



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

August 23, 2013

E11-0651

[REDACTED]

v.

[REDACTED] Program ([REDACTED])

I. Complainant's Charge:

Complainant [REDACTED] has a hearing disability. She has alleged that she was discriminated against, denied reasonable accommodation, terminated and retaliated against based on disability in employment¹ by [REDACTED] Program (" [REDACTED]"). She alleged that she was deprived of the benefits, privileges and services she had previously enjoyed including, but not limited to, an equal opportunity to receive benefits such as tax-free remuneration for mileage, training, connection in the community and experience.

II. Respondent's Answer:

Respondent [REDACTED] Program (" [REDACTED]") has taken the position that Complainant [REDACTED] was never a [REDACTED] employee; rather, she was always a volunteer. [REDACTED] also contends that Ms. [REDACTED] was provided with the requested accommodation and was terminated because of performance issues.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: April 27, 2011 (continuing action).
- 2) Date complaint filed with the Maine Human Rights Commission ("MHRC"): November 4, 2011.

¹ Ms. [REDACTED] complaint also alleged that [REDACTED] discriminated against her as a public accommodation. [REDACTED] is a "public accommodation" by virtue of its operating a "social service center establishment." 5 M.R.S. § 4553(8)(K). However, because Ms. [REDACTED] sought to provide a service for others on behalf [REDACTED] rather than receive a service from Respondent, she was not denied the accommodations, advantages, facilities, services, or privileges of a public accommodation. *See, e.g.*, Commission Counsel Memo 3/31/2010, http://www.maine.gov/mhrc/guidance/memo/20100331_g.pdf. The public accommodation claim was administratively dismissed for failure to substantiate, pursuant to 94-348 C.M.R. ch. 2, § 2.02(H)(2).

- 3) Respondent employs approximately 280 people and is subject to the Maine Human Rights Act, the Americans with Disabilities Act, Title VII of the 1964 Civil Rights Act as amended, as well as state and federal regulations.
- 4) Complainant is represented by [REDACTED]. Respondent is represented by [REDACTED], Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution Conference ("IRC"). Based on this review, the complaint has been identified for a shortened Investigator's Report, which summarizes the allegations and denials in relationship to the applicable law but does not fully explore the factual issues presented. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

- 1) The parties and issues in this case are as follows:
 - a) Complainant [REDACTED] was a volunteer driver for [REDACTED] for nearly 17 years.
 - b) Respondent [REDACTED] is a not-for-profit social services agency which has served the economically disadvantaged people of Central Maine for more than 40 years. Among the services provided to the needy are home ownership, repair and weatherization services, heating assistance, transportation, family services, childcare services, Head Start, and a teen center.
 - c) Important third parties: Transportation Manager, SB; Dispatcher, CX.
 - d) Complainant [REDACTED] who has a hearing disability, alleged that she was discriminated against, denied reasonable accommodation, terminated and retaliated against based on disability in employment by [REDACTED]. She alleged that she was deprived of the benefits, privileges and services she had previously enjoyed including but not limited to an equal opportunity to receive benefits such as tax-free remuneration for mileage, training, connection in the community and experience. Respondent [REDACTED] has taken the position that Complainant [REDACTED] was never a [REDACTED] employee; rather, she was always a volunteer. [REDACTED] also contends that Ms. [REDACTED] was provided with the requested accommodation and was terminated because of performance issues.
- 2) The initial major issue in this matter is a difference of opinion about whether Ms. [REDACTED] was an employee or a volunteer. The parties offer the following:
 - a) (Ms. [REDACTED] [REDACTED] had the power to hire me and terminate my employment. For nearly 17 years, I devoted myself to serving [REDACTED] and its clients. I had no other job. I took my job at [REDACTED] very seriously and I was devastated when I was informed by Transportation Manager in a letter that I was terminated because of my disability; "because communications between staff and yourself have become almost impossible in regards to phone conversations."
 - b) (Ms. [REDACTED] During the years I drove for the agency, I received remuneration in the form of mileage; 40 cents per mile, generally or 44 cents per mile for a MaineCare trip, which was either

