



Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330

Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711

www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

December 19, 2014

INVESTIGATOR'S REPORT E13-0646

██████████ (Peabody, MA)

v.

██████████, ██████████, ██████████ (██████████)

I. Complaint:

Complainant ██████████ alleges that Respondent ██████████, ██████████ (██████████ Sheriff's Office) discriminated against him on the basis of disability in the terms and conditions of employment by denying him a reasonable accommodation in its job application process, which resulted in his disqualification for the position.

II. Respondent's Answer:

Respondent denied discrimination and alleged that Complainant was never denied a reasonable accommodation, and that Complainant was not hired because he did not show up to take the required exams during the application process.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: September 5, 2013.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): November 12, 2013.
- 3) Respondent ██████████, ██████████ employs 180 people and is subject to the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act, and state and federal employment regulations.
- 4) Respondent is represented by ██████████. Complainant is not represented by counsel.
- 5) Investigative methods used: A thorough review of the materials submitted by the parties, a request for further information and documents, 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 relevant parties, issues, and facts in this case are as follows:
 - a) Complainant has a disability (residual effects after brain tumor previously removed, including effects on balance and coordination).¹ He applied for the position of Correctional Officer with Respondent on or around July 29, 2013.
 - b) Respondent [REDACTED] [REDACTED] operates the [REDACTED] [REDACTED] Jail, to which Complainant applied to be a Correctional Officer.
 - c) In order to be considered for employment as a Correctional Officer, applicants must pass written and physical fitness exams. The time allotted for the written exam is 1.5 hours. The physical fitness exam required male applicants in their 20s to run 1.5 miles in 13:46 minutes or less (see file).
 - d) On or around August 23, 2013, Complainant requested that Respondent reasonably accommodate his disability in the application process by allowing him to modify the requirements for the physical fitness exam which was necessary to be considered for employment.
 - e) Complainant submitted a doctor's note requesting a reasonable accommodation of a longer amount of time to complete the written exam in the application process, as well as a proposed modified physical exam requirement of walking 1 mile in 20 minutes (Exhibit A).
 - f) On September 5, 2013, Respondent emailed Complainant stating that Complainant would be granted an accommodation for the physical fitness exam: he would be allowed to complete a 1.39 mile walk in 12 minutes, rather than the required 1.5 mile run in 13:46 minutes. Complainant was also granted the accommodation of an extra 45 minutes for the written exam. Complainant responded by email the same day, accepting the accommodation for the written exam, but stating that he would need more time for the walk. Complainant wrote: "I can walk the 1.39 miles fine but not in 12 mins. I can also walk a 1.5 mile if thats the case but it requires more time." (See Exhibit B.)
 - g) "Captain" is a captain employed by Respondent. Captain communicated with Complainant and Complainant's medical provider regarding Complainant's request for an accommodation (see Exhibit B). Captain also contacted an officer at the Maine Criminal Justice Academy ("MCJA") to discuss Complainant's request for an accommodation.
 - h) "Academy Officer" is a training officer at the MCJA. Captain spoke with Academy Officer regarding alternatives to the standard physical fitness exam. Although Academy Officer has little independent recollection of his conversation with Captain Bean, he provided the following relevant information to the investigation:

There is no standard physical fitness exam used for a Corrections Officer position. These standards are up to the agency to determine. The "Cooper Standard" (the one requiring 1.5 miles

¹ While additional medical documents confirming the extent of Complainant's disabilities were not obtained, the record contains a note from Complainant's doctor provided to Respondent requesting a modification of the entrance exam due to Complainant's disability. Given this note, Complainant is being considered as having a disability under the MHRA for the purposes of this report.

in 13:46) is used for the entrance exam for all standard law enforcement positions. The MCJA offers reasonable accommodations for this exam based on medical documentation and specific individual needs. Possibilities of alternate accommodations include a specific cardio fitness test involving a bicycle (performed only at the MCJA) and shortening the distance of 1.5 miles to 1 mile, maintaining the same pace as outlined in the Cooper Standard. The act of running or walking is not considered important, as long as the applicant is able to complete the distance in the time allotted. The MCJA is currently considering a standard physical fitness exam for corrections officers, but there is no current standard practice. Academy Officer vaguely remembers speaking with Captain regarding alternatives to the Cooper Standard for a correctional officer position. He does not remember details of the conversation, but presumes that he would have given Captain generally the same information above.

2) Complainant provided the following:

- a) Complainant asserted that he is qualified based on education and experience to do the job of a Corrections Officer with or without reasonable accommodations.
- b) Complainant asked for a reasonable accommodation of a modified physical fitness exam of a one-mile walk in 20 minutes. Respondent denied his request for the accommodation, and instead offered the accommodation that he could walk 1.39 miles in 12 minutes. This alternative was not reasonable as it would require him too little time to complete the distance required, and would require him to complete it at a pace faster than the standard requirement of a run of 1.5 miles in 13:46 minutes or less (8.6 minutes per mile for the walk offered, versus 9.1 minutes per mile for the run).
- c) Because the alternative accommodation offered by Respondent was unreasonable and would not enable Complainant to complete the exam, Complainant was disqualified for employment. Respondent denied Complainant the opportunity for employment as a Corrections Officer by denying his request for a reasonable accommodation.
- d) Complainant emailed Respondent and stated that he would need more time to complete the walk, but Respondent did not reply. Complainant did not show up for the scheduled exam because Respondent had offered him an unreasonable accommodation and therefore denied him an accommodation necessary to enable him to complete the exam.
- e) Complainant spoke with administrators at the MCJA and was told that an acceptable accommodation for the 1.5 mile run in the physical exam is a walk of one mile in 20 minutes. Complainant was told that this was accepted throughout the state. Complainant did not understand why Respondent was implementing a different requirement.
- f) Complainant believes that Respondent failed to hire him due to his disability.

3) Respondent provided the following:

- a) Complainant was not denied a reasonable accommodation. Respondent did not deny his request for additional time to complete the 1.39 mile walk. By not appearing for the test, Complainant ended the interactive process of his request for an accommodation.
- b) In Respondent's letter offering Complainant an alternate accommodation, it is clearly stated that any further suggestions or information from Complainant would be considered in the interactive process

(see Exhibit B). Complainant should not have interpreted the offer of accommodation as final given this language. Furthermore, Complainant did not follow up with Respondent when he did not hear back immediately.

- c) On November 13, 2013, Respondent mailed a letter to all pending applicants, including Complainant, informing them that the applicant testing was scheduled for December 5, 2013 (see file). Applicants were told to contact a number if they wished to participate in the testing. Complainant did not respond to the letter and did not appear for the testing. Therefore, he was not considered further for employment.
- d) Respondent offered an accommodation that was different than the one Complainant requested. This does not constitute a denial of an accommodation. Due to the fact that Complainant's doctor specified that Complainant had a problem with running, Respondent felt it was reasonable to change the requirement of running to walking, and a shorter distance of 1.39 miles as opposed to 1.5 miles. The change from running to walking was proposed after Respondent consulted with the MCJA, and was informed that the walk instead of a run had been used as an accommodation in the past.

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 that it is unlawful, based on physical or mental disability, to refuse to hire or otherwise discriminate against an employee in the terms and conditions of employment. See 5 M.R.S. § 4572(1)(A).
- 3) This case is not about whether or not