



Maine Human Rights Commission
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INVESTIGATOR'S REPORT
E12-0219

January 28, 2013

██████████ (██████████)

v.

██████████ ██████████

I. Complainant's Complaint:

Complainant ██████████ (hereinafter "Complainant" or "██████████" alleged that Respondent ██████████ (hereinafter "Respondent" or "the Hospital") violated the medical examination provisions of the Maine Human Rights Act (the "Act") and withdrew a conditional offer of employment because of disability discrimination.

II. Respondent's Answer:

Respondent alleged that the offer was withdrawn because, in the medical opinion of the doctor who conducted the post-offer medical screening, Complainant could not safely perform several essential functions of the position.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: December 19, 2011.
- 2) Date complaint filed with the Maine Human Rights Commission: May 10, 2012.
- 3) Respondent has about 960 employees and is subject to the Maine Human Rights Act and the Americans with Disabilities Act as well as state and federal employment regulations.
- 4) Respondent is represented by ██████████. Complainant is represented by ██████████.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and a follow-up request for information. Based on this review, this complaint has been identified for a brief 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) The Hospital is a community health system that includes a 58-bed acute care hospital in Sanford, Maine.
 - b) ██████ applied a position as Environmental Services Technician ("EVS") in the Hospital's Housekeeping Department. He received a conditional offer of employment on November 30, 2011.
 - c) "Dr. D" is employed in the Hospital's Occupational Health department. He conducted ██████ post-offer medical screening on December 5, 2011. By letter dated December 19, 2011, ██████ was informed that he had not successfully passed the post-offer screening.
 - d) ██████ alleged that the Hospital violated the medical examination provisions of the Act and withdrew the conditional offer of employment because of disability discrimination.
 - e) The Hospital alleged that the offer was withdrawn because, in the medical opinion of the doctor who conducted the post-offer medical screening, ██████ could not safely perform several essential functions of the position.
- 2) Complainant provided the following sworn statements:
 - a) He has a history of a serious knee injury that required surgery in 1997, about 15 years prior to December 2011. His knee condition lasted more than six months and substantially limited his ability to walk, stand, and work. Also, his knee condition significantly impaired his health.
 - b) During the course of his post-offer medical screening, Dr. D expressed concern about ██████ history of knee condition/surgery. ██████ explained that the condition had been treated effectively and that it no longer limited him. ██████ also discussed the types of jobs that he had held prior to receiving the conditional offer from the Hospital, making it clear that he performed physical labor on a daily basis without any issues.
 - c) Dr. D told ██████ that he was concerned about the possibility that if ██████ started work for the Hospital, that he could potentially slip or fall and reinjure his knee at some point in the future. ██████ reiterated that he was not limited at all by his knee condition and offered to run up and down the stairs in the building to demonstrate that his knee would not adversely impact his ability to perform the duties of my job. Dr. D continued to express concern that ██████ could potentially reinjure his knee in the future.
 - d) Subsequent to this, the Hospital informed him that Dr. D did not believe that he would be able to meet the essential functions of the position.
- 3) Respondent provided the following documents:
 - a) The Hospital has a policy of non-discrimination on the basis of disability.

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- b) The Hospital has a policy of providing reasonable accommodations to individuals with disabilities.
- c) Complainant's application and resume indicated that he worked as a crew member for a landscaping company (1999-2004), an applicator for a roofing company (2003-2004) and an operational supervisor for a pressure washing business (2004-2009).

- d) The job description for EVS Technician contains the following:

Physical requirements: "Motor coordination is necessary, manual and finger dexterity to reach, handle, lift and carry environmental services supplies and equipment. Ability to lift 45 pounds, extensive walking, bending, stooping, climbing, pulling and pushing. Visual acuity (corrected) necessary.

Working conditions: "Work is heavy with extensive, living, moving equipment, walking, standing, pushing, pulling, bending, stooping...Exposure to risk from moving equipment parts."

- e) The medical questionnaire completed by [REDACTED] on December 5, 2011 indicates that he had surgeries/operations on his knee as well as other procedures. The physical examination record shows that his physical capacity was within normal limits. [REDACTED] was able to push 120 pounds, pull 240 pounds, and squat for 30 seconds with support. He was able to climb stairs for 5 minutes at a quick pace.
- f) Notes apparently taken during the [REDACTED] examination indicate that he was asked about his job history, prior surgeries, recovery, and residual symptoms.
- g) A fax from Dr. D to the HR Director, dated December 5, 2011, sent at 12:08 PM, indicated that [REDACTED] "met" the requirements of "GOHC Physical Capacity"¹ and that he "met with following restrictions – see enclosed." It is unclear what restrictions were enclosed.
- h) A second fax from Dr. D to the HR Director, dated December 5, 2011, sent at 1:07 PM, indicated "this candidate requires further post-offer/pre-work testing to fully evaluate ability to meet the essential functions of the designated position" and "Recommend functional capacity evaluation."
- i) An exchange of emails between HR and Occupational Health indicates that there were discussions about whether or not to refer [REDACTED] for a functional capacity examination or whether to have Dr. D perform a physical examination.
- j) A letter from the Human Resources Director to [REDACTED] dated December 19, 2011, reads in part: "We have been notified by our Employee Health and Wellness department on 12/13/11 that you would not be able to meet the essential functions of the EVS Tech position."

