



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT

**E15-0412**

June 28, 2017

**Anthony DeSalle (Windham)**

v.

**Rollins, Inc. d/b/a Orkin Pest<sup>1</sup> (Atlanta, GA)**

### Summary of Case:

Complainant, who has a disability, alleged that a conditional job offer was withdrawn based upon blood test results despite his doctor having cleared him to work with no restrictions. Respondent, a pest control company, denied discrimination and provided that Complainant was placed on a medical hold and failed to provide updated bloodwork as requested. The Investigator conducted a preliminary investigation, which included reviewing all of the documents submitted by the parties. Based upon this information, the Investigator recommends that the Commission find reasonable grounds to believe that Complainant was discriminated against on the basis of disability.

### Jurisdictional Data:

- 1) Dates of alleged discrimination: 4/8/2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 8/24/2015.
- 3) Respondent employs several thousand people and is required to abide by the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act ("ADA"), and state and federal employment regulations.
- 4) Complainant is not represented by legal counsel. Respondent is represented by Adriana Scott, Esq.

### IV. Development of Facts:

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

Complainant, who has diabetes, applied for a Pest Control Technician<sup>2</sup> position in March 2015. He was

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<sup>1</sup> Complainant named "Rollins Inc. d/b/a Orkin Pest" as the Respondent in his complaint. Respondent noted that its corporate name is "Orkin, LLC." Since Complainant did not amend his complaint, the name he used has been retained.

<sup>2</sup> The position would not have required Complainant to obtain a federal Commercial Driver's License [REDACTED] Exemption due to the size and weight of the vehicle he would be driving for Respondent.

offered a job conditioned upon him passing a physical examination.<sup>3</sup> He reported to a company-approved clinic on 3/24/2015. The medical report generated indicated that he was able to perform all essential functions of the position with no medical restrictions. A few days later, he was contacted by Respondent's third-party medical provider ("Provider"), who informed Complainant that his [REDACTED] blood test and his [REDACTED] were too high for company guidelines.<sup>4</sup> Provider asked Complainant to have his [REDACTED] retested and sent him a "MD Clearance Form for [REDACTED] Treatment" (Exhibit A) for his doctor to complete. Complainant sent the completed form and latest test results to Provider, who contacted him a couple days later to tell him his [REDACTED] [REDACTED] were still too high for company guidelines. Provider requested that Complainant have his [REDACTED] [REDACTED] tested again, but he explained to Provider that he would not do so because the [REDACTED] test is a three-month average of [REDACTED] [REDACTED] so testing again would not change the result.<sup>5</sup> Provider told Complainant they were closing his file with no clearance for work. Respondent's Service Manager later contacted Complainant to see why the company never received this clearance. Complainant stated his file had been closed by Provider due to his [REDACTED] [REDACTED]. The Service Manager arranged to have Complainant's file reopened, but Complainant refused to get his [REDACTED] tested again because he knew there would be similar results. He told Provider that this was discrimination.

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

Complainant reported to an approved clinic on 3/24/2015 for a physical. The results were sent to Provider, who informed Respondent that Complainant had been placed on a "medical hold pending further evaluation." Provider did not disclose to Respondent why he had been placed on a medical hold, or what medical condition or disability had triggered the hold. After several days, Complainant contacted Respondent's Service Manager, who contacted Provider on Complainant's behalf. Provider informed the Service Manager that it was awaiting updated bloodwork from Complainant in order to complete his physical exam. The Service Manager relayed this information to Complainant, who initially refused to provide updated bloodwork to Provider, before eventually informing the Service Manager that he would do so. Despite this, Complainant never provided any further bloodwork to Provider. On 4/9/2015, Provider notified Respondent that Complainant was "temporarily medically unqualified" to work because he "[d]oes not meet Rollins criteria."

3) The Investigator made the following findings of fact:

- a) Complainant passed all of his pre-employment physical aside from the [REDACTED] [REDACTED] tests.
- b) Although Respondent utilized a third-party occupational health provider to conduct pre-employment medical exams, Respondent provided the screening criteria to be applied.
- c) Complainant's treating physician reviewed the job description for the offered position and determined that he could perform the essential functions of the job without any work restrictions.
- d) There is nothing in the record suggesting that Complainant could not perform the essential functions of the position, or that employing him would pose a direct threat to the health or safety of himself or others.