reimbursement or remuneration. During my nearly 17 years with KVCAP, although I used two of my own vehicles,² I was trained, I enjoyed connection to the community and equipment to do my job, including a phone and charger among other things. For the years that I worked as a driver, [REDACTED] exercised control over how I performed each driving assignment. The agency provided me with the tools I needed to do my job, including my daily assignments, trip manifest, dispatchers, and access to [REDACTED] facilities and driver workshops. [REDACTED] controlled the information I could provide to clients, and I was not allowed to discuss anything personal with the clients. I was required to keep all client information confidential. I was required to maintain my car in safe condition and to keep it clean, both inside and out at all times. I was required to conduct a vehicle safety pre-trip check prior to every workday. I kept my 2004 Subaru as was mandated by agency policy.

- c) [REDACTED] The agency's lifeblood is its network of uncompensated volunteers without which it could not operate. These individuals total between 800 and 900 in number. Ms. [REDACTED] was a 17-year volunteer transportation driver when her relationship with [REDACTED] ended in spring, 2011.
 - d) [REDACTED] volunteer drivers receive no compensation and/or benefits in connection with their service. They are provided with a cell phone which may be used only in the performance of their [REDACTED] driving function. They are provided with the mileage reimbursement at a rate which is mandated by the Maine Department of Health and Human Services. These reimbursement monies are not taxed by federal or state taxing authorities.
- 4) Ms. [REDACTED] provides the following about her 17-year experience with [REDACTED]
- a) I was able to do my job with or without reasonable accommodation despite my hearing loss. Nonetheless, on or about April 27, 2011, [REDACTED] terminated me as a volunteer and/or employee due to my disability and request and need for reasonable accommodation.
 - b) [REDACTED] is a public accommodation which openly offers and provides opportunities for volunteer drivers to transport children and adults to medical visits, childrens' services and other programs throughout Maine. Volunteer opportunities at [REDACTED] constitute a benefit, privilege or service of a place of public accommodation. As a volunteer driver at [REDACTED] I enjoyed the accommodations, advantages, facilities, goods, services or privileges of a public accommodation.
 - c) Although I was classified as a "volunteer driver" and received no hourly wage, [REDACTED] provided me a tax-free mileage reimbursement which was directly deposited into my account. Transportation Manager was my supervisor. [REDACTED] required me to pass background checks through the Maine Department of Motor Vehicles, State Bureau of Identification, and the

² [REDACTED] argues that Ms. [REDACTED] was a volunteer notwithstanding payment/reimbursement for mileage and asserts that volunteers are not "employees" under the MHRA. Ms. [REDACTED] characterizes the mileage payment as a "reimbursement for costs associated with the use and operation of her car while performing volunteer services." Ms. [REDACTED] describes it as "tax-free remuneration" and "a livelihood." It is unknown whether the payment was reimbursement equal to Complainant [REDACTED] driving costs or remuneration in excess of those costs. This would depend on factors such as the type of car Ms. [REDACTED] drove, its condition and her driving habits. Ms. Farnsworth stated, in response to this issue, that during her years with [REDACTED] she drove two Subaru 4-door vehicles.

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Department of Human Services. I had access to [REDACTED] facilities and was given a cell phone and chargers. I attended all driver workshops as required for the job. [REDACTED] had the power to hire and discharge me, which they did.