¹ "GOHC Physical Capacity" includes heel/toe strength, balance, squat w/support, 25# push and pull and 100# pivot transfer/No lift...."

4) Respondent's counsel provided the following:

- a) The Hospital has a post-offer screening policy that it applies to all new hires and current employees selected for transfer. Pursuant to that policy, applicants must pass a post-offer screening conducted by the Hospital's Occupational Health department as a condition of employment. The screening is job-related and designed to determine whether applicants can safely perform all of the essential functions of the particular position for which they have received an offer.
- b) After completion of the screening, the Human Resources department reviews Occupational Health's recommendation and makes a final employment decision.
- c) EVS Technicians are responsible for maintaining the hospital in a clean and sanitary environment. As an EVS Technician, Complainant would have had to, among other things, dry and wet mop floor surfaces and periodically strip and refinish floors throughout the hospital. Stripping floors requires Technicians to get on their hands and knees in order to scrape the corners and edges of the floors (where floor meets wall) along the entire perimeter of every room in the hospital. This activity requires prolonged kneeling, crouching, squatting, and crawling. In addition, EVS Technicians must move equipment which sometimes requires them to squat in order to properly lift.
- k) On December 5, 2011, Complainant underwent a post-offer screening. In order to complete the screening, Dr. D, staff physician at Occupational Health, reviewed the job description of the EVS Technician position and discussed the physical requirements of the job with the Director of Environmental Services ("Director"), reviewed Complainant's medical records² and history, and met with Complainant. The screening revealed that Complainant had a knee condition that had required surgery. During the screening, Dr. D asked Complainant questions about his mobility and pain given his knee condition. Dr. D also asked Complainant to demonstrate that he could perform a full squat to the floor. Dr. D recalls that Complainant was unable to do so because of intense pain in his knee.³
- l) Dr. D made a preliminary determination that Complainant had physical limitations that would prevent him from safely performing the essential functions of the job that required him to kneel, crouch, squat or crawl.
- m) On December 5, 2011, Occupational Health sent a fax to the Human Resources department suggesting the possibility of a functional capacity exam to further evaluate Complainant's limits. The suggestion of a functional capacity examination was preliminary. After Dr. D reviewed his preliminary determination with his superior, Dr. U, Occupational Health's Medical Director, and with the Hospital's Director of Human Resources, he made a final determination that Complainant must avoid all kneeling, crouching, squatting, or crawling.
- n) Upon learning of these restrictions, the Human Resources Director informed Complainant by letter dated December 19, 2011 that he had not successfully passed the post-offer screening.

² Respondent did not submit copies of any medical records obtained and reviewed by Dr. D.

³ Records submitted by Respondent do not reflect this and Complainant states that it is false.

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- o) Given that the essential functions of the EVS Tech position require kneeling, crouching, squatting, and crawling - the precise activities which Dr. D determined Complainant could not safely perform – the Hospital made the determination that Complainant could not safely perform the job.
 - p) ██████ ultimately determined that a functional capacity examination was unnecessary given Dr. D's medical opinion that Complainant could not safely kneel, crouch, squat, or crawl.
 - q) Complainant did not suggest or request, nor is the Hospital aware of, any accommodations that would enable him to perform these essential functions.
 - r) Dr. D strongly disagrees with Complainant's insistence that he can perform the essential functions of the job safely, and Complainant has not provided any medical information that would call into question the results of the screening.
 - s) Dr. D has approximately 12 years of experience in occupational health and the Hospital was certainly entitled to rely on his medical opinion.
- 5) Respondent was asked to submit a sworn statement by Dr. D regarding his opinion that (a) Complainant could not meet the essential functions of the job with or without reasonable accommodation and/or (b) that to a reasonable probability, the Complainant's physical impairment rendered him unable to perform the duties or to perform them in a manner that would not endanger the health or safety of the Complainant.
- 6) Respondent declined to provide a sworn statement by Dr. D. Respondent's counsel explained:
- (a) Respondent disagrees that it is relying solely on the "safety defense" and could not meet its burden without providing such a statement. (b) The contents of the signed statement would likely simply mirror the position statement because the position statement had been written based on interviews with the doctor; it is not necessarily a good use of our client's resources to recreate that information. (c) Complainant's counsel has stated that he expects this case to proceed to litigation and given his position we did not think it was in our client's interest to spend more time and resources preparing a signed statement for the doctor that would likely later be used in litigation.

