



Maine Human Rights Commission

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INVESTIGATOR'S REPORT E12-0361

April 4, 2014

[REDACTED] ([REDACTED])

v.

[REDACTED]

I. Complainant's Complaint:

Complainant [REDACTED] alleges that Respondent [REDACTED] [REDACTED] d/b/a Downeast EMS (" [REDACTED] discriminated against her on the basis of sex by applying its policy against working for a competitor to her and another female employee but not to a male employee.

II. Respondent's Answer:

Respondent states that the non-compete policy was applied equally to all [REDACTED] employees regardless of sex.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: June 1, 2012.
- 2) Date complaint filed with the Maine Human Rights Commission: August 1, 2012.
- 3) Respondent has about 15-17 full time employees and 33 part-time/per diem employees and is subject to the Maine Human Rights Act ("MHRA") and Title VII of the Civil Rights Act as well as state and federal employment regulations.
- 4) Respondent is represented by [REDACTED]. Complainant is not represented by counsel.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and witness interviews. 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) [REDACTED] is a professional Emergency Medical Services company located in Washington County, Maine with operations in [REDACTED] Eastport, Lubec and Machiasport. [REDACTED] provides emergency medical care and hospital transfer care at the EMT (emergency medical technician), AEMT (advanced emergency medical technician), and Paramedic levels.
- b) Ms. [REDACTED] is female and resides in [REDACTED]. She was hired by [REDACTED] as an EMT on about July 1, 2011. At the time of her hire, Ms. [REDACTED] was also employed as a part time/per diem EMT by the City of Calais Fire/EMS Department ("Calais Fire/EMS"), which provides firefighting and Emergency Medical Services in Calais.
- c) In April 2012, the Board of Directors for [REDACTED] adopted a policy prohibiting full-time employees receiving benefits from working for any competing EMS service. *See Exhibit 1.*
- d) Ms. [REDACTED] alleged that [REDACTED] discriminated against her on the basis of sex by requiring her to stop working for Calais Fire/EMS if she wanted to remain employed by [REDACTED] and not applying the same policy to a male.
- e) [REDACTED] alleged that the non-compete policy was applied equally to all employees regardless of sex.

2) Complainant provided the following:

- a) Ms. [REDACTED] and one other employee, Ms. R who is also female, were the only employees affected by the non-compete policy. Both of them had to give up work as part time / per diem EMTs at Calais Fire-EMS in order to remain full time EMTs for [REDACTED]
- b) The EMS Captain for [REDACTED] a male, was not required to give up his part time job at Calais Fire-EMS. An exception was made for the benefit of only one employee – a man. EMS Captain continued to do sleep-in time for Calais Fire-EMS and if an emergency arose, he worked as an EMT on their ambulance.
- c) Ms. [REDACTED] raised concerns internally about the non-compete policy being applied selectively to her and not EMS Captain before filing this complaint with the Commission.

3) Respondent provided the following:

- a) There were 15 to 17 full time employees at the time the non-compete policy went into effect and it applied to all of them. This included about 10 males and about seven females.¹
- b) None of the exceptions to the non-compete policy applied to Ms. [REDACTED] or Ms. R, who both worked for competing EMS agencies as EMTs.

¹ EMS Captain supplied some of this information about the workforce.

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- c) EMS Captain's situation fit the exception for full time employees who worked for a volunteer service in the town which they resided and the volunteer work did not interfere with their full time employment for [REDACTED] EMS Captain was a resident of Calais. He was a volunteer firefighter for Calais Fire-EMS. He did not volunteer solely or primarily as an EMT for Calais Fire/EMS.
 - d) [REDACTED] original response to the complaint indicated that EMS Captain did not receive any compensation for his work as a volunteer firefighter. In a subsequent filing, [REDACTED] indicated that EMS Captain received a stipend of about \$100 per month to sleep in at the firehouse and when he actually attends fires, but that he was not paid for any EMS activities.
 - e) Ms. [REDACTED] would have been permitted to volunteer for a similar entity in her town of residence.
- 4) An interview with EMS Captain revealed the following:
- a) EMS Captain resides in Calais. He was considered an on-call volunteer firefighter for Calais Fire/EMS. He sleeps in every eighth night as a firefighter. He was not routinely sent out to provide emergency medical care and hospital transfer care to patients. He occasionally participated in an emergency transfer run if no one else was available. EMS Captain received a stipend for his volunteer work.
 - b) EMS Captain was aware that Ms. [REDACTED] and Ms. R were upset that the non-compete policy was applied to them and not to him.
- 5) The Calais City Manager provided the following:
- a) Calais Fire/EMS does not have any volunteers. The City has the following paid part time positions in the Fire/EMS department: Call Firefighter, Call Firefighter/EMT, and Part time EMT.
 - b) EMS Captain was and is a part time Call Firefighter/EMT.
 - c) All Call Firefighters who are licensed as EMTs are expected to work in the capacity of EMT.
 - d) All employees including EMS Captain are paid. EMS Captain is paid at a higher rate than other firefighters because he is a licensed EMT and is expected to use his license in the course of his employment for Calais Fire/EMS.

