



Maine Human Rights Commission
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INVESTIGATOR'S REPORT
E11-0437

March 8, 2013

██████████ (Bar Harbor)

v.

██████████ (Bar Harbor)

I. Complainant's Complaint:

Complainant ██████████ (hereinafter "Complainant" or "██████████") alleged that Respondent ██████████ (hereinafter "Respondent" or "██████████") has a hiring policy that has an adverse impact on her and other employees based on age, and that ██████████ refused to consider her and/or rehire her because of her age.

II. Respondent's Answer:

Respondent states that even though it incorrectly told Complainant that she was ineligible for rehire, the actual reason she was not hired when she applied for open positions was because she was not the most qualified candidate.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: November 2010 and March 2011 (informed of ineligibility for rehire), April 23, 2011 and September 8, 2011 (failure to hire).
- 2) Date complaint filed with the Maine Human Rights Commission: June 29, 2011.
- 3) Respondent employs about 1300 employees and is subject to the Maine Human Rights Act and the Age Discrimination in Employment Act as well as state employment regulations.
- 4) Respondent is represented by ██████████, Esq. Complainant is represented by ██████████.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, interviews and an Issues and Resolution Conference. 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 parties and issues in this case are as follows:

- a) Complainant [REDACTED] was 61 years old in 2010. She had worked for [REDACTED] as a scientific researcher since 1972, most recently as a Nomenclature Coordinator (Senior Scientific Curator) in the Mouse Genome Database group.
- b) [REDACTED] is an independent, nonprofit organization focusing on mammalian genetics research to advance human health.
- c) In 2007, [REDACTED] offered several options for early retirement¹ to employees who were over the age of 55, 58, or 65, depending on their years of service. [REDACTED] was one of the eligible employees who accepted early retirement, effective May 31, 2008.
- d) [REDACTED] was a valued employee and was not forced to retire. The early retirement option she selected entitled her to a lump sum payment equal to the actuarial net present value of her Lab-paid post-retirement insurance premium coverage.²
- e) Before the effective date of her retirement, [REDACTED] and a group of other long-term employees were invited to apply for rehire. [REDACTED] applied and was rehired to the same position she occupied before she accepted the early retirement offer. Her status was as a new employee in a temporary position without and related benefits. The expected end date for the position was the end of 2011, after she trained her replacement.³
- f) [REDACTED] alleged that in November 2010 and again in March 2011, she was informed that because she accepted early retirement, she was not eligible for rehire into vacant positions. She alleged that this policy is illegal because of its adverse impact based on age. In spite of the policy, [REDACTED] applied for vacant positions in [REDACTED] of "PI," a principal investigator within the Mouse Genetic Information ("MGI") group, and was not selected. [REDACTED] alleged that she was not rehired because of her age.
- g) Respondent alleged that even though it incorrectly told Complainant that she was ineligible for rehire, the actual reason she was not hired when she applied for open positions was because she was not the most qualified candidate.

2) The following concerns the rehire policy:

¹ [REDACTED] was in the process of eliminating Lab-paid retiree medical benefits for new hires and employees with less seniority.

² The majority of employees who were offered early retirement elected not to retire; they continued working and instead received a lump sum contribution to the retirement plan. They (along with new hires and employees with less seniority) were no longer eligible for Lab-paid post-retirement medical benefits.

³ In early 2011, Ms. [REDACTED] learned that her temporary position was going to end as of July 31, 2011.

INVESTIGATOR'S REPORT E11-0437

- a) (██████████) In November 2010, a similarly situated co-worker ("Ms. C", a person who had accepted early retirement and had been rehired), told her that she (Ms. C) was informed by human resources that she was ineligible for rehire to any position at ██████████ because she accepted the early retirement offer.⁴
 - b) (██████████) On about November 4, 2010, ██████████ emailed the Senior Director of human resources ("HR") to clarify if she (██████████) was eligible for rehire if/when her current position was eliminated. HR replied that she and others who elected to keep retiree medical and leave ██████████ employment were not eligible for rehire. See attached, Exhibit A.
 - c) (██████████) In March 2011, she submitted an application for two positions in PI's lab. In response, she received an email from a human resource representative reiterating that because she accepted the early retirement offer in 2008, she was ineligible for rehire.
 - d) (██████████) has a record of bringing back retirees on a part time temporary basis and usually to the position they held before retiring. Employees given consideration for leaving have typically not been eligible for rehiring. This interpretation was communicated to ██████████ because she received special consideration when she opted to retire and leave ██████████. The issue of fairness was communicated to Ms. ██████████ because the overwhelming majority of employees in her situation (similar age and number of years of service) gave up a Lab-paid benefit to continue their careers at ██████████ an option ██████████ chose not to elect so she could receive a lump sum payment.
 - e) (██████████) Nevertheless, employees who accepted early retirement and voluntarily left are eligible for rehire. They are not eligible for rehire into the positions they held when they retired except under special circumstances where the person's unique skills are critical to ██████████ work. They are eligible for rehire into a different position, provided they are the most qualified of those who apply.
 - f) (██████████) When ██████████ applied for the two positions in PI's lab, she was informed incorrectly that she was ineligible for rehire. Incorrect information was also given to Ms. C in November 2010.
- 3) The following concerns the non-selection ██████████ for the position in PI's lab that was filled on April 23, 2011:
- a) ██████████ (age 61) and the successful candidate ("SC-1", age 41) applied in March 2011.
 - b) No applicant was interviewed by telephone or in person.