V. Analysis:

- 1) The Act 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.A. § 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 Act permits employers to require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant and may condition an offer of employment on the results of the examination, if all entering employees are subjected to the same examination regardless of disability, 5 M.R.S.A.

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§4572(2)(C)(1), and if the results of the examination are used only in accordance with the MHRA, 5 M.R.S.A. § 4572(2)(C)(3).

- 3) The Act prohibits employers from discharging or refusing to hire an employee because of "physical disability." 5 M.R.S.A. § 4572(1)(A).
- 4) The MHRC defines "physical disability" in relevant part, as

A. A physical ... impairment that:

- (1) Substantially limits one or more of a person's major life activities; [or]
- (2) Significantly impairs physical ...health... [or]

C. With respect to an individual, having a record of any of the conditions in paragraph A ... [or]

D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A....

5 M.R.S.A. § 4553-A(1).

- 5) The MHRA does not prohibit an employer from refusing to hire an individual when the employer can show that the applicant, "because of the ... physical...disability, is unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or others. . . ." 5 M.R.S.A. § 4573-A(1-B).
- 6) The "health or safety" defense requires an individualized assessment of the relationship between an employee or job applicant's disability and the specific legitimate requirements of the job. *See Higgins v. Maine C. R. Co.*, 471 A.2d 288, 290 (Me. 1984); *Maine Human Rights Com. v. Canadian Pacific, Ltd.*, 458 A.2d 1225, 1234 (Me. 1983). The defense imposes upon the employer the burden of establishing that it had a factual basis to believe that, to a reasonable probability, the employee or job applicant's disability renders him or her unable to perform the duties or to perform them in a manner that would not endanger the health or safety of the employee or job applicant or others. *See Canadian Pacific, Ltd.*, 458 A.2d at 1234. An employer cannot deny an employee or applicant an equal opportunity to obtain gainful employment on the mere possibility that a disability might endanger health or safety. *See id.*
- 7) As a part of his claim, 5 M.R.S.A. § 4572(1) (A) does not require Complainant to prove that he was capable of performing the job. Rather, the burden rests with Respondent to prove, through an individualized assessment, that Complainant could not perform the job due to his disability. *See* 5 M.R.S.A. § 4573-A (1-B); *Maine Human Rights Com. v. Canadian Pacific, Ltd.*, 458 A.2d 1225, 1230, 1234 (Me. 1983). Disability is thus treated the same as any other protected class under section 4572(1)(A), and Complainant's burden of proof is the same as it would be, for example, in cases of race or sex discrimination.
- 8) In this regard, the MHRA and its federal counterpart, the Americans with Disabilities Act (ADA), differ substantively. The ADA requires plaintiff to prove that he or she is "qualified," meaning

able to perform the “essential functions” of the job in question. *See* 42 U.S.C. §12112(a) (prohibiting discrimination against a “qualified individual with a disability”) (emphasis added); *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996) (allocating burden). *See also* 5 M.R.S.A. § 4572(2) (prohibiting discrimination against “a qualified individual with a disability”).

- 9) Although two Law Court decisions have referenced a requirement under the MHRA that a plaintiff prove that he or she is “qualified” and able to perform the essential functions of the job, *see Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, 824 A.2d 48, 54 and *Whitney v. Wal-Mart Stores, Inc.*, 2006 ME 37, ¶ 9, 895 A.2d 309, 312, in both cases, the Law Court touched on the standards in passing and did not address the differences between sections 4572(1) and 4572(2). The reference was also dicta in both cases and is not controlling. In *Doyle*, the Law Court based its decision to affirm summary judgment on the plaintiff's failure to establish that the reasons given for the termination of her probationary period were pretextual or irrelevant. 2003 ME 61, ¶ 18, 824 A.2d 48, 56. The Court specifically noted that it was not addressing whether the plaintiff had established a prima-facie case of discrimination. 2003 ME 61, ¶ 16 n. 8, 824 A.2d 48, 54 n. 8. In *Whitney*, the Court decided only a certified question concerning the scope of the definition of “physical or mental disability” under the MHRA. 2006 ME 37, ¶ 1, 895 A.2d 309, 310.
- 10) Complainant here alleged that Respondent violated the medical examination provisions of the MHRA and withdrew the offer of an EVS Technician position because of his history of and/or perceived knee disability. Respondent denied the allegations and said that the job offer was withdrawn because Complainant could not safely perform the essential functions of the EVS Tech position which requires kneeling, crouching, squatting, and crawling.

