



Maine Human Rights Commission

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December 19, 2014

INVESTIGATOR'S REPORT E13-0121, E13-0122

[REDACTED]

v.

[REDACTED]

I. Complaint:

Complainants [REDACTED] and [REDACTED] alleged that Respondent [REDACTED], Inc. discriminated against them and other employees on the basis of age by implementing a company-wide layoff that, although not directly based on age, had a disproportionate impact on older employees.¹

II. Respondent's Answer:

Respondent denied discrimination and alleged that age was not a factor in the layoff, and that the layoff was implemented to achieve a legitimate business necessity.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: November 2, 2012.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): March 14, 2013.
- 3) Respondent employs approximately 19,000 people and is subject to the Maine Human Rights Act ("MHRA"), the Age Discrimination in Employment Act, and state and federal employment regulations.
- 4) Respondent is not represented by counsel. Complainants are represented by [REDACTED].
- 5) Investigative methods used: A thorough review of the materials submitted by the parties, requests for further information and documents. 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.

¹ Complainants stated in their original submissions that they were also claiming they were individually discriminated against on the basis of their age (disparate treatment). They have provided no evidence to show that their age was a factor in their individual layoffs, or that they were selected for layoff because of their age. Because Complainants have not substantiated any possible disparate treatment claims, those claims will not be discussed further.

IV. Development of Facts:

- 1) The relevant parties, issues, facts, and documents in this case are as follows:
 - a) Complainant [REDACTED] [REDACTED] was 55 years old at the time of her layoff. Complainant worked for Respondent as a full-time Service Desk Clerk for 33 years until November 2, 2012, when she was laid off.
 - b) Complainant [REDACTED] [REDACTED] was 55 years old at the time of her layoff. Complainant worked for Respondent primarily as a full-time Service clerk for 36 years until November 2, 2012, when she was laid off.
 - c) Respondent is a grocery retailer operating throughout New England.
 - d) On November 2, 2012, Respondent implemented a company-wide layoff of 700 employees. This layoff was applied only to full-time employees, and did not include any part-time employees. The layoff was based on seniority. Of all the full-time employees, the 700 that were selected for layoff had the shortest tenure with Respondent.
 - e) Respondent produced documents showing that the layoff was applied without age as a consideration. Complainants argued that regardless of whether age was a factor in the layoff decisions, the documents show that a disproportionate number of older workers were affected by the layoff. This is because the layoff targeted only full-time employees, who generally were older than part-time employees given their years of service with Respondent.
- 2) Complainants provided the following:
 - a) Respondent's policy of limiting the layoffs to full-time employees had a disparate impact on older employees. It is clear from the record that overall, full-time employees were older than part-time employees due to their tenure with Respondent. Therefore, a disproportionate number of older employees, including Complainants, were adversely impacted by the layoff.
 - b) While Respondent alleges that the layoff was applied without regard to age and for a legitimate business purpose, Respondent failed to show that no other methods of achieving the same business necessity existed that would have had less of a discriminatory impact. Complainants stated that (at least according to some courts) when implementing a policy or practice that has a disparate impact on a protected class, an employer must show that no such alternative exists, or at least that the employer investigated alternative methods to determine the one with the least impact.
 - c) Here, Respondent could have implemented a variety of alternative methods to the layoff in order to minimize the adverse impact on older employees, such as:
 - i) Respondent could have asked full-time employees to work split shifts so that they could retain full-time employment status while giving Respondent the same flexibility with scheduling as it had with part-time employees.
 - ii) Respondent could have reduced the hours of full-time employees to part-time. This would have been far preferable than full loss of employment.

- iii) Respondent could have reduced the pay of full-time employees.
 - iv) Respondent could have utilized a combination of these methods.
 - d) The above methods would have allowed Respondent to achieve the same business necessity without the same level of adverse impact on older employees. In locations where Respondent is unionized (southeast Massachusetts and Rhode Island), Respondent did implement layoffs strictly based on seniority, without regard to full-time versus part-time employment. This shows that this method is feasible.
- 3) Respondent provided the following:
- a) Due to an unprecedented level of competition that impacted Respondent's results and profitability, the company had to reevaluate its full-time staffing needs. A full-time staffing model for each department by store was established within each district. The staffing model did not consider the specific employees in each department or store but rather determined the staffing needs of a store based upon the needs of the business.
 - b) Based on the model, it was determined that a reduction in force was necessary due to excessive full time staff. The associates impacted by the reduction in force were selected by department, position, and length of service within each district. The age of associates was not a consideration in determining staffing needs.
 - c) Respondent was faced with the business necessity of saving a minimum of \$550,000 per week in labor costs. A financial analysis was conducted and showed that a layoff of full-time rather than part-time employees was necessary. Reasoning was as follows:
 - i) Full-time employees typically work 40 hours per week on a set schedule, while part-time employees work 15-25 hours and can be scheduled over shorter periods throughout the day and week depending on business needs (such as high traffic hours). This gives Respondent more flexibility with its workforce.
 - ii) The average hourly pay for a full-time employee is approximately \$20 whereas a part-time employee typically makes \$9.25 hourly. In order to achieve the same financial savings by laying off part-time employees, Respondent would have had to lay off over four times the number of employees. This is based on number of hours worked and hourly pay.
 - iii) A layoff of 700 full-time associates resulted in a cost savings of \$560,000 per week (700 x 40 hours at \$20 per hour). If the same cost savings had been achieved by laying off part-time employees, 3,027 employees would have had to be laid off (\$560,000 / 20 hours at \$9.25). This would have cut 17% as opposed to 4% of Respondent's workforce, and would have made it difficult for Respondent to meet its customer needs with such a reduction in employees.
 - d) Although the models above look at the impact of applying the layoff to full-time versus part-time employees separately rather than together, it is logical given that Respondent rarely hires new full-time staff with no company tenure, and therefore a layoff based strictly on seniority would have affected an overwhelming majority of part-time employees.

