for retirement-age faculty to leave “voluntarily”. In addition, younger members of Department were permitted to remain and fund their work through grants, while Complainant, who brought in a substantial amount of direct grant funding, was not.

⁸ Respondent contended that the statements do not meet the standard for direct evidence. In particular, Respondent denied that it ever said that it intended to replace older professors with younger ones. The statements here are taken directly from written materials drafted by Provost, and from a taped meeting which included Provost’s remarks about attracting young faculty. Provost was one of the decision-makers selecting programs and faculty to be laid off, and his own words plainly indicate his discriminatory view of the goals of that process.

⁹ The continued application of the mixed-motive analysis has been called into question as a result of the U.S. Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2348 (2009), in which the Court held that the burden of persuasion does not shift to defendant even with “direct evidence” of unlawful discrimination in a federal ADEA case. That decision did not interpret the MHRA, however, and the guidance from the Maine Supreme Court in *Doyle* will continue to be followed.

- 6) Respondent did not establish that it would have laid off Complainant if it had not considered age. In particular, the amount of grant money Complainant brought in would have seemed to justify retaining him, rather than his younger colleagues. In addition, Provost's age-related statements compel the conclusion that he was seeking to lower the age of Respondent's faculty through the layoff process.
- 7) It is found that Complainant was subjected to disparate treatment in employment due to age.¹⁰¹⁰

Age Discrimination - Layoff (Disparate Impact)

- 8) Complainant also alleged that he was subjected to age discrimination due to Respondent's use of a policy or practice that had a disparate impact on older persons.
- 9) Unlawful discrimination can be established by proof that an employment practice has a "disparate impact" on members of a protected group. *See Maine Human Rights Com. v. City of Auburn*, 408 A.2d 1253, 1264 (Me. 1979); Me. Hum. Rights Comm'n Reg. § 3.02(A)(2)(c).
- 10) The analysis of a disparate impact claim follows a three-step burden-shifting scheme:

First, the plaintiff must establish a prima facie case of disparate impact by identifying a facially neutral practice that affects one group more harshly than another. Second, if the plaintiff meets her burden in the first step, the defendant must present prima facie evidence that its practice is justified by a business necessity. Finally, if the defendant meets its burden in the second step, the plaintiff must present prima facie evidence that the defendant's proffered justification is pretextual or that other practices would have a less discriminatory impact.

Scamman et al. v. Shaw's Supermarkets, Inc., 2017 ME 41, ¶ 10, quoting *Dussault v. RRE Coach Lantern Holdings, LLC*, 2014 ME 8, ¶ 24, 86 A.3d 52. The touchstone for Respondent is business necessity, not mere business convenience. *See City of Auburn*, 408 A.2d at 1265.

- 11) Overall, Complainant must show that the challenged practice has both an adverse impact on a protected class in general and on him in particular. *See Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 110 F.3d 2, 4 (1st Cir. 1997). In order to prevail, Complainant must show that he would not have suffered the adverse job action but for membership in a protected class, although other factors may have contributed to the employment practice. *See City of Auburn* at 1268. The burden of persuasion remains with Complainant throughout this analysis. *Id.* at 1265.

¹⁰ It is at least as likely as not that Complainant would prevail on this claim even using a non-direct-evidence analysis 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). Considering the fact that USM had a continuing need for teach-out of Department courses for some time after the layoffs, Complainant established a prima-facie case of unlawful age discrimination. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *cf. City of Auburn*, 408 A.2d at 1261; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (federal ADEA). Respondent articulated a legitimate, non-discriminatory reason for the adverse job action, namely that it had a large budget deficit to close and eliminated faculty positions to save money. *See Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. Complainant demonstrated that Respondent's reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action (in that he provided significant evidence of Respondent's discriminatory motive), and that he would not have suffered the adverse job action but for membership in the protected class. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68.

- 12) Here, Complainant established a prima-facie case of age discrimination by showing that Respondent's layoff was neutral on its face, but resulted in an adverse impact on the Complainant as well as on a disproportionate number of older employees. Respondent's own data showed that all of the 25 faculty members laid off were over the age of 40. In addition, as part of the same cost-reduction strategy, Respondent pressured its retirement-eligible employees to take an early retirement, resulting in the exit of 25 other older faculty members. The net result was a significant decrease in the number of full-time faculty members over the age of 40, and in particular those over the age of 60.
- 13) Respondent did articulate a business necessity justifying the layoff. Respondent provided information indicating that it reorganized its USM programs and laid off staff because doing so would allow USM to save \$6 million dollars per year at a time when its deficit was projected to more than double that. Respondent provided information indicating that it considered in some detail each USM program's enrollment, courses, revenues, and costs when it determined which programs to eliminate, and decided to eliminate the Department based on these factors, making Complainant's position unnecessary.
- 14) At the final stage of the analysis, Complainant succeeded in establishing a disparate impact on older employees because the record demonstrates that Respondent likely could have achieved its business goal of saving money by eliminating employment positions through other methods, with reasoning as follows:
- a. First, it is worth noting that Respondent provided almost no objective evidence to justify its decisions. It did not provide any data underlying its limited statistical analysis, did not provide any information about the makeup of its faculty as a whole, and did not provide any financial information tending to show that the projected budget shortfall was likely to come about. The record also strongly suggests that Respondent never considered other methods for reducing its employee costs. It did not provide any information comparing or contrasting different departments, or the cost of adjunct and non-tenure track lecturers, or any information about grant-holders in order to explain why it selected particular departments or professors for elimination. Without any such evidence, it is difficult, if not impossible, to conclude that no other, less discriminatory methods existed for achieving the necessary cost savings.
 - b. The record indicates that Respondent declined to consider such things as raising tuition in order to close its budget gap. Doing so would not have had a discriminatory impact on older employees. Respondent also could have, among other things: considered grant funding in other ways; considered cuts System-wide; considered consolidating teaching positions across campuses; considered eliminating adjunct and non-tenure track positions; or considered a faculty-wide or targeted salary reduction. All of these methods could have resulted in less of a discriminatory impact on older faculty members.
 - c. It also is notable that Respondent allowed only about three days for its disparate impact analysis to be conducted, and on limited data.¹¹
- 15) It is found that Respondent's layoff was an employment policy/practice that had a disparate impact on Complainant due to his age.