- d) Sometime around March 2011, I asked [REDACTED] for reasonable modification or accommodation. I asked [REDACTED] to text me, instead of calling me, on the cell phone when they needed to give me any updated instructions for pickup or dropping off riders. This was because of my hearing disability. Texting was an effective accommodation because it allowed me to receive any information necessary from [REDACTED] by text instead of voice which was difficult for me due to my hearing disability.
 - e) [REDACTED] agreed to text me and did so for about two weeks. My phone would buzz, alerting me to a text message. I would then safely pull over to the side of the road to review the text. This worked well and I was able to execute all jobs effectively.
 - f) Without providing me with an explanation, [REDACTED] discontinued texting me.
 - g) On or about April 27, 2011, I received a letter from Transportation Manager. She informed me that I was terminated because "communication between staff and yourself [sic] has become almost impossible in regards to phone conversations and that is a very important part of our process."
 - h) I was devastated to be denied the continued benefit, privilege or service that I had received from [REDACTED]. Being a volunteer driver provided me with a livelihood and connected me to my community for nearly 17 years. When I was terminated, I became isolated and it was difficult for me to cope.
- 5) [REDACTED] provides the following:
- a) [REDACTED] volunteer drivers are provided with a cell phone which may be used only in the performance of their [REDACTED] driving function. They are provided with mileage reimbursement at a rate which is mandated by the Maine Department of Health and Human Services. These reimbursement monies are not taxed by federal or state taxing authorities.
 - b) Ms. [REDACTED] drove out [REDACTED] Augusta transportation unit. She would typically pick up her written trip manifest at the Augusta [REDACTED] transportation office on the day before her scheduled appointments. If scheduling changes were to occur on the day of an appointment, dispatching would contact Ms. [REDACTED] by cell phone to advise of the change. During the 2010-2011 timeframe, there were roughly 30 volunteer drivers who drove out of the Augusta office.
 - c) During Ms. [REDACTED] entire time with [REDACTED] she was hearing impaired and utilized hearing aids. In late fall 2010, Ms. [REDACTED] made two requests of dispatching, neither one of which she made known to her supervisors. First, she requested that all cell phone calls to her be made on her personal (as opposed to her [REDACTED] cell phone; second, she requested that text messaging be utilized in contacting her for trip cancellations/modifications. Dispatching complied with these requests. Text messaging, which dispatching tested with Ms. [REDACTED] (and some other volunteer drivers) in response to Ms. [REDACTED] request, proved to be

problematic. This was due to irregularities in the service provided by [REDACTED] cell phone service provider. On numerous occasions, text messages did not arrive or arrived late. Also, operator error among the drivers on the road produced deleted messages and the like. In the end, dispatching concluded that the most effective method of communication with its drivers (including Ms. [REDACTED] was to utilize both texting and cellular calls to update trip manifests, which dual method was utilized with Ms. [REDACTED]

- d) For most of Ms. [REDACTED] volunteer service with [REDACTED] she did a competent job. In the 2010-2011 timeframe, however, her performance deteriorated to the point where in late April 2011, [REDACTED] made the decision to no longer utilize her volunteer driving services. These performance problems included (1) repeated missed and/or late appointments even though the appointments were scheduled on Ms. [REDACTED] written trip manifest; (2) repeated last minute cancellations by Ms. [REDACTED] which placed undue strain on [REDACTED] dispatchers; (3) driving to long trip destinations which had clearly been cancelled using the dual communication method referenced above, thus accruing a mileage reimbursement for no Agency purpose; (4) complaints of erratic driving, including excessive speed and swerving in and out of lanes; (5) repeated refusal to accommodate passengers with disabilities, including making one tall-statured passenger with an obvious mental impairment and leg braces ride in the back of Ms. [REDACTED] cramped vehicle, causing the consumer's caregiver to insist that Ms. [REDACTED] no longer transport the consumer; (6) refusing consumer requests to keep the volume of the radio at an acceptable level, remarking that she could not hear the radio otherwise; (7) bringing her dog on the road with her while transporting consumers in violation [REDACTED] policy; and (8) failing to advise [REDACTED] of an accident in violation [REDACTED] policy.
- e) [REDACTED] acceded to Ms. [REDACTED] requests for accommodation even though (1) they were not made to, nor shared with [REDACTED] management; and (2) as Ms. [REDACTED] was a volunteer driver, [REDACTED] was under no legal obligation to do so.
- 6) Ms. [REDACTED] responds to the alleged performance deficiencies which form the basis for [REDACTED] termination of her employment (with [REDACTED] as "R" and Ms. [REDACTED] as "C"):