V. Analysis:

- 1) The MHRA 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 provides, in part, that it is unlawful based on age to terminate employment or “discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment.” 5 M.R.S. § 4572(1)(A).
- 3) 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).
- 4) “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).
- 5) 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.

- 6) At the final stage of the analysis, even if Respondent is able to show a business necessity for its challenged practice, “there may be affirmative evidence that other selection devices, without a similarly undesirable racial or sexual 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.
- 7) 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

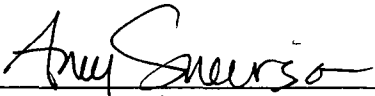
practice. *See id.* at 1268. The burden of persuasion remains with Complainant throughout this analysis. *Id.* at 1265.

- 8) Here, Complainants established a prima-facie case of age discrimination by showing that Respondent's practice of applying its company-wide layoff to only full-time employees was neutral on its face, but resulted in an adverse impact on the Complainants as well as on a disproportionate number of older employees. It is undisputed that Complainants were laid off as a result of the facially neutral policy at issue in this case, and it is undisputed that a disproportionately large population of older workers was affected.
- 9) Respondent articulated a legitimate business necessity for the company-wide layoff, namely that it needed to cut costs by a projected minimum of \$550,000 per week, and achieved this by laying off 700 full-time employees. Respondent was able to show that its decision to include only full-time employees in the layoff was reached because it would result in one-quarter of the projected layoffs that would have been needed if part-time employees were laid off (Respondent articulated that part-time employees would be the majority of those impacted if the layoff was based on seniority).
- 10) At the final stage of analysis, Complainant prevailed by showing that other methods existed that Respondent could have used to achieve the same business goal, methods that would not have resulted in a similar adverse effect on older employees. Complainant alleged, in part, that Respondent could have implemented one or a combination of the following:
 - a) Respondent could have reduced the hours of full-time employees to part-time, which would have been preferable to losing employment altogether.
 - b) Respondent could have cut the rate of pay of full-time employees.
- 11) While Complainant's proposed methods still would apply only to full-time employees and therefore would not change the pool of affected employees, those methods would have a less severe adverse impact on older employees than what Respondent chose to do, in that those employees would still have jobs, and part-time employment or a reduction in pay is better than no employment. Logically, it would seem that in order to achieve the same financial result just using the proposed change of full-time employees to part-time, Respondent would have to cut the hours from 40 to 20 of twice as many full-time employees as were laid off (1,400 full-time employees as opposed to 700). Although more employees would be affected, this method appears to be more just in than full-time employees whose hours were reduced would then be on at least an equal level (same terms and conditions of employment) as part-time employees (working an average of 20 hours per week) rather than having no employment, which is a less favorable condition of employment. Arguably, the once full-time employees would still be at an advantage if they were able to retain the same rate of pay.
- 12) Finally, Respondent clearly was able to perform the layoffs in a manner that would have had less of an impact on older employees, since they did so in its unionized stores. In those stores, Respondent implemented its layoff based solely on seniority.
- 13) Disparate impact discrimination on the basis of age was found.


VI. Recommendation:

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

- 1) There are **No Reasonable Grounds** to believe that [REDACTED], [REDACTED] discriminated against [REDACTED] and [REDACTED] on the basis of age by terminating their employment (disparate treatment), and this portion of the Complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).
- 2) There are **Reasonable Grounds** to believe that [REDACTED], [REDACTED] discriminated against [REDACTED] and [REDACTED] on the basis of age by implementing a practice that had an adverse impact based on age and resulted in the separation of their employment (disparate impact), and conciliation should be attempted on this portion of the Complaint in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneirson, Executive Director



Angela Tizón, Investigator