*Failure to Recall – WPA and MHRA Retaliation*¹²

¹¹ In its initial answer to the complaint here, Respondent stated that Assistant HR was provided relevant data several weeks prior to decisions being made about layoffs. Assistant HR's statements at the FFC did not support that timeline. In a response to the Investigator's supplemental request for information, Respondent stated that Assistant HR actually was provided data three days before the layoff decisions were made.

- 16) Complainant alleged that he was not recalled to his full Department professor position due to retaliation for alleging age discrimination in his Commission complaint and elsewhere.
- 17) The MHRA prohibits retaliation against employees who, pursuant to the WPA, make good faith reports of what they reasonably believe to be a violation of law or a condition jeopardizing the health and safety of the employee or others in the workplace. *See* 5 M.R.S. § 4572(1)(A)&(B); 26 M.R.S. § 833(1)(A). The MHRA also makes it unlawful for “an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of [the Act] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA].” 5 M.R.S. § 4572(1)(E).
- 18) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that he engaged in activity protected by the WPA, he was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse action, which may be proven by a “close proximity” between them. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). The prima-facie case for a claim of MHRA retaliation requires, in addition, that the adverse employment action be “material,” which means that “the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).
- 19) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wyrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry his overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See 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).
- 20) Here, Complainant established a prima facie claim of retaliation, as he engaged in statutorily protected activity (alleged that his layoff constituted age discrimination, filed a Commission complaint), he was the subject of a materially adverse action (not recalled after layoff). For the purposes of his prima-facie case, it is assumed that the proximity between his layoff and his complaints of age discrimination is sufficient to establish an inference of retaliation, especially in light of his allegation that USM's current president has stated he will not hire anyone in a suit against Respondent.
- 21) Respondent provided a nondiscriminatory reason for not recalling Complainant: his position was not reestablished at USM, and he did not identify another position that he was qualified for and in which he was interested.


¹² Complainant alleged that Respondent's decision not to recall him could also have been due to age discrimination. In this case, the record does not support a finding that Complainant would have been recalled but for his age. Complainant's submission reflects that additional faculty over the age of 40, including faculty over the age of 60, has been hired since his layoff. In addition, Provost and President are no longer administrators at USM, so the age bias attributed to them has not played a part in the decision not to reemploy Complainant. Finally, Complainant agrees that he did not apply for or otherwise identify a new position in which he was interested.

- 22) In the final analysis, Complainant has not established that he would have been recalled but for his protected activity, with reasoning as follows:
- a. The letter sent to Complainant discussing his layoff and his recall rights stated specifically that he would be "offered re-employment [*sic*] in the same position at the campus where the [layoff] occurred should the opportunity arise." It is undisputed that Complainant's position at USM was not reestablished.
 - b. The letter also provided that Complainant would have "a priority right" to any positions in the System for which he was qualified. The letter provided a website where positions were posted, and instructed Complainant to "alert [Respondent] if you feel you are qualified and interested in any of them." It is undisputed that Complainant did not contact Respondent about any open position.
 - c. While the current president's alleged comment that he would not hire anyone with a suit against Respondent is disquieting if it occurred, given Complainant's failure to identify for Respondent any position in which he had interest, the record does not support a finding that his age discrimination was the reason for Respondent's failure to recall Complainant.
- 23) It is not found that Respondent subjected Complainant to retaliation for engaging in protected MHRA activity.

VI. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that Respondent University of Southern Maine/University of Maine Systems discriminated against Complainant Samuel Monroe Duboise on the basis of age (disparate treatment) when it discharged him from employment; and
- 2) There are **Reasonable Grounds** to believe that Respondent University of Southern Maine/University of Maine Systems discriminated against Complainant Samuel Monroe Duboise on the basis of age (disparate impact) when it discharged him from employment; and
- 3) These claims should be conciliated in accordance with 5 M.R.S. § 4612(3).
- 4) There are **No Reasonable Grounds** to believe that Respondent University of Southern Maine/University of Maine Systems discriminated against Complainant Samuel Monroe Duboise on the basis of age or retaliated against him for engaging in protected activity when it failed to recall him to a vacant position; and
- 5) These claims should be dismissed in accordance with 5 M.R.S. § 4612(2).


Amy M. Sneirson, Executive Director


Jennifer Corey, Investigator