R: Repeated missed and/or late appointments even though the appointments were scheduled on her written trip manifest. **C:** "On the day before I was scheduled to work, I had to pick up my trip manifest from [REDACTED]. This was a list of my assignments for the following day. My trip manifests were assigned to me containing the names of each client I was to pick up and drop off and special instructions or needs of each client. I also had to calculate and record my mileage and note whether the client was a no-show, cancel, etc., and report back to [REDACTED]"

R: Repeated last-minute cancellations by Ms. [REDACTED] which placed undue strain on [REDACTED] dispatchers. **C:** "If there was any issue that would delay or change the schedule, or if a client was a no-show when I went to pick her up, I had to call [REDACTED] and report it on the trip manifest. I was not allowed to leave a location without authorization from [REDACTED]. When I called, dispatch would then give me further instruction. I was never allowed to cancel, change a job assignment or schedule rides for clients on my own. All requests and changes had to go through [REDACTED]"

R: Driving to long trip destinations which had clearly been cancelled using the dual communication method referenced above, thus accruing mileage reimbursement for no Agency

purpose. C. "The only time this happened that I can recall was when [REDACTED] texted me while I was already en route on the highway to Portland, Bangor or Lewiston. I would have to pull off the highway and turn around and come back, but this could not happen right away. I would have to get off an exit to turn around. I could not make u-turns on the highway. Any mileage reimbursement under these circumstances was not my fault. [REDACTED] never raised this as an issue or criticized me for this."

R: Complaints of erratic driving, including excessive speed and swerving in and out of lanes.

C. "[REDACTED] never brought me in or shared any of these types of complaints with me. I have no idea where this is coming from. I did not drive erratically and I did not swerve in and out of lanes. Passengers never said a word to me. Instead, many would tell me that they wish they could have me as a driver every time."

R: Repeated refusal to accommodate passengers with disabilities, including making one tall-statured passenger with an obvious mental impairment and leg braces ride in the back seat of Ms.

[REDACTED] cramped vehicle causing the consumer's caregiver to insist that she no longer transport the consumer. C. "The agency said that I refused to accommodate people with disabilities. This is not true. If the person had a walker or cane, I got out and went around and asked if they needed my help. When they said that they wanted to do it themselves, I would never force my help on them. I do not recall ever having a tall passenger with leg braces sitting in the back of my vehicle. If I did have a client who needed to sit in the front, of course they could. [REDACTED] never raised this issue with me. I recall transporting a passenger who used a wheelchair, who sat in the front of my vehicle because it was easier to get her in and out. I folded her wheelchair and placed it in my vehicle. I never minded accommodating clients who had disabilities."

R. Refusing consumer requests to keep the volume of her radio at an acceptable level, remarking that she could not hear the radio otherwise. C. "The Agency alleges that I refused a customer request to keep my radio 'at an acceptable level.' I disagree and would never refuse a customer this sort of request. If a customer wanted the radio up, I would turn it up. If they wanted the volume low, I'd turn it low. If they wanted it off, I would turn it off. I did not mind. [REDACTED] never raised this issue with me."