Failure to Hire

- 11) 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).
- 12) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that (1) he belongs to a protected class, (2) that he applied and (3) met the minimum objective qualifications for the job sought, and (4) that he was rejected. *City of Auburn*, 408 A.2d at 1263.
- 13) 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 his 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.

- 14) In order to prevail, Complainant must show that he 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.
- 15) ██████ established a prima-facie case. He established that he has a disability under the Act by disclosing his medical history, which includes serious knee injury that required surgery in 1997. His knee condition lasted more than six months and substantially limited his ability to walk, stand, and work. Also, his knee condition significantly impaired his health. ██████ also established that the Hospital regarded him as disabled by treating him as though he could not perform jobs that require prolonged kneeling, crouching, squatting, and crawling.
- 16) ██████ applied for and was found qualified for an EVS Technician position with the Hospital in light of the fact that he received a conditional job offer on November 30, 2011. The Hospital withdrew the job offer after learning that ██████ has a history of serious knee injury.
- 17) The Hospital denied the allegation of disability discrimination and stated that the job offer was withdrawn because Dr. D deemed ██████ to be unqualified because he could not safely perform the essential functions of the EVS Technician position.
- 18) The Hospital did not meet its burden of proving that ██████ could not perform the job, or perform it safely, due to his disability, based on the following:
 - a. The Hospital provided no evidence that would be admissible in court to establish that ██████ was unable to safely perform the essential functions of the EVS Technician position. The only information was provided by counsel for the Hospital, which is not admissible as evidence. Information provided by counsel could lead the investigator to admissible evidence – i.e., a statement or other testimony by Dr. D – but the Hospital declined to provide such evidence.
 - b. The Hospital's unwillingness to provide a statement from Dr. D suggests that his testimony would not fully support its defense to ██████ claim.
 - c. In contrast to the Hospital's evidence, ██████ provided a sworn statement that Dr. D expressed concern that he (██████) could potentially slip or fall and reinjure his knee at some point in the future. Dr. D did not deny this claim. This establishes that Dr. D was worried about the risk of future injury because of ██████ medical history (and the Hospital's liability for that injury), not about ██████ current ability to perform the job.
 - d. In addition, documents submitted by the Hospital show that ██████ passed all of the physical tests administered to him during his post-offer medical screening. The physical examination record showed that ██████ physical capacity was within normal limits. Among other things, he was able to push 120 pounds, pull 240 pounds, squat for 30 seconds with support, and climb stairs for 5 minutes at a quick pace. This shows that an applicant who did not have a record of disability likely would have been hired.
 - e. The evidence does not support the Hospital's claim that ██████ was unable to perform a full squat to the floor because of intense pain in his knee. ██████ denies this, the documents provided do not confirm this, and there was no statement to that effect from Dr. D.

- f. At the conclusion of the standard post-offer medical screening, Dr. D recommended that [REDACTED] undergo a functional capacity evaluation. This appears to be based solely on [REDACTED] medical history and record of disability, not on any current deficits in his physical capacity. Dr. D's recommendation was reversed after further discussion with the Director of Human Resources and Dr. U. The Hospital did not provide any witness statements to substantiate what was said during those discussions. No witness explained why Dr. D's recommendation for a functional capacity evaluation was overturned.
- g. In sum, the Hospital did not carry its burden of providing objective evidence to prove that [REDACTED] could not perform the essential functions of the EVS Technician position, or that he could not perform the position safely, due to the current condition of his knee. The decision to withdrawal the job offer made to [REDACTED] appears to be based on unsupported assumptions that he was at greater risk of future injury than others because of his medical history which included a serious knee condition that required surgery.

19) It is found that the Hospital unlawfully refused to hire [REDACTED] because of a physical disability.

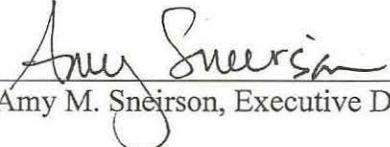
Medical Examination

- 20) Employers are permitted to require a medical examination of all applicants if all entering employees are subject to the same examination regardless of disability and the results are used in accordance with the Act.
- 21) Here, the Hospital violated 5 M.R.S.A. § 4572(2)(C)(3) because the post-offer medical screening was not used in accordance with the Act. Instead, the examination was used to deny Complainant an equal employment opportunity.
- 22) It is found that the Hospital unlawfully required a medical examination of [REDACTED]

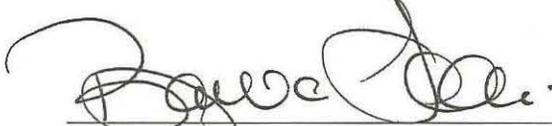
VI. RECOMMENDATION:

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] conducted an unlawful medical examination and withdrew a job offer from Complainant [REDACTED] on the basis of physical disability; and
2. Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Amy M. Sneirson, Executive Director



Barbara Lelli, Chief Investigator