



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT

MHRC No. E18-0281-A/B

October 18, 2019

**Lisa Edstrom (Biddeford)**

v.

**Biddeford School Department (Biddeford)**

**Jeremy Ray (Biddeford)<sup>1</sup>**

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

Complainant alleged that Respondent's new sick leave policy discriminated against her because the policy, while neutral on its face, had a disparate impact based on her age and sex. Respondent denied discrimination and responded that the new policy was a business necessity in order to address teacher absenteeism.<sup>2</sup> The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, and Issues and Resolution Conference, and requests for additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that Respondent discriminated against Complainant based on her sex and age.

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

1) Date of alleged discrimination: June 13, 2018.

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<sup>1</sup> Respondent Jeremy Ray is the Superintendent for Respondent Biddeford School Department. The Maine Supreme Judicial Court, sitting as the Law Court, has held that individual supervisory employees cannot be held liable as "employers" under the Maine Human Rights Act ("MHRA"), see *Fuhrmann v. Staples the Office Superstore East, Inc.* 2012 ME 135. While in some cases, individuals might be held liable for interference with a complainant's rights under the MHRA see 5 M.R.S. § 4633(1)&(2); *Roy v. Correct Care Sols., LLC*, 914 F.3d 52 (1<sup>st</sup> Cir. 2019), the Respondents named here have committed no acts that would rise this level. Accordingly, only the claims against Biddeford School District will be analyzed in this report. Biddeford School District will be referred to as Respondent.

<sup>2</sup> Respondent made efforts during the investigation to reopen negotiations of the Collective Bargaining Agreement ("CBA"), but the teachers' union ("Union") would not consent to new negotiations. Respondent does not have unilateral authority to change a CBA. Though this shows Respondent's willingness to address Complainant's concern, it is not a defense to the claim of discrimination. This information may be relevant to any later claim by Complainant for damages, but that issue is not relevant to an initial analysis of whether the policy in place amounted to a violation of the MHRA.

- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 24, 2018.
- 3) Respondent has 550 employees and is subject to the MHRA, Title VII of the Civil Rights Act of 1964 (as amended), the Age Discrimination in Employment Act ("ADEA"), as well as state and federal employment regulations.
- 4) Respondent is represented by Tom Trenholm, Esq. Complainant is represented by Jonathan Goodman, Esq.

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

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

Complainant is a Special Education Teacher. She has been employed by Respondent for 22 years and she is 51 years old.<sup>3</sup> In 2018, Respondent and Union modified the sick leave policy for the new CBA. The new policy targets employees who have more than 15 years of employment with Respondent and have used over 75% of their accrued sick time. These employees get six fewer sick days per year going forward with limited opportunity to regain those days. Complainant has used more than 75% of her sick days over her 22 years due to her own medical issues and two pregnancies. This policy disparately affects older, female employees like Complainant.

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

Respondent is a school district. When contract negotiations began in 2018, Respondent was concerned with the high costs of substitute teachers, and the decrease in the quality of education on days when regular teachers are not in the classroom. Respondent proposed a change to the sick time policy to address these concerns and discourage misuse of sick time. Complainant and others raised concerns about the new policy. In response to those concerns, Respondents modified the policy to allow for teachers to earn back their sick time, or to get additional sick days approved by providing medical documentation. Respondent had a nondiscriminatory business-related reason for enacting the policy and any increased effect on older, female employees is a result of the make-up of the teacher population.

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

- a) Complainant is currently employed by Respondent as a Special Education Teacher. She has been employed by Respondent for over 20 years and she is 51 years old.
- b) Complainant's primary use of sick time during her employment has been related to pregnancy and pregnancy related conditions or complications. Respondent did not allege that Complainant had ever used her sick time other than for an approved purpose.

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<sup>3</sup> Complainant was 50 years old when she filed her complaint.