R. Bringing her dog on the road with her while transporting consumers in violation [REDACTED] policy. C. "I did not bring my dog on the road while transporting consumers in violation of [REDACTED] policy. This is true – I did drive with a client with my dog in the car some years back. However, it was with the permission of the Agency. I recall this day clearly. I had gone into work on a Friday to pick up my trip manifest for my next shift. I was not scheduled to drive any clients at that time, so I had brought my dog with me in the car. My dog is a 5-pound Pomeranian Chow. She is well behaved, very clean and affectionate. While picking up my trip manifest in the office, Dispatcher told me that a client needed a ride. I said that I couldn't do it because I had my dog in the car with me. Dispatcher told me that she would ask the client if they would mind the dog in the car. Dispatcher told me that the client did not mind, so she prepared a trip manifest authorizing the transport. I drove the client to where he needed to go. I do not understand why [REDACTED] is criticizing me for this, when I was thanked at the time for taking the client."

R. Failing to advise [REDACTED] of an accident in violation of Agency policy. C. "This is not true. I recall that I had an accident around January or February of 2007 when another car hit me and it was not my fault. I did not have a client in my car at the time, as I had just dropped off a client and was going to pick up another client. I called the office and reported the accident immediately. I told Dispatcher that I had an accident and I wanted to make sure another driver could cover my assignments that day. Former Office Manager came to the accident site to see me."

7) This concerns the issue of cellular phone messages with back-up texting:

- a) During the IRC, Ms. [REDACTED] was credible in her assertion that the March 2011 accommodation she requested was that the texts be sent to the [REDACTED] phone which she utilized to do the work. Respondent had alleged that Ms. [REDACTED] was using her own personal phone for this texting rather than the [REDACTED] provided cell phone. Respondent was incorrect about which phone Dispatch was texting; this was not her personal property. She reiterated, "I asked that I be notified of changes in trip manifests and it was agreed upon. When the office texted me, I pulled over safely to review instructions and then completed my driving duties. [REDACTED] never indicated this was a problem or suggested other ways of accommodating me. Instead, they terminated me even though I could do my job despite my hearing disability. Two months after the Agency terminated my employment, I was hired to drive for Community Concepts in Lewiston and I continue to do that work today."
- b) [REDACTED] offered this explanation during the IRC: "Text messaging, which dispatching tested with Ms. [REDACTED] [and some other volunteer drivers] in response to Ms. [REDACTED] request, proved to be problematic. This was due to irregularities in the service provided by [REDACTED] cell phone service provider. On numerous occasions, text messages did not arrive or arrived late. Also, operator error among the drivers on the road produced deleted messages and the like. In the end, dispatching concluded that the most effective method of communication with its drivers, including Ms. [REDACTED] was to utilize both texting and cellular calls to update trip manifests, which dual method was utilized with Ms. [REDACTED]"

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. § 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 prohibits discrimination against an "employee," in relevant part, as follows: "It is unlawful employment discrimination, in violation of this Act, . . . [f]or any employer [because of physical or mental disability] to 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).
3. Discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee. . . ." 5 M.R.S. § 4553(2)(E). The MHRA also makes it "unlawful for a person to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted or

protected by this Act or because that individual has exercised or enjoyed, or has aided or encouraged another individual in the exercise or enjoyment of, those rights." 5 M.R.S. § 4633(2).

