



Maine Human Rights Commission
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Amy M. Sneirson
Executive Director

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Commission Counsel

INVESTIGATOR'S REPORT
E10-0497

July 27, 2012

██████████ (Raleigh, NC)

v.

██████████ (Portland)

I. Complainant's Charge:

Complainant ██████████ alleges that Respondent ██████████ discriminated against her on the basis of sex (pregnancy), national origin and religion by terminating her employment. Complainant also alleges that she was terminated in retaliation for previously complaining of unlawful sex and national origin discrimination.

II. Respondent's Answer:

Respondent denies discrimination and alleges that Complainant was terminated solely because she could no longer perform the essential functions of her position within her pregnancy-related medical restrictions.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: June 4, 2010.
- 2) Date complaint filed with the Maine Human Rights Commission: October 4, 2010.
- 3) Respondent employs 235 people and is subject to the Maine Human Rights Act, Title VII of the U.S. Civil Rights Act of 1964, as amended, and both state and federal employment regulations.
- 4) Complainant is represented by ██████████. Respondent is represented by ██████████.
- 5) This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds".

IV. Development of Facts:

- 1) The relevant parties and documents in this case are as follows:

- a) Complainant is female and was pregnant at the time her employment was terminated. She is Muslim and her nation of origin is in Africa (unspecified). She was employed as a Direct Support Professional from June of 2008 to June 4, 2010 when she was terminated.
 - b) Respondent is an organization that provides direct care to developmentally disabled individuals. All of the clients have serious mental disabilities, and have past and present tendencies of violence toward themselves and other individuals.
 - c) "Human Resources Director", "Area Director", "State Director", "Operations Manager" and "Portland Area Director" are members of management that interacted with Complainant and were involved in the decision to terminate her employment.
 - d) The Direct Support Professional position has physical requirements that include ability to respond to violent behavior (Exhibit A).
 - e) On June 2, 2010 Complainant provided a note from her doctor which stated that due to her pregnancy, she should not work with clients who need to be physically restrained (Exhibit B).
 - f) On June 4, 2010 Area Director delivered a letter to Complainant terminating her employment due to her inability to perform physical restraints due to her pregnancy-related restrictions (Exhibit C).
- 2) Complainant provided the following:
- a) In February of 2010, she filed a grievance against Area Director alleging unfair treatment because of her sex and because she is from Africa. She complained that Area Director spoke to female staff in a derogatory manner and would ignore her at times when he spoke to her. Area Director resigned after she filed the complaint and it does not appear that there was an investigation into her grievance.
 - b) On June 2, 2010 she submitted a doctor's note to her employer that stated she could not participate in physical restraints of patients due to her condition during pregnancy. She was told to apply for an available Program Manager position, and was told she would be accommodated. Later that day, however, Operations Manager told her that she would not be accommodated and that she should continue in her job at her own risk performing physical restraints if needed. She told Operations Manager that she did not feel comfortable doing this, and that she would just apply for the Program Manager position instead.
 - c) On June 4, 2010 Human Resources Director informed her that State Director stated that she needed to sign a letter of resignation because she was no longer able to complete her duties due to her pregnancy, and Respondent could not accommodate her. She refused to sign a letter of resignation and was subsequently terminated.
 - d) Her termination was discriminatory on the basis of sex, because she was terminated due to her pregnancy. She was not offered an accommodation of a modified job or a leave of absence and was terminated immediately. Other similarly situated employees who were unable to work because they were restricted from performing restraints were not terminated and were allowed to return to their positions when their restrictions were lifted (see file). This shows that she

was treated differently than other employees who experienced non-pregnancy related medical conditions, which is a violation of the MHRA.

- e) Complainant provided a sworn affidavit providing, in part: "[REDACTED] never informed me about any rights that I might have to Family and Medical Leave and never offered me any leave time either before or when they fired me."
- f) She also believes she was terminated because of her religion and national origin, and because she filed a grievance alleging sex and national origin discrimination against Area Director. The fact that her grievance was filed only three months prior to her termination is evidence of a causal connection between the two events. Furthermore, Respondent did not conduct a thorough investigation into her grievance which shows it was not taken seriously.