- c) The CBA that governed Complainant's employment up until 2018 granted all teachers 16 sick days per year.<sup>4</sup>
- d) In 2018, Union and Respondent began the process of negotiating the new CBA. As part of the new agreement Respondent worked on a proposal for a change in the sick day policy.<sup>5</sup>
- e) Respondent was concerned with excessive teacher absenteeism. Respondent has high costs and low availability for substitutes. Respondent also had reports of teachers who has been misusing their sick days. Respondent provided at the IRC that the concern was a combination of misuse and the overall effect of high usage.
- f) The newly negotiated sick leave policy made a change to the total amount of sick days granted each year. Teachers who had been working for Respondent for more than 15 years of service and had less than 25% of their maximum possible sick time accrual total remaining would be granted only 10 sick days a year going forward.
- g) In a meeting with Union to discuss the changes, Complainant raised concerns over the change. Some modifications were made to the agreement as a result of these concerns. Teachers being given only 10 days could have additional days approved with appropriate medical documentation. They could also be restored to the regular allotment of 16 days if they used zero sick days in a year or used less than 40% of their sick days over a three-year period.
- h) The new CBA was ratified in May of 2018 with the modified sick leave policy.
- i) Complainant contacted Respondent and set up a meeting to discuss the change because she was still upset that the changes did not appropriately address her concerns. Respondent was sympathetic but told her they could not unilaterally make changes to the contract.
- j) The CBA went into effect on September 1, 2018 and remains in effect until August 31, 2021. Since the complaint was filed, Respondent has tried to reopen negotiations to modify the sick policy again or return it to its previous language. Union has not agreed, and Respondent does not have unilateral authority to change the agreement.

#### **IV. Analysis:**

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 Maine Revised Statues ("M.R.S.") §

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<sup>4</sup> There are other provisions in the policy that were brought up in the investigation. There was a "sick bank" for teachers to donate sick days, and a total number of sick days a teacher could accrue. These terms of the sick policy were modified as well. Teachers were allowed to accrue more days due to inconsistent and poor record keeping regarding the sick bank, and there were changes made to sick bank access. The record did not support that these changes had a discriminatory disparate impact. Any claim as to these parts of the policy fail and will not be further analyzed in the report.

<sup>5</sup> The Commission does not have the authority to interpret terms of a CBA. The Commission does have the authority to investigate possible discriminatory terms in a CBA based on their effect.

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, in part, that it is unlawful, based on protected-class status, to “fail or refuse to hire or otherwise discriminate . . . [or] discharge an employee or 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. . . .” 5 M.R.S. § 4572(1)(A).

Disparate Impact – Age and Sex

- 3) 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. Ch. 3, § 3.02(A)(2)(c).
- 4) “A Complainant makes a prima facie showing of disparate impact where an employment practice is facially neutral but in fact affects more harshly one group than another.” *See Maine Human Rights Com. v. Department of Corrections*, 474 A.2d 860, 865-866 (Me. 1984). Statistical evidence is the primary method of establishing a disparate impact. *See City of Auburn*, 408 A.2d at 1264. “Proof of disparate impact upon one group supports an inference of unlawful discrimination against a particular plaintiff who is a member of that group.” *Id.* To establish this type of claim, Complainant must show more than an adverse impact on themselves, but rather must show that the challenged practice has both an adverse impact on a protected class in general and on the Complainant in particular. *See Bramble v. American Postal Workers Union, AFL-CIO Providence Local*, 135 F.3d 21, 26 (1<sup>st</sup> Cir. 1998); *Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 110 F.3d 2, 4 (1<sup>st</sup> Cir. 1997).
- 5) Once Complainant establishes a prima-facie case, Respondent must provide prima-facie evidence that its practice “is justified by a business necessity.” *Dussault v. RRE Coach Lantern Holdings, LLC*, 2014 ME 8, ¶ 24, 86 A.3d 52; *see City of Auburn*, 408 A.2d at 1265.<sup>6</sup> So, for example, if “hiring requirements or criteria, such as prior experience or strength, are at issue, there must be credible evidence that they are necessary to safe and efficient job performance.” *Id.* “The touchstone is business necessity, not mere business convenience.” *Id.*
- 6) At the final stage of the analysis, even if Respondent is able to show business necessity for its challenged practice, Complainant can prevail by providing prima-facie evidence that Respondent’s proffered reason is pretextual, or that other practices could achieve the same result with less discriminatory impact. *Dussault*, 2014 ME 8 at ¶ 24. “Such affirmative evidence would have probative force to show that the [Respondent] was using [their] selection device as a pretext for discrimination.” *City of Auburn*, 408 A.2d at 1268. In order to prevail, Complainant must show that they would not have suffered the adverse job action but for their membership in a protected class, although other factors may have contributed to the action. *See id.* at 1268. The burden of persuasion remains with Complainant throughout this analysis. *Id.* at 1265.
- 7) Complainant established her prima facie case. Complainant asserted that as an older female she had used more of her sick time for legitimate purposes throughout her career. Those purposes were