Employee Status

4. The MHRA does not expressly address whether an individual must receive any payment at all in order to be an "employee." It defines "employee," in relevant part, simply as "an individual employed by an employer." 5 M.R.S. § 4553(3). *Compare with* 26 M.R.S. § 832(1) (Whistleblowers' Protection Act) ("[e]mployee" means a person who performs a service for wages or other remuneration under a contract of hire, written or oral, expressed or implied") (emphasis added). Courts recognize that this terminology "is completely circular and explains nothing." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S.Ct. 1344, 1348 (1992). When a statute does not define a term that has a settled meaning at common law, the common-law definition should be applied. *See Tremblay v. Murphy*, 111 Me. 38, 53-54 (1913) (currently published sub nom. *Pelletier v. O'Connell*, 88 A. 55, 63) (holding that when a statute is silent, common law principles must be applied); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S.Ct. 1673, 1679 (2003) ("congressional silence often reflects an expectation that courts look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law"). *Cf. Lopez v. Massachusetts*, 588 F.3d 69, 83 (1st Cir. 2009) ("A series of Supreme Court decisions have established that when a statute contains the term "employee" but does not define it, a court must presume that Congress has incorporated traditional agency law principles for identifying 'master-servant relationships.'").
5. In Maine, the settled common law does not require an individual to receive any compensation in order to be an "employee." *See Lunt v. Fidelity & Cas. Co. of New York*, 28 A.2d 736, 739-740 (Me. 1942) ("a sufficient contract of employment is created by a mutual agreement that one is to labor in the service of another, and that the question of compensation is not material"); *Fournier v. Rochambeau Club*, 611 A.2d 578, 579 (Me. 1992) ("That Fournier was not paid for his services does not preclude the existence of an employment relationship, although a contrary rule applies for purposes of workers' compensation.") (citations omitted). *Cf. 30 C.J.S. Employer—Employee Relationship* § 10 (2012) ("The fact of compensation and the manner of paying it are factors to be considered in determining whether an employer-employee relationship exists, but such considerations are not conclusive."). Accordingly, regardless of whether Ms. [REDACTED] mileage payments constitute compensation, she may still be found to be an "employee" for MHRA purposes.³
6. This interpretation is different from the position taken by the Equal Employment Opportunity Commission ("EEOC") and federal courts, which require the existence of remuneration in order for a person to be an "employee" under substantively identical definitions of "employee" in federal statutes.⁴ *See, e.g., EEOC Compliance Manual* § 2-III(a)(1)(c) ("Volunteers usually are not protected 'employees.' However, an individual may be considered an employee of a particular entity if, as a result of volunteer service, s/he receives benefits such as a pension, group life insurance,

³ The term for an employee who does not receive compensation is a "gratuitous employee." *See Fournier v. Rochambeau Club*, 611 A.2d at 579.

⁴ While these interpretations provide guidance in interpreting the MHRA, they are not controlling. *See, e.g., Jackson v. State*, 544 A.2d 291, 296 n.7 (Me. 1988).

workers' compensation, and access to professional certification, even if the benefits are provided by a third party. The benefits constitute 'significant remuneration' rather than merely the 'inconsequential incidents of an otherwise gratuitous relationship.'”(footnotes and citations omitted); *Graves v. Women's Professional Rodeo Ass'n, Inc.*, 907 F.2d 71, 73 (8th Cir. 1990) (interpreting Title VII of the Civil Rights Act of 1964) (relying on a dictionary definition of “employee” because “the legislative history explicitly provides that the dictionary definition should govern the interpretation of ‘employer’ under Title VII”); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 295, 105 S.Ct. 1953, 1958 (1985) (interpreting Fair Labor Standards Act).

7. These interpretations are not persuasive guidance here, however, in light of the settled Maine common-law meaning of employee, which does not require compensation. In addition, the federal interpretations can be traced to the Title VII legislative history—inapplicable to the MHRA—which “explicitly provides that the dictionary definition should govern the interpretation of ‘employer’ under Title VII.” *Graves v. Women's Professional Rodeo Ass'n, Inc.*, 907 F.2d at 73. Moreover, decisions interpreting the definition of “employee” in the Fair Labor Standards Act to require compensation should not be relied upon in this context because of the different purposes behind the FLSA and the MHRA. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152, 67 S.Ct. 639, 641 (1947) (FLSA) (“The definition ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages.”); *Percy v. Allen*, 449 A.2d 337, 342 (Me. 1982) (“To the extent that there exists an identity of purpose and objectives as between the Maine and federal provisions, reference to the latter in construing the former is entirely appropriate.”). It would be entirely consistent with the purposes behind the MHRA, by contrast, to prevent employment discrimination against a gratuitous employee. See 5 M.R.S. § 4552 (“[t]o protect the public health, safety and welfare”).
8. Here, because Ms. [REDACTED] may be considered an “employee” regardless of whether she received any compensation, the analysis of her employment disability claim will proceed.

