



- a) [REDACTED] is a full-time college student who applied and was hired for a summer position at [REDACTED]
  - b) [REDACTED] is a restaurant and gift shop located in Bar Harbor, Maine.
- 2) Complainant's position:
- a) [REDACTED] has cerebral palsy, which substantially limits major bodily functions, including brain functions, among other major life activities.
  - b) In late April of 2013, [REDACTED] had lunch at [REDACTED] and noted that there was a posting indicating that there was an opportunity for employment. Because he was seeking summer employment, he went to [REDACTED] gift shop, located below [REDACTED] and requested and was given an application for employment.
  - c) He was able to perform the essential functions of the Retail Sales Clerk position with or without reasonable accommodation.
  - d) In approximately mid-May 2013, [REDACTED] spoke with Store Manager, who indicated that she had not yet looked at his application, but that she would contact him soon. A few days later, Store Manager offered [REDACTED] the job of Retail Sales Clerk. She asked him to come in to work on or about Friday, May 17, 2013.
  - e) [REDACTED] reported for work, as instructed, on or about Friday, May 17, 2013. Store Manager gave him paperwork that he began filling out. Before he had completed the paperwork, Store Manager looked at him and said that she saw that he had "something wrong with his hand" and that the job required folding. [REDACTED] replied that he had mild cerebral palsy on his left side and that he didn't think that the job would be a problem. He stated that he would let her know if there was something he was unable to do. Store Manager then stated that she wasn't sure that he could handle the work and that she would have to talk to Owner.
  - f) In any event, Store Manager began training [REDACTED] that day and he was able to both understand and accomplish the tasks he was taught.
  - g) [REDACTED] returned to work the next day, May 18, 2013, but Store Manager did not train him on the cash register. Rather, she instructed him to "work the floor." He told her that he had run the register and handled money before, but she told him that she had not yet spoken with Owner. Store Manager repeatedly referenced his hand, reminding him that she was not sure that he was going to be able to continue to work there.
  - h) Store Manager said that she didn't know [REDACTED] could keep up with the pace or handle the money.
  - i) Store Manager allegedly mentioned the names of other places that she thought were hiring just in case he did not think that he could handle the work, and even offered to make a call to see if she could get him a job somewhere else. He declined and said that he wanted to work at [REDACTED] and that he was confident that he could handle the work.

- j) During his time at [REDACTED] Store Manager said his performance went "above and beyond." [REDACTED] continued to report for work, but during the nine days of his employment with [REDACTED] he was sent home early on three separate occasions.
  - k) Then, on May 26, 2013, [REDACTED] reported for his 10:00 a.m. – 3:00 p.m. shift. At about 1:00 p.m., Store Manager abruptly terminated his employment because of "his hand." Throughout his brief employment at [REDACTED] Store Manager had frequently commented "there's something wrong with your hand." After having been hired, trained and on the job, he was also told by Store Manager, "I'm not sure you can do the job, because of your hand - I'm very sorry."
  - l) Store Manager allegedly told him that she could assist him in finding work elsewhere; Hannaford for example. At no time was [REDACTED] told that he was simply being "laid off" and that he would be called back if business increased. He stated that he responded, "Why would I want to go anywhere else, I am doing the job here and I am doing it well." At that time, he said that Store Manager wanted to hug him, but that he didn't accept the hug – he felt the tears coming on – he simply walked away." As he drove home, he stated that he was forced to pull over to the side of the road because he was concerned about the danger of driving under those circumstances since he was crying.
  - m) On May 29, 2013, [REDACTED] posted an advertisement on the Hancock County Help Wanted page on Facebook, seeking a seasonal sales associate.
  - n) When [REDACTED] went in to pick up his paycheck, there was a new employee being trained to do the same job he had held.
- 3) Respondent [REDACTED] provided its position:
- a) Respondent stated that the only reason Complainant's employment was terminated was because of lower-than-expected business at Geddy's.
  - b) Acadia National Park's opening was delayed by one month in the spring of 2013 due to budget cuts made necessary by the federal sequestration. See National Parks Traveler article, dated March 20, 2013, submitted by Respondent (in file). Rather than opening on April 15<sup>th</sup>, the Park Loop Road did not open until May 19<sup>th</sup>. [REDACTED] alleged that its business suffered as a result of the Spring closure as numerous would-be patrons cancelled travel plans because of it. The extent of the slowdown was not anticipated by Geddy's, but showed itself in reduced revenues as the spring progressed, resulting in the determination in late May 2013 to engage in belt-tightening, including cutting a position in the gift shop.
  - c) Ms. [REDACTED] was selected for lay off because he was the most recent hire. According to [REDACTED] at the time that [REDACTED] was laid off, Store Manager told him that they would call him if and when business picked up; [REDACTED] responded that he would appreciate that.
  - d) [REDACTED] father called Store Manager and berated her on the afternoon of the layoff, including threatening a lawsuit, and swearing at her. The phone call reduced Store Manager to tears. She related the call to Owner, who decided that [REDACTED] would have nothing more to do with [REDACTED] as a result of the call.