⁴ Ms. C worked for ██████████ for almost 40 years before accepting the early retirement package. Her husband was and is a principal investigator with ██████████. In April 2012, Ms. C was to work in her husband's lab. Ms. C applied through ██████████ human resources department along with 13 other candidates and was selected as the best candidate among the applicants.

INVESTIGATOR'S REPORT E11-0437

- c) PI hired SC-1 on April 23, 2011. She was an internal candidate who had worked in another laboratory at [REDACTED] for six years. She was using the same scientific techniques that PI was looking for in the position he was filling (GXD Scientific Curator).
 - d) (PI) He did not receive or consider [REDACTED] application from the human resources department. He compared [REDACTED] application to SC-1 after-the-fact and determined that [REDACTED] was less qualified than SC-1 and would not have been hired even if he received her application. Among other things, [REDACTED] has a bachelor's degree and SC-1 had nearly completed her doctorate degree ("Ph.D."). In the 20 years he has worked at [REDACTED] he has never hired anyone with a bachelor's degree and even a master's degree would be an exception. He believes that to be successful working in his lab, a person needs a Ph.D.
 - e) ([REDACTED]) She does not believe that PI discriminated against her because of her age. Her skills, experience and abilities are not fully explained in her application package. PI might have had a different/better view of her qualifications if he had interviewed her.
- 4) The following concerns the non-selection [REDACTED] for the position in PI's lab that was filled on September 8, 2011:
- a) Thirty-four (34) people applied for the position.
 - b) No applicant was interviewed by telephone. One candidate was interviewed in person.
 - c) The most qualified candidate withdrew before a job offer was made. The job was offered to the second best candidate ("SC-2," age 34) and s/he was hired on September 8, 2011.
 - d) (PI) SC-2 was a stronger candidate than SC-1, and far better qualified than [REDACTED] for the same reasons outlined in paragraph 3(d).
 - e) ([REDACTED]) See paragraph 3(e) above.

V. Analysis:

- 1) The Maine Human Rights Act ("MHRA") provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" 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 employment discrimination, except when based on a bona fide occupational qualification, for any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of age. 5 M.R.S. § 4572(1)(A).
- 3) The MHRA also provides, in part, that it is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification: ... D. [f]or any employer, ... prior to employment ... of any individual, to: ... (5) [e]stablish, announce or follow a

policy of denying or limiting, through a quota system or otherwise, employment ... opportunities of any group because of the ... age ... of that group." 5 M.R.S. § 4572(1)(D)(5).

- 4) Complainant here alleged that Respondent has a hiring policy denied or limited her employment opportunities at [REDACTED] and that [REDACTED] refused to consider her and/or rehire her because of her age. Respondent states that even though it incorrectly told Complainant that she was ineligible for rehire, the actual reason she was not hired when she applied for open positions was because she was not the most qualified candidate.
- 5) 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. § 3.02(A)(2)(c).
- 6) "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.* Overall, Complainant must show that the challenged practice has both an adverse impact on a protected class in general and on the Complainant in particular. See *Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 110 F.3d 2, 4 (1st Cir. 1997). To establish this type of claim, Complainant must show more than an adverse impact on Complainant in particular. See *Bramble v. American Postal Workers Union, AFL-CIO Providence Local*, 135 F.3d 21, 26 (1st Cir. 1998); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 121 (3rd Cir. 1983).
- 7) Once Complainant establishes a prima-facie case, Respondent must offer a job-related justification for the employment practice having a disparate impact. See *Maine Human Rights Com. v. Auburn*, 408 A.2d at 1265.

For example, if employment tests, oral or written, are at issue, there must be evidence indicating by 'professionally acceptable methods' that the employer's discriminatory tests are predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated. Or, if other 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. The touchstone is business necessity, not mere business convenience.

Id.

- 8) At the final stage of the analysis, even if Respondent is able to show business necessity for its challenged practice, "there may be affirmative evidence that other selection devices, without a similarly undesirable racial or sexual [or agist] effect, would also assure safe and effective work performance. Such affirmative evidence would have probative force to show that the defendant was using his selection device as a pretext for discrimination." *Id.* at 1268.
- 9) In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in a protected class, although other factors may have contributed to the employment

practice. *See id.* at 1268. The burden of persuasion remains with Complainant throughout this analysis. *Id.* at 1265.