3) Respondent provided the following:

- a) Complainant filed a complaint with Human Resources Director against Area Director (her supervisor at the time) on March 1, 2010 alleging unlawful workplace harassment. At the time, Area Director had already submitted his resignation for issues unrelated to Complainant's grievance. Complainant specifically denied in her grievance and in speaking with Human Resources Director, that Area Director subjected her to sexual or racial harassment in any way. After interviewing Area Director and Complainant, Complainant was informed in a letter that Area Director had denied the charges in her grievance, and that since all of her allegations pertained to other people, she should encourage those people to come forward for further investigation. The letter also informed Complainant that she could file an appeal, which she did not. Respondent did not terminate Complainant in retaliation for filing the grievance.
- b) Respondent did not discriminate against Complainant because of her national origin or religion. The employee population is extremely diverse with regard to national origin and religion. The President and CEO of the organization is an immigrant from the Congo, as well as the Director of Continuing Quality Improvement. The majority of the 235 employees are also immigrants from Africa. Many are Muslim (known by Respondent because of religious practices of the employees such as fasting during Ramadan, and employee clothing such as modified head coverings). Race and national origin were not a factor in the decision to terminate Complainant.
- c) The Direct Support Professional position has essential job requirements that include the ability to physically respond to episodes of violent behavior from clients. This includes self-defense moves and performing physical restraints, actions that are necessary for the safety of employees and the clients. This requirement is an essential function of the job due to safety concerns, and is clear in the job description (Exhibit A).
- d) On June 4, 2010, Complainant informed Portland Area Director (her supervisor at the time) that she was pregnant, and provided a note from her doctor that stated that she should not work with clients who need to be physically restrained. That same day Complainant met with Human Resources Director regarding the note, and acknowledged that she could not perform physical restraints, which she was aware was a job requirement. She also stated that she planned to apply for an open Program Manager position, but was reminded by Human Resources Director that the job also required ability to perform physical restraints.

- e) After consultation with management, Operations Manager notified Complainant that she could not be accommodated because she would have to have additional staffing to assist her in the event of a restraint, which would be an undue financial and administrative burden because staffing levels are limited by state funding obligations. Complainant worked as a provider who lived in the house with her client Sunday night to Friday night, which put her more at risk of physical interactions, including restraints, than regular staff. Without additional staff in her location, she was not able to perform an essential function of her job. Respondent offered Complainant the option of resignation, but Complainant refused to resign, verbally stating that she wanted to keep working in her position despite being unable to perform restraints. Complainant was then served with a termination notice, outlining that performing restraints was an essential function of her job, and that she was being terminated because she was no longer able to perform this function (Exhibit B).
 - f) There were no positions within Complainant's medical restrictions that were open at the time of her termination. Given the nature of the clients, all positions require the ability to use physical restraint to qualify for the positions. It is true that Respondent has accommodated employees in the past when they have been unable to perform their jobs due to the same restriction as Complainant, but these employees were all injured on the job and had worker's compensation claims. While the MHRA requires that an employer treat a pregnant employee the same as it would treat an employee with a non-pregnancy disability or illness, case law has shown that workers with occupational injuries are not intended to be covered under this category.
 - g) During the discussions regarding possible accommodations, Complainant made it very clear that unpaid leave was not an option that she would consider.
 - h) Respondent did not terminate Complainant because she was pregnant. Other employees (JB, CS) continued to work while pregnant but did not have the restriction of no physical restraints.
- 4) Further investigation reveals the following:
- a) Respondent has provided unpaid medical leave, rather than termination, to at least two other Direct Support Professionals (in 2009 and 2010) for non-occupational medical conditions that rendered them temporarily unable to perform physical restraints. See E10-0268 Respondent 2/22/12, and 9/20/10 submissions.

V. Analysis:

- 1) The Maine Human Rights Act requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 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.

Termination - Sex (Pregnancy)

- 2) The Maine Human Rights Act provides, in part, that "it is unlawful employment discrimination. . . for any employer to . . . because of . . . sex . . . 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.A. § 4572(1)(A).

- 3) The MHRA defines the word “sex” to include pregnancy and medical conditions which result from pregnancy. 5 M.R.S.A. § 4572-A(1).
- 4) The MHRA also provides, “It shall also be unlawful employment discrimination in violation of this Act, except where based on a bona fide occupational qualification, for an employer, employment agency or labor organization to treat a pregnant woman who is not able to work because of a disability or illness resulting from pregnancy, or from medical conditions which result from pregnancy, in a different manner from other employees who are not able to work because of other disabilities or illnesses.” M.R.S.A. § 4572-A(3).
- 5) A complainant establishes a prima-facie case of pregnancy discrimination by showing that she was disabled due to pregnancy, her employment was terminated because of her disability, and others were not terminated because of temporary disabilities. *See Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651, 653 (5th Cir. 1975).
- 6) Here, Complainant alleges that she was discriminated against on the basis of sex when her employment was terminated due to pregnancy related medical restrictions. She alleges that while her restrictions prohibiting her from performing restraints disqualified her from performing an essential function of her job, other employees who had similar restrictions due to non-pregnancy related medical conditions were not terminated from employment.
- 7) Respondent alleges that Complainant was treated the same as all other employees with non-work-related injuries, and that the employees with similar restrictions were not terminated from employment because they were injured on the job and had workers’ compensation claims. Respondent further alleges that Courts have determined that employees with occupational injuries are not similarly situated to pregnant employees, and that an employer is only required to treat pregnant women who are unable to work the same as other employees who are unable to work because of non-work-related injury or illness.
- 8) Complainant has established her claim of pregnancy discrimination, with reasoning as follows:
 - a) Complainant was terminated immediately after receiving her doctor’s note prohibiting her from performing restraints, which rendered her unable to perform an essential function of her job. Documents in the file make it clear that she was terminated for this reason.
 - b) Other Direct Support Professionals with non-occupational medical conditions that rendered them temporarily unable to perform restraints were provided unpaid leaves of absence during their period of disability, but Complainant was not offered an unpaid leave as an alternative to termination.
 - c) Although Respondent states that Complainant made clear that she would not consider a leave of absence, Complainant’s affidavit asserting that leaves of absence were not discussed is being credited. In response to Complainant’s affidavit, Respondent has not submitted its own affidavit, statement, or other contemporaneous documentation supporting its position. Moreover, neither the termination letter (Exhibit C) nor Respondent’s initial January 27, 2011