V. Analysis:

- 1) The MHRA provides that the Maine Human Rights Commission ("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.

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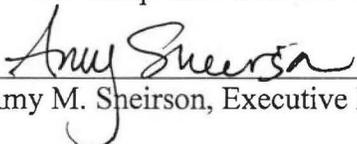
- 2) The MHRA provides, in part, that it is unlawful employment discrimination to discriminate in the terms, conditions and privileges of employment on the basis of sex. 5 M.R.S. § 4572(1)(A).
- 3) Complainant here alleged that Respondent discriminated against her on the basis of sex by requiring her to stop working for Calais Fire/EMS if she wanted to remain employed by Respondent while not applying the same policy to a male. Respondent alleged that the non-compete policy was applied equally to all employees regardless of sex.
- 4) 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).
- 5) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that she (a) was a member of a protected class, (b) was qualified for the position she held, (c) suffered an adverse employment action, (d) in circumstances giving rise to an inference of discrimination. See *Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). Cf. *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1st Cir. 2002).
- 6) 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 with affirmative evidence of pretext or by the strength of Complainant's evidence of unlawful discriminatory motive. See *City of Auburn*, 408 A.2d at 1262, 1267-68.
- 7) 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.
- 8) Here, Complainant has established a prima-facie case by showing that (1) she is female, (2) she performed her EMT job satisfactorily, (3) she was denied the opportunity to work for a competing EMS company, and (4) a male employee, EMS Captain, was permitted to continue working for the competing company.
- 9) Respondent has articulated a legitimate, nondiscriminatory reason for permitting the male employee, and not Complainant, to continue working for the competing company: Respondent had a non-compete policy that generally prohibited full time employees from working for any competing EMS service. An exception to the policy permitted full time employees to work for a volunteer service in the town which they resided and the volunteer work did not interfere with their full time employment for Respondent. According to Respondent, EMS Captain's situation fit the exception and Complainant's situation did not.
- 10) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason is false and pretextual and that unlawful sex discrimination is the reason she was denied the opportunity to continue working for the competing company, with reasoning as follows:

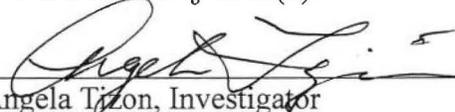
- a) Respondent's policy prohibits full time employees from working for any other competing EMS agency during their full time employment.
 - b) Respondent considered Calais Fire/EMS a competing EMS agency and prohibited Complainant and another female employee from continuing to work there as EMTs while employed full time by Respondent. Complainant and the female employee were the only two employees affected by the policy at the time of its implementation.
 - c) An exception to Respondent's policy allowed full time employees to work for a volunteer service in the town.
 - d) Respondent stated that this exception to the policy applied to EMS Captain because he was a volunteer for Calais Fire/EMS and resided in Calais. EMS Captain also stated that he was a volunteer and resided in Calais.
 - e) The Calais City Manager, who is in a position to know, and who had no apparent motive for fabricating her claim, refuted the information provided by Respondent and EMS Captain and indicated that it was false. She stated that Calais Fire/EMS does not have any volunteers, and that EMS Captain was and is a part time Call Firefighter/EMT. She stated that EMS Captain is paid wages at a higher rate than other employees who are firefighters only because he is a licensed EMT uses his license in the course of his employment for Calais Fire/EMS.
 - f) Given that EMS Captain told the Commission that he is a volunteer, he may have said the same thing to Respondent. However, Respondent did not raise this argument during the course of the investigation. Furthermore, it is highly implausible that Respondent did not know that EMS Captain was a part time employee and not a volunteer. Information about Calais Fire/EMS's employment practices is easily available to the public.
 - g) Given the facts above, Complainant met her burden by showing that Respondent's nondiscriminatory reason was false and pretextual, and that Respondent treated EMS Captain more favorably than Complainant because of his sex.
- 6) The claim of unlawful sex discrimination is founded.

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] on the basis of sex; and
2. The complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).


Amy M. Sheirson, Executive Director


Angela Tizon, Investigator