Complainant's Prima-Facie Case

- 10) Here, Complainant has established a prima-facie case by showing that Respondent has or had a rehire policy or practice that had a disproportionately adverse impact on applicants based on age. The policy or practice applied to former employees who accepted early retirement in exchange for valuable consideration. The policy or practice was two-fold. First, such former employees were not eligible for rehire into the jobs they held when they accepted early retirement absent special circumstances where the person's unique skills were critical to [REDACTED] work.⁵ Second, employees in the cohort that accepted early retirement with [REDACTED] were told that they were not eligible for rehire into a different position.
- 11) These policies or practices had a disparate impact based on age because (a) employees who are qualified for early retirement are, for the most part, older than employees who are not eligible for retirement, (b) the policy/practice was not related to successful job performance, and (c) the policy/practice deprived employment opportunities to older persons while having no impact on employment opportunities for younger employees who are not eligible for retirement. To be eligible for the early retirement options offered by [REDACTED] in 2007, employees had to have a certain number of years of service and be over the age of 55. Other evidence of the discriminatory nature of the policy is that employees who leave [REDACTED] for reasons other than early retirement or in exchange for compensation do not appear to be automatically ineligible for rehire.
- 12) [REDACTED] has not argued that she was adversely affected by part "A" of the policy or practice. She was rehired on a temporary basis into the position she held at the time she accepted early retirement. She did not allege that her termination from that position after training her replacement was discriminatory.
- 13) [REDACTED] was, however, adversely affected by part "B" of the policy or practice, since she was repeatedly told that she was not eligible for rehire in to other positions at [REDACTED] and her application was not provided to the hiring authority, PI, when she applied for jobs in his laboratory.

Respondent's Job-Related Justification

- 14) Respondent states that it never adopted a policy that mandated that employees who elected to take early retirement or otherwise retire cannot apply for rehire. Respondent states that information provided to early retirees, [REDACTED] and Ms. C, was the result of was some confusion at [REDACTED] and that the information was incorrect. As such, Respondent did not offer a job-related justification for the employment policy or practice that had a disparate impact. Here, at the time of these events, Respondent told Complainant that the policy was "for the express purpose of assuring equal treatment" and "fairness." Respondent believed that rehiring people who accepted compensation for early retirement was unfair to employees who forfeited compensation to continue their careers. This explanation is not

⁵ This policy or practice would fall most heavily on employees with low-skill jobs.

job-related, since it has nothing to do with the knowledge, skills, physical or mental abilities, or experience required to perform a specific job.

Final Stage of Analysis – Announcing / Following a Policy that Discriminates based on Age

- 15) Complainant here was discriminated against on the basis of age because she and Ms. C were told that they could not apply for open positions at [REDACTED] for no other reason than because they had accepted early retirement.
- 16) Complainant's application for the GXD Scientific Curator was not passed along to the hiring decision-maker, PI, and she was not considered for employment prior to her filing this complaint. By informing [REDACTED] and others in her early retirement cohort that they were not eligible for rehire, [REDACTED] announced or followed a policy of denying or limiting employment opportunities to a group of employees because of the age of that group in violation of 5 M.R.S. § 4572(1)(D)(5).

Final Stage Analysis of Evidence – Failure to Hire

- 17) In order to prevail in her failure to hire claim, Complainant must show that she would not have suffered the adverse job action but for membership in a protected class, although other factors may have contributed to the employment practice. *See id.* at 1268. The burden of persuasion remains with Complainant throughout this analysis. *Id.* at 1265.
- 18) At the final stage of the analysis, Complainant has not demonstrated that she would have been hired if her application for the GXD Scientific Curator positions had been provided to the hiring decision-maker, with reasoning as follows:
 - a) PI has never hired a researcher into his lab whose highest academic degree was a bachelor's degree. PI believes that a research should have a Ph.D. or, at a minimum, a master's degree.
 - b) [REDACTED] conceded that her application for employment did not fully demonstrate the extent of the skills, experience and abilities she acquired on-the-job during her long career at [REDACTED]. She argued that if she had the opportunity to be interviewed, she would have been able to communicate her qualifications to PI.
 - c) However, PI did not grant any interviews when he selected SC-1 for the position in April 2011, and he only interviewed one candidate for the position filled in September 2011. Thus, it is unlikely that PI would have interviewed [REDACTED] given that she had a bachelor's degree, and given that her application was not strong, even if human resources had passed her application on to him for consideration.