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<sup>6</sup> Under the MHRA, disparate impact age discrimination claims are evaluated under the business necessity standard, not the “reasonable factor other than age” standard applicable under the ADEA. *Scamman v. Shaw’s Supermarkets, Inc.* 2017 ME 41.

related to being female, such as time off for a pregnancy, and therefore she, and other older and female employees would be disparately impacted by the new sick time policy. Respondent provided information on all the employees affected by the policy. The following statistics were calculated based on that information:<sup>7</sup>

- a. 44% of the teachers in the total population are 50 years of age or older, and 81% of the teachers affected by the policy are 50 years of age or older.
  - b. 75% of the teachers in the total population are female, and 100% of the teachers affected by the policy are female.
  - c. 34% of the teachers in the total population are female *and* 50 years of age or older, and 81% of the teachers affected by the policy are female *and* 50 years of age or older.
- 8) There is a statistically significant difference that shows older teachers, female teachers, and especially older female teachers are being disproportionately affected by the new policy. Complainant has shown that the policy has had an adverse impact on her as well as on older teachers and female teachers.
- 9) Respondent did not establish that the change in policy was a business necessity with reasoning as follows:
- a. Respondent provided the job-related justification for making a policy was to reduce teacher absenteeism. Respondent's concern was for the welfare of its students when regular teachers are absent from their classrooms as well as the financial burden of hiring substitute teachers. Respondent contended that high use created an opportunity for misuse, which Respondent intended to reduce through the new policy. However, Respondent could not provide any support for how overuse corresponded to misuse.
  - b. There is no question that the policy targeted high usage over a lengthy period of time, but no evidence was presented to support that this solved a problem related to misuse. Complainant argued that the policy, in effect, punished older, female teachers who used their sick time for legitimate purposes, especially for pregnancy-related purposes. The data provided corroborated that concern: notably, only female employees received less sick time under the new policy
- 10) Overall, Complainant has made a showing that there is a statistically significant impact on older female teachers and Respondent has not explained how their policy solved the problem of misuse of sick time by teachers even if their policy would target high usage by teachers.
- 11) Even if reducing the use of sick time generally, rather than reducing misuse of sick time, is a business necessity, the record supports a finding of disparate impact, since other approaches could have reached such a result without a discriminatory impact. Respondent could have addressed each teacher's usage individually and sanctioned those who actually misused their sick time. Respondent also could have applied the policy to all teachers, not just those with more than 15

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<sup>7</sup> Complainant performed her own informal survey of teachers that also included information on whether female teachers had used their time for pregnancy. This survey did not have the participation of all the teachers affected so the information provided by Respondent was used to get more accurate results.

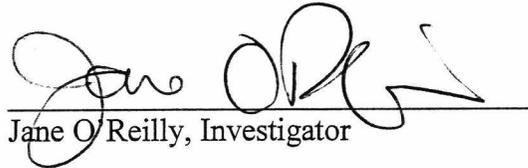
years in the district, or provided exceptions for sick time that also qualified for protected leave under the Family and Medical Leave Act (birth/placement of a child; serious health conditions).

12) Discrimination on the basis of age and sex is found.

**VI. Recommendation:**

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

1. There are **Reasonable Grounds** to believe that Biddeford School Department discriminated against Lisa Edstrom on the basis of age and sex; and conciliation of these claims should be attempted in accordance with 5 M.R.S. § 4612(3); and
2. There are **No Reasonable Grounds** to believe that Jeremy Ray discriminated against Lisa Edstrom on the basis of age or sex; and these claims should be dismissed in accordance with 5 M.R.S. § 4612(2).

  
Jane O'Reilly, Investigator