



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

PA15-0216

April 25, 2017

Danny Dalton (United Kingdom)

v.

Maine Medical Center (Portland)

Summary of Case:

Complainant, who is transgender and identifies as male, alleged that he was treated differently on the basis of his gender identity when he was informed by a security guard ("Guard") at Respondent's hospital that he had to use the women's room if he had "lady parts." Respondent denied discrimination and stated that Guard offered Complainant directions to the other bathroom based on Complainant's appearance as "an attractive woman." The Investigator conducted a preliminary investigation, which included reviewing all of the documents submitted by the parties and holding a Fact Finding Conference ("FFC"). Based upon all of this information, the Investigator recommends that the Commission find reasonable grounds to believe that Complainant was discriminated against on the basis of his gender identity.

Jurisdictional Data:

- 1) Dates of alleged discrimination: 2/15/2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 5/11/2015.
- 3) Respondent Maine Medical Center ("MMC") is a place of public accommodation and is subject to the Maine Human Rights Act ("MHRA") and state rules and regulations.
- 4) Complainant is represented by Zack Paakkonen, Esq. Respondent is represented by Nicole Lorenzatti, Esq.

IV. Development of Facts:

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

Complainant is transgender. He was assigned female at birth but identifies as male and has a male gender identity. On 2/15/2015, he used the men's bathroom at MMC. Upon exiting the bathroom, Guard told him, "That is the men's bathroom ma'am, the women's bathroom is that way," which upset and confused Complainant because he does not dress in a feminine manner. Complainant, his partner, and his partner's mother all spoke to the Guard, who continued to assert that if Complainant had "lady parts"

he needed to use the women's restroom. The Guard repeatedly referenced Complainant's "lady parts" while insisting that he had to use the women's restroom. Complainant called Respondent the next day to file a complaint. He was told that employees would receive training and that he would receive a letter of apology; Complainant never received the promised letter.

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

Respondent had no record of Complainant contacting it about this incident.¹ When it learned of the incident through his Commission complaint, Respondent investigated the incident. Guard stated that he had seen two women in the lobby, and then one of them (Complainant) entered the men's restroom. When Complainant exited the bathroom, the Guard got his attention and offered him directions to the women's bathroom, based on Complainant's appearance as "an attractive woman." Guard believed Complainant was a woman, and might not know where the women's bathroom was located. Guard denied using the term "lady parts" or referencing genitalia during his discussions with Complainant, Complainant's partner, and Complainant's partner's mother.

3) The Investigator made the following findings of fact:

- a) Complainant and his partner ("Partner") were visitors at the hospital on the day of the incident. Complainant went into the men's bathroom while his partner's mother waited for a prescription at the pharmacy. When he came out of the bathroom, Guard approached and said "That is the men's bathroom, ma'am, the women's bathroom is that way." Complainant was shocked and upset, and went to tell his partner about the incident and confer about how to handle it.
- b) Complainant and Partner approached the Guard. Partner informed the Guard that Complainant is transgender and identifies as male. The Guard replied, "If SHE still has 'lady parts' [indicating with air quotes], then the bathroom is that way."
- c) Complainant and Partner then explained to Partner's mother ("Mother") what the Guard had said. Mother approached Guard and questioned the Guard's action. Guard responded, "She has girl parts and is not supposed to go into a male's bathroom." Mother asked Guard how he would know what "parts" Complainant has and stated that he is allowed to use whichever bathroom he wants. Guard replied that he was only doing his job, that he saw a female walk out of the men's bathroom, and that he told her where the correct bathroom was located. The Guard then again stated that, "If she has any lady parts, then she has to use the women's bathroom." Guard denies making any reference to "lady parts" or genitalia.²
- d) The next day, Complainant called MMC to file a complaint. After he explained what had occurred (including the Guard's reference to "lady parts"), the employee taking the call apologized, stating that Complainant would receive a formal letter of apology, and that staff at the hospital would be educated. Respondent initially denied that this call occurred; after Complainant submitted telephone records

¹ In response to this claim, Complainant provided telephone records showing he placed a call to MMC on 2/16/2015. Respondent then stated that these records allowed it to confirm that he had called about the incident. Respondent denies that Complainant referenced any "lady parts" comments during that call, or that the Guard had informed him that he "had" to use the woman's bathroom. Complainant simply expressed that he was upset that Guard approached him at all.

² Complainant's partner and her mother submitted written statements to the Commission. Both claim therein that the Guard made repeated references to Complainant having to use the woman's bathroom if he had "lady parts."

showing the call happened, Respondent investigated further and stated that while Complainant did call, he never mentioned the alleged "lady parts" comments.

- e) Guard stated that he had approached a number of women to make sure they knew where the appropriate bathroom was, and that he did the same here based on his belief that Complainant was an attractive woman. After speaking with Mother, he pointed out where both bathrooms were located. He also told Mother that he did not know Respondent's policy on this matter.
- f) Respondent has a policy that prohibits discrimination on the basis of sex, sexual orientation or gender identity.
- g) Complainant submitted photographs taken at the hospital that day, which reflect that he had short hair (just below his ears), and that he was wearing a sweatshirt that day.

V. Analysis:

- 1) The MHRA requires the Commission 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 makes it unlawful:

For any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

5 M.R.S. § 4592(1). Because this language is similar to that in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a), case law interpreting Title II is helpful in analyzing this claim.

- 3) In order to establish a prima-facie case of public accommodations discrimination, Complainant may show that he "(1) is a member of a protected class, (2) attempted to contract for services and afford himself or herself of the full benefits and enjoyment of a public accommodation, (3) was denied the full benefits or enjoyment of a public accommodation, and (4) such services were available to similarly situated persons outside his or her protected class who received full benefits or were treated better." *Jackson v. Waffle House, Inc.*, 413 F.Supp.2d 1338, 1361 (N.D.Ga. 2006) (Title II).
- 4) Once Complainant has established a prima-facie case, Respondents must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse treatment. *Id.* at 1355-56. *See also Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1262 (Me. 1979). After Respondents have 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 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 Respondents' 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 articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the 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 treatment 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.

- 5) Here, Complainant established a prima-facie case by demonstrating that he was a member of a protected class (transgender), that he attempted to access the full benefits and enjoyment of a public accommodation by using the bathroom corresponding to his gender identity, that he was confronted by Guard and directed to use a bathroom not corresponding to his gender identity, and that others outside of his protected class were allowed to use the bathroom that corresponded to their gender identity.
- 6) Respondents articulated a legitimate, non-discriminatory reason for the adverse treatment: Complainant was directed to the woman's bathroom because the guard perceived him to be "an attractive woman."
- 7) Ultimately, Complainant established that he was subjected to less favorable terms and conditions in accessing a public accommodation, with reasoning as follows:
 - a. There is no dispute that Guard approached Complainant after his exit from the men's bathroom and provided him with directions to the woman's bathroom. Guard claimed that he did this because Complainant appeared to be a woman to him, and because the women's room was not readily visible from that location. However, even if the Guard was well-intentioned, it was clearly inappropriate to direct a patron exiting the men's room to use the women's room based solely on that patron's outward appearance. Guard's explanation is also inconsistent with the photographs of Complainant from that day, which do not reflect anything in his outward appearance consistent with appearing to be a woman. This raises questions about Guard's credibility on this and related issues.
 - b. Complainant alleged that after telling him to use the women's bathroom, Guard subsequently made additional offensive comments about "lady parts" determining which bathroom Complainant was allowed to use. Although Respondent and Guard deny that any such comments were made, Complainant and two witnesses (albeit his partner and her mother) provided written statements that Guard made multiple comments about "lady parts," even after they informed the Guard that Complainant was transgender and identified as male. While it is conceivable that Complainant and his witnesses conspired to fabricate this allegation, this is unlikely; it seems more likely that the Guard would have a reason to deny making the alleged offensive comments out of fear for his job. This is especially true if, as Respondent claimed, Guard told Mother that "he did not know MMC's policies on the matter", meaning his actions could have been a violation of Respondent's policies.
 - c. Respondent's credibility is also in some doubt due to its initial denial that Complainant ever filed a complaint about the incident. Although Respondent claimed that Complainant's phone records somehow allowed them to track down a record of his report, in his Commission complaint he specifically stated that he called MMC the day after the incident, on 2/16/2015. The only additional information gleaned from the telephone records appears to be the precise time of day the calls³ were made. While Respondent denies that Complainant referenced the "lady parts" comments during the complaint call, it

³ Complainant placed a three-minute call to MMC and then received a nine-minute return call from them minutes later.

is doubtful that Complainant would have taken the time to file a complaint had the Guard's comments been limited to pointing Complainant towards the women's bathroom, as the Guard alleged.

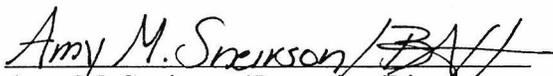
- d. Complainant was also found to be very credible at the FFC. His responses to questions were not only consistent with his own statements contained in his Commission complaint, they were also consistent with the statements provided by his witnesses.

8) Discrimination on the basis of sex/sexual orientation/gender identity is found.

VI. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that Danny Dalton was subjected to discrimination on the basis of sex/sexual orientation/gender identity when he was denied full and equal access to the bathroom corresponding to his gender identity by Respondent Maine Medical Center (MMC); and
- 2) That the claim should be conciliated in keeping with 5 M.R.S. § 4612.


Amy M. Sneirson, Executive Director


Robert D. Beauchesne, Investigator