Disability Discrimination

9. The Maine Human Rights Act defines “physical or mental disability,” in relevant part, as follows:
 1. **Physical or Mental Disability, defined.** “Physical or mental disability” means:
 - A. A physical or mental impairment that:
 - (1) Substantially limits one or more of a person’s major life activities;
 - (2) Significantly impairs physical or mental health; or
 - (3) Requires special education, vocational rehabilitation or related services;
 - B. Without regard to severity unless otherwise indicated: absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn’s disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson’s disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury;

- C. With respect to an individual, having a record of any of the conditions in paragraph A or B; or
- D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A or B.

2. Additional terms. For purposes of this section:

- A. The existence of a physical or mental disability is determined without regard to the ameliorative effects of mitigating measures such as medication, auxiliary aids or prosthetic devices; and
- B. "Significantly impairs physical or mental health" means having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population.

5 M.R.S. § 4553-A,

- 10. Ms. [REDACTED] was a qualified individual with a hearing disability as defined by the Maine Human Rights Act. For almost 17 years, she performed her job satisfactorily. She could do the job of driver with a reasonable accommodation of communicating by written information including trip manifests and text rather than phone conversation. Her employer had a continuing need for the work she had performed but terminated her after refusing to continue providing her with reasonable accommodation for her hearing impairment.
- 11. Respondent abruptly terminated her position because of "communication" issues. Its termination letter to Ms. [REDACTED] explicitly informs that Ms. [REDACTED] services are no longer needed because of her inability to communicate via phone conversation. Respondent's termination statement constitutes direct evidence of unlawful discrimination; therefore, a mixed-motive analysis applies.
- 12. A mixed-motive analysis applies in cases involving "direct evidence" of unlawful discrimination. *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination. . . ." *Id.* Where this evidence exists, Complainant "need prove only that the discriminatory action was a motivating factor in an adverse employment decision." *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Doyle*, 2003 ME 61, ¶ 14, n.6, 824 A.2d at 54, n.6. Upon such a showing, in order to avoid liability, Respondent must prove "that it would have taken the same action in the absence of the impermissible motivating factor." *Id.*; *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 276-77, 109 S. Ct. 1775, 1804 (1989) (O'Connor, J., concurring).⁵
- 13. Ms. [REDACTED] has shown that her inability to communicate by phone due to her hearing loss was a motivating factor in [REDACTED] adverse employment decision.

⁵ The continued application of the mixed-motive analysis has been called into question as a result of the U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2348 (2009), in which the Court held that the burden of persuasion does not shift to defendant even with "direct evidence" of unlawful discrimination in a federal Age Discrimination in Employment Act case. That decision did not interpret the Maine Human Rights Act, however, and the guidance from the Maine Supreme Court in *Doyle* will continue to be followed.

14. Respondent here was unable to show that it would have terminated Ms. [REDACTED] if she had not had communication issues with her cell phone. In its April 27, 2011 termination letter, Respondent introduced, for the very first time, a litany of performance deficiencies for which Ms. [REDACTED] was being terminated. Notably, none of these performance problems were raised prior to Ms. [REDACTED] request for accommodations. Even if they had been brought up before the disability-related issue arose, as discussed above Ms. [REDACTED] has addressed each one of these alleged issues with her performance.
15. It is found that Respondent unlawfully discriminated against Complainant Ms. [REDACTED] based on disability in terminating her employment.

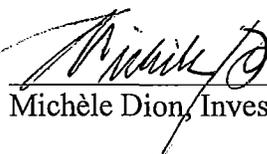
VI. Recommendation:

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] discriminated against Complainant [REDACTED] in terminating her employment because of physical disability; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S. § 4612 (3).



Amy M. Sheirson, Executive Director



Michèle Dion, Investigator