Conclusions

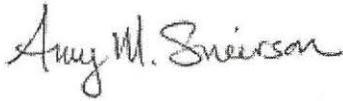
- 19) [REDACTED] policy and practice of announcing or following a no-rehire policy for early retirees unlawfully denied or limited the employment opportunities to a group of employees because of age and had an adverse effect on Complainant by discouraging her from seeking employment at [REDACTED]

20) The discriminatory policy or practice was not, however, is not the reason for the non-selection of Complainant for the positions she sought in 2011.

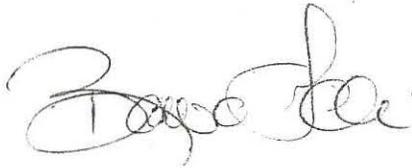
VI. RECOMMENDATION:

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

1. There are **Reasonable Grounds** to believe that Respondent [REDACTED] has or had a discriminatory policy or practice regarding rehiring retirees, including Complainant [REDACTED]
2. Conciliation of that portion of the claim should be attempted in accordance with 5 M.R.S.A. § 4612(3);
3. There are **No Reasonable Grounds** to believe that [REDACTED] failed to hire [REDACTED] because of her age; and;
4. That portion of the claim should be dismissed in accordance with 5 M.R.S.A. § 4612(2).



Amy M. Sneirson, Executive Director



Barbara Lelli, Chief Investigator

Exhibit A

Nov 4

As you are probably aware of, I am one of the individuals that took the retire/rehire option. Apparently there seems to be some misinformation going around that I hope you can clarify. In discussions with [REDACTED] she said I can NEVER apply for a position at [REDACTED] once I leave when the current grant ends. However, I heard today that this is not the case, that I can apply for a position, just not my current one. Which is correct? Thanks for the clarification. [REDACTED]

I have confirmed that the communications for the retiree medical did include the 'Never' rehire option. This was for the express purpose of assuring equal treatment. As I stated earlier, we have individuals who elected to stay but forfeited their retiree medical and had a contribution made to their 403(b). Those who elected to keep the retiree medical had to leave [REDACTED] employment to receive the benefit. A few individuals like yourself were granted an extension to assist in completing grant funded research or to train their successor. The understanding is that once this is completed, you would leave [REDACTED] and not be eligible for re-employment and be treated the same way as those who left immediately to either maintain the benefit or receive a lump sum distribution in lieu of the benefit. I believe I may have contributed to the confusion in my response to a question posed yesterday. I plan to cycle back and clarify. Thanks for checking in. [REDACTED]

From: [REDACTED] [mailto:[REDACTED]] Sent: Thursday, November 04, 2010 12:05 PM To: [REDACTED]
Subject: Re: Rehire Info Thanks for getting back to me, [REDACTED]...with the clarification.
Since you mention that the "communications" for the retiree medical did include the word "never" rehire option, could you please send me the document that states this? I've gone through all my paperwork and do not see where this was communicated to us in written form. [REDACTED]

Attached is the communication which allowed you to be 'rehired' for a specific term limit so your word 'never' which I responded to and used below actually isn't appropriate because you were in essence 'rehired'. However, the SMT did state in the attached follow up communication to Group 1 employees that the rehire was to be only under specific circumstances and as approved by them. The rehire was meant to be for a specific term limit given that other employees who wanted to maintain the benefit had to leave [REDACTED] in order to receive it. A special consideration was made for a few individuals like yourself. Whether that special consideration could be exercised a second time is not explicitly stated in the memo; however, given that the criteria for being considered was very specific, it could be inferred that the SMT intended this to be a one-time only event and we have been tracking it as such, hence my response to your 'never'. I hope you can appreciate the fairness issue surrounding this given that a number of employees who left to maintain the benefit did not receive this special consideration nor did those employees who forfeited the benefit by choosing to stay employed. [REDACTED]

You are correct - see email just sent. From: [REDACTED] [mailto:[REDACTED]] Sent: Thursday, November 04, 2010 1:24 PM To: [REDACTED] Subject: Re: Rehire Info [REDACTED], In rereading your email, I want to clarify some things: Those who elected to keep the retiree medical had to leave [REDACTED] employment to receive the benefit. A few individuals like yourself were granted an extension to assist in completing grant funded research or to train their successor. The understanding is that once this is completed, you would leave [REDACTED] and not be eligible for re-employment and be treated the same way as those who left immediately to either maintain the benefit or receive a lump sum distribution in lieu of the benefit. Individuals like myself did retire from [REDACTED] (losing all our sick time), and are classified as "retirees". We had to reapply for our old job and were rehired as new employees, losing our seniority in a number of areas (vacation, wellness credit, etc.) Therefore, we have already left [REDACTED] once and have been rehired as new employees, getting all the benefits as a new employee. So, I don't quite understand your reasoning above.... we have already been rehired once... nor do I understand the phrase...."that we were granted an extension". There was no extension, we had to apply as retirees. Is there a legal issue here??? I appreciate your time, [REDACTED] As you might guess, this came as a surprise to me so I have to question it all. [REDACTED]