(see file), response to the Commission's Request for Information and Documents mentioned that Complainant had refused a leave of absence. If Complainant had refused a leave of absence, it is reasonable to expect that Respondent would have referenced that in the termination letter and the initial response.¹

- d) Respondent has not shown a "bona fide occupational qualification" that would justify its failure to provide Complainant with a temporary leave of absence rather terminating her employment.

Termination – National Origin and Religion

- 9) 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).
- 10) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) she belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261.
- 11) 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. Department 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 her 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.
- 12) In order to prevail, Complainant must show that she 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.
- 13) Here, Complainant has not met her overall burden of proving that she was terminated on the basis of national origin or religion because it is found that she was terminated because of her temporary

¹ Although the complaint did not specifically allege a failure to provide a leave of absence, it did allege a failure to accommodate Complainant's pregnancy.

disability due to her pregnancy. It is undisputed that Complainant was temporarily unable to perform physical restraints due to her pregnancy-related restrictions. It is clear from documentation provided by Respondent that she was terminated for reasons related solely to her pregnancy restrictions. There was no evidence that she was terminated because of national origin or religion. Furthermore, Respondent provided evidence that the majority of the 235 of its employees are immigrants from Africa, many of which are Muslim, and that the CEO of the organization is an immigrant from the Congo, as well as the Director of Continuing Quality Improvement. Complainant did not refute these facts and could not establish a connection between her termination and religion or national origin.

Termination - Retaliation

- 14) The MHRA 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 MHRA] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA].” 5 M.R.S.A. § 4572(1)(E).
- 15) The MHRA further defines unlawful discrimination to include “punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act. . . .” 5 M.R.S.A. § 4553(10)(D).
- 16) The Maine Human Rights Commission regulations provide as follows:

No employer, employment agency or labor organization shall discharge or otherwise discriminate against any employee or applicant because of any action taken by such employee or applicant to exercise their rights under the Maine Human Rights Act or because they assisted in the enforcement of the Act. Such action or assistance includes, but is not limited to: filing a complaint, stating an intent to contact the Commission or to file a complaint, supporting employees who are involved in the complaint process, cooperating with representatives of the Commission during the investigative process, and educating others concerning the coverage of the Maine Human Rights Act.

Me. Hum. Rights Comm'n Reg. 3.12 (July 17, 1999).

- 17) In order to establish a prima-facie case of retaliation, Complainant must show that she engaged in statutorily protected activity, she was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56; *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006). The term “materially adverse action” covers only those employer actions “that would have been materially adverse to a reasonable employee or job applicant. In the present context that 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*, 126 S. Ct. 2405. One method of proving the causal link is if the adverse action happens in “close proximity” to the protected conduct. *See Id.*
- 18) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wytrwal 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 her overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.*

- 19) Here, Complainant establishes a prima-facie case of retaliation by showing that she filed a grievance against her supervisor alleging sex and national origin discrimination, that she was terminated, and that her termination was in close proximity to the filing of her grievance (3 months).
- 20) Respondent produced probative evidence to show that Complainant was terminated for pregnancy-related restrictions and not in retaliation for filing a grievance alleging sex and national origin discrimination. The documents submitted (see exhibits and file), and the timing of her termination, make it clear that Complainant was terminated because she could not perform physical restraints during her pregnancy. Complainant was unable to show that there was in fact a causal connection between her termination and her grievance. Complainant provided no evidence to show Respondent failed to investigate her grievance or resented her for filing it.