- e) After laying [REDACTED] Store Manager learned that one of her senior staff members would be leaving on May 28, 2013. This employee had already said she would be leaving, but had not given a date for her departure.
  - f) Had [REDACTED] not, through his father, verbally accosted Store Manager, he would have been recalled to take the departing employee's place.<sup>1</sup>
  - g) Of the gift shop employees remaining who were senior to [REDACTED] two were disabled. One employee had a serious spinal condition and one had a debilitating arthritic condition. Both these workers were accommodated.
  - h) [REDACTED] has stated that, during his interview with Store Manager on May 17, 2013, while in the process of filling out the required paperwork, [REDACTED] actually told Store Manager that he had what he referred to as a "disability." Store Manager hired [REDACTED] with knowledge of his disability.
- 4) Additional information reveals:
- a) During the Issues and Resolution Conference, [REDACTED] was seated to the immediate right of the Investigator. His hands were casually clasped over his waist. Although in some cases, Cerebral Palsy can affect body movement, muscle control, muscle coordination and reflex, there was no indication to the Investigator that one hand was any different than the other.
  - b) [REDACTED] was credible during the Issues and Resolution Conference<sup>2</sup> in his recounting of those last moments on the job. He alleged that he was taken to an area which was not private, near a jewelry counter downstairs. He was blindsided by the statement that he could not continue to work there because of his hand. During the Conference, as he recounted these last few moments, his eyes became red immediately and they filled with tears within seconds. He said that while he was being told that it was not going to work out, he felt nervous and speechless. His statements included: "I was being discriminated against"; "I had been discriminated against during my childhood and always carried the fear of being ridiculed around with me"; and "I felt that fear again". [REDACTED] also stated that Store Manager actually asked him if he wanted to stay until the end of his shift or leave. He stated that since his employment had been terminated, it felt uncomfortable for him to stay, so he left.
  - c) Respondent offered at the close of the IRC to provide business records to support its contention that it suffered financially when Acadia National Park had a delayed opening in Spring 2014.

## **V. Analysis:**

1. The 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

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<sup>1</sup> Complainant has not alleged that the failure to recall him to work was discriminatory. This may be because of the intervening telephone conversation or because Complainant's position is that his employment was terminated (rather than his being "laid off"). In any event, this potential claim was not raised or investigated, and is not addressed in this report.

<sup>2</sup> Respondent chose not to appear at the Issues and Resolution Conference other than through its attorney.

"reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

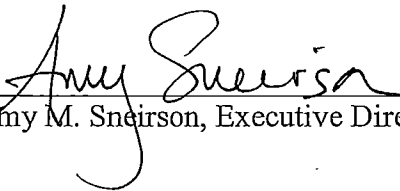
2. Complainant alleged that he was subjected to disability discrimination when his employment was terminated because of the physical symptoms of his disability. Respondent denies discrimination, and states that Complainant was laid off due to an unanticipated economic downturn.
3. It is unlawful employment discrimination for an employer to discharge an employee because of the employee's physical or mental disability. 5 M.R.S. § 4572(1)(A). Cerebral palsy is included in the definition of "physical or mental disability" without regard to severity. 5 M.R.S. § 4553-A(1)(B).
4. In this case Complainant alleged that Respondent abruptly terminated his employment because of "his hand." He was told, "there's something wrong with your hand." While working, he was told by Store Manager, "I'm not sure you can do the job, because of your hand - I'm very sorry."
5. Respondent's statements about the reasons for, or at the time of, termination constitute direct evidence of unlawful discrimination; therefore, a mixed-motive analysis applies.
6. 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 (1<sup>st</sup> 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).
7. Complainant has shown that his disability was a motivating factor in the termination of his employment, with reasoning as follows:
  - a. Respondent did not deny during the Issues and Resolution Conference that the discriminatory comments had been made about Complainant's hand, or that there were comments which communicated doubt that he would be able to do the job because of his hand spasms, which were caused by his disability.
  - b. In addition, Complainant credibly recounted the statements made during his discharge, explaining that Store Manager explicitly stated that his hand was the reason for the decision to terminate his employment.
8. Respondent has not proven that it would have discharged Complainant in the absence of his disability, with reasoning as follows:
  - a. Respondent claimed that the reason for Complainant's discharge was the economic downturn resulting from the delayed opening of Acadia National Park in the Spring of 2013. This explanation seems to be pretextual.

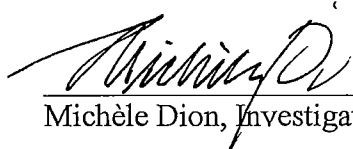
- b. According to the article submitted by Respondent, the federal government provided approximately a month's notice of the delayed opening before it happened. The article provided by Respondent showed that the federal government issued notice March 2013 that the typical opening of the Park in April 2013 would be delayed to May 19-25, 2013.
  - c. [REDACTED] began working on May 17, 2013 – two days prior to Acadia's 2013 opening. His hire should therefore have coincided with the beginning of an increase in tourism, not a decrease.
  - d. Respondent advertised for a sales associate just three days after discharging Complainant, which suggests that the economic downturn was not the real reason for his termination from employment. Even if another sales associate did leave Respondent's employ, Respondent knew that employee was planning to depart, and apparently made no effort to ascertain her plans before discharging Complainant.
  - e. The statement that [REDACTED] was not called back following his "layoff" because of his father's angry phone call to Store Manager is not credible.
9. It is found that Respondent unlawfully discriminated against Complainant based on physical disability in terminating his employment.<sup>3</sup>

**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 his employment because of physical disability; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S. § 4612 (3).

  
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Amy M. Sneirson, Executive Director

  
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Michèle Dion, Investigator

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<sup>3</sup> In the interest of thoroughness, we note that even in the absence of direct evidence, Complainant would prevail on his claim of disability discrimination under 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).