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<sup>3</sup> Complainant's employment was also conditioned upon him passing a drug test and background check, which he did.

<sup>4</sup> Respondent confirmed during the investigation that it provides medical guidelines to Provider for evaluating prospective employees, including a limit of an [REDACTED] level greater than 8, or a [REDACTED] [REDACTED] level greater than 200 mg/dl.

<sup>5</sup> Complainant also stated that he did not want to spend any more money on his doctor.

There is also nothing in the record explaining the rationale for imposing a [REDACTED] [REDACTED] restriction on the position Complainant sought.

- e) Complainant had his [REDACTED] [REDACTED] tested on 3/24/2015 and 3/31/2015. Since the [REDACTED] test measures average [REDACTED] [REDACTED] over a 2-3 month period, submitting to another test shortly thereafter at Provider's request would not likely have produced significantly different test results.

**V. Analysis:**

- 1) The MHRA requires the Commission in this investigation 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.
- 2) The MHRA provides that it is unlawful to fail to hire an employee because of physical or mental disability. *See* 5 M.R.S. § 4572(1)(A).
- 3) 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).
- 4) In a failure to hire case, first, Complainant establishes a prima-facie case of unlawful discrimination by showing that (1) he belongs to a protected class, (2) that he applied and (3) met the minimum objective qualifications for the job sought, and (4) that he was rejected. *City of Auburn*, 408 A.2d at 1263.
- 5) 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. Dept. 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. 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.
- 6) In this case, the Complainant has established a prima-facie case of disability discrimination. He has diabetes, which is a *per se* disability under the MHRA (5 M.R.S. § 4553(1)(B)), and he applied for a position. It is evident from the record that Respondent considered Complainant to be qualified for the job since a conditional offer of employment was extended to him. It is undisputed that the job offer was effectively withdrawn when Provider determined that Complainant did not meet Respondent's imposed criteria for blood sugar levels.
- 7) The Respondent has articulated legitimate nondiscriminatory reasons for its employment actions,

specifically that the Complainant chose to terminate the employment process by refusing to provide updated bloodwork to Provider.

- 8) In the final analysis, Complainant has established that it is at least as likely as not – the MHRC's "reasonable grounds" standard – that Respondent did not hire him because of his disability, with reasoning as follows:
- a) It is undisputed that Complainant was considered suitable for the open position prior to his [REDACTED] [REDACTED] test results. Provider then requested that Complainant's treating physician provide additional information in a "MD Clearance Form for [REDACTED] Treatment." The form specifically sought confirmation of the condition, current medications, and treatment plan, and the test results and dates of applicable [REDACTED] [REDACTED] tests. It is far from clear that this type of inquiry was warranted or lawful. Two of the requested test results were over two years old and would have very little if any relevance to Complainant's current condition at the time of the job offer.
  - b) Further, while Respondent focused solely on the blood test results, it blatantly ignored Complainant's doctor's explicit opinion that Complainant was able to meet the essential functions of the position without any work restrictions. Clearly Complainant's doctor had the best knowledge of his [REDACTED] capabilities, and limitations, and whether those fit the provided and reviewed job description.
  - c) Respondent asserted that Complainant essentially stopped the employment process by refusing to provide additional information to Provider. However, given the time and expense involved in undergoing a third blood test within a two-week period, and especially given the high probability the [REDACTED] results would not have varied significantly, given it would be based upon the same prior 2-3 month [REDACTED] average, Complainant appears more than justified in refusing to undergo the additional requested test.
  - d) Respondent has also submitted no evidence that the [REDACTED] [REDACTED] criteria it gave Provider to screen potential employees is in any way related to the position Complainant was offered. The criteria instead appear to identify and weed out job candidates who might be at risk for future medical issues such as [REDACTED] or [REDACTED] which is unlawful.
- 9) Discrimination on the basis of disability is found in this case.

## **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 Complainant Anthony DeSalle was subjected to unlawful disability discrimination in hiring by Respondent Rollins, Inc. d/b/a Orkin Pest; and
- 2) The claim should be conciliated in keeping with 5 M.R.S. § 4612(3).

  
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Amy M. Sneirson, Executive Director

  
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Robert D. Beauchesne, Investigator