VI. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that [REDACTED] discriminated against Malyun Isman by terminating her employment because of sex (pregnancy).
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).
- 3) There are **No Reasonable Grounds** to believe that [REDACTED] discriminated against Malyun Isman by terminating her employment based on national origin or religion.
- 4) This portion of the case should be dismissed in accordance with 5 M.R.S.A. § 4612(2).
- 5) There are **No Reasonable Grounds** to believe that Granite Bay Care, Inc. retaliated against Malyun Isman by terminating her employment for complaining of unlawful sex and national origin discrimination.
- 6) This portion of the case should be dismissed in accordance with 5 M.R.S.A. § 4612(2).



Amy M. Sneirson, Executive Director



Angela Pizón, Investigator

JOB DESCRIPTION

- Title:** Direct Service Professional
Designation: Non-Exempt benefited Employee; hourly wage, compensated bi-weekly
Responsible to: Program Manager / Program Manager Director
Supervises: N/A
Qualifications: High School Degree or equivalent
Requirements:
1. Commitment to skill development, independent living, and full community participation for all citizens.
 2. Successful completion of identified training (including but not limited to):
 - a. Community Alternatives to Restrictive Environments;
 - b. Certified Registered Medication Assistant (CRMA);
 - c. Direct Service Professional (DSP);
 - d. (Non-Violent Crisis Intervention (CPI) training; and
 - e. Intrusive Behavior Plan Training (if applicable).
 3. A valid Drivers License, working automobile, and proof of insurance;
 4. A working cell phone.

Definition and Purposes:

The Direct Care Professional assists the Adult Foster Care Provider as a second tier of support. Under the supervision of the Program Manager they are responsible for the implementation of the supported individual's Person Centered Plan. They promote the acquisition of daily living skills, secure vocational opportunities, and facilitate community integration.

Specific Duties:

1. Exemplify [REDACTED] Mission, Vision, and Values; providing opportunities for individual choice and decision-making, enhancing community participation while fostering community relationships.
2. Assist Program Manager with development and implementation of house management routines. Participate in bi-weekly House Meetings.
3. Teach daily living skills during morning and/or evening routines such as personal hygiene, housekeeping, cooking, etc in accordance with individual's "Person Centered Plan".
4. Assess training needs of supported individual; develop descriptive teaching programs and monitor effectiveness through data collection and progress notes.
5. Maintain required documentation such as daily logs, staff notes, data collection, monthly progress notes, medication documentation, incident reports, fire drill logs, financial transactions, medication administration records, medical/dental records, etc. Produce the monthly reports, including financial and progress notes as necessary.
6. Attend and participate in designated appointments to advance the rights, hopes, goals, and care of the supported individual. Assist individuals with scheduling appointments including those for medical, dental and psychological treatment as well as social security determinations, court appearances, etc.
7. Facilitate individual safety by supervising activities of daily living and household routines in accordance with Program Model and/or individual's "Intrusive (Behavior) Plan".
8. Notify [REDACTED] of any incidents impacting individual or community safety/security/rights in accordance with the state's "Reportable Event" reporting obligations.
9. Implement monthly fire drills and daily-annual program safety checks. Perform medication dispensation, ordering refills as needed.

A Professional Association
GYNECOLOGY, OBSTETRICS, MENOPAUSE, FERTILITY

06/02/2010

, MD

Patient Name: [REDACTED]

[REDACTED] is pregnant and because of this, she should not work with clients who need to be physically restrained

[REDACTED] M.D., F.A.C.O.G.

cc:
enc:

[REDACTED]
[REDACTED]

Hand delivered
June 4, 2010

[REDACTED]
[REDACTED]

As you are aware, you are an "at will" employee of this company, i.e. you do not have a contract. Therefore, you may be discharged by [REDACTED] at any time, with or without cause. One of the job requirements of the Direct Support Professional (DSP) position you agreed to upon hire by signing the DSP job description is to be able to perform physical restraints (this is recognized as a Bona Fide Occupational Qualification for the job or "BFOQ"). Today you gave [REDACTED] the Human Resource Director a note from your Obstetrician indicating that you are pregnant and therefore cannot perform physical restraints of individuals. You are now unable to perform that required part of the DSP job.

Employee Handbook section 7-07 provides that there are certain types of employee problems that are serious enough to justify termination of employment without going through the progressive discipline steps. Given the circumstances, this is such a situation. Therefore your employment is terminated effective today June 4, 2010 because you are unable to perform an essential function of the DSP job duties.

If you wish to discuss this matter further you may contact [REDACTED], Human Resource Director at [REDACTED] ext. 235.

Sincerely yours,

[REDACTED]
[REDACTED], Area Director

cc: [REDACTED], Human Resource Director
[REDACTED], Operations Director
[REDACTED] State Director

[REDACTED]