Memo

Date: April 24, 2012

To: Amy Sneirson, Executive Director

From: John Gause, Commission Counsel

Re: E12-0049, 0049-A,

By Memo dated February 7, 2012, Chief Investigator Barbara Lelli has requested that the medical disclosure aspect of this complaint be administratively dismissed. A complaint may be administratively dismissed by the Executive Director for lack of jurisdiction and failure to substantiate the complaint of discrimination. *See* 94-348 C.M.R. ch. 2, §2.02(H)(1, 2). For the following reasons, the complaint should not be administratively dismissed.

Complainant alleges that she has a mental disability that causes her to inflict injuries upon herself. She worked as a medical assistant for Respondent. She sought treatment for her self-inflicted injuries from a physician who worked in her office, and she alleges that a different physician in the practice, who she characterizes as a "superior," took over her care by telling her, "Let me deal with this. Tell me what's going on." March 7, 2012 letter from , Esq. (" Letter") at 1. She asserts that she not disclose her medical information to the second physician voluntarily "but upon instruction from a superior." *Id.* at 2. Complainant asserts that the second physician subsequently disclosed her medical information to her coworkers.

The Maine Human Rights Act provides, in relevant part, that "[a] covered entity may conduct voluntary medical examinations, including voluntary medical histories, that are part of an employee health program available to employees at that work site. . . . Information obtained under this paragraph regarding the medical condition or history of an employee is subject to the requirements of paragraph C, subparagraphs (2) and (3)." 5 M.R.S. § 4572(2)(E). Paragraph C, subparagraph (2)

makes the information so obtained confidential with a few exceptions that are inapplicable here. *See* 5 M.R.S. § 4572(2)(C)(2).

Chief Investigator Lelli requested administrative dismissal because Complainant's disclosure of medical information appeared to have been voluntary. Complainant has clarified, however, that she asserts that the disclosure was involuntary. Further investigation is necessary to determine whether the disclosure was voluntary or involuntary. If involuntary, the second physician's examination and inquiries were themselves unlawful. *See* 5 M.R.S. § 4572(2)(D) ("A covered entity may not require a medical examination and 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."). The claim would thus not be for a breach of the confidentiality requirements (which only apply to information gleaned from *lawful* examinations and inquiries) but for an unlawful examination and inquiry.

If the disclosures were voluntary, the investigation should focus on whether the disclosure was made as a "part of an employee health program available to employees at that work site." 5 M.R.S. § 4572(2)(E). The term "employee health program" is undefined, and the parties should be given an opportunity to submit information and argument concerning the appropriate definition and applicability of the term to the facts of this case. If Complainant's medical treatment by the second physician was pursuant to "an employee health program," even voluntary disclosures made in that context are confidential. 5 M.R.S. § 4572(2)(E). If not, voluntary disclosures are not confidential. *See E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1047 (10th Cir. 2011) (holding that analogous confidentiality provision in the Americans with Disabilities Act "does not apply to or protect information that is *voluntarily* disclosed by an employee unless it is elicited during an authorized employment-related medical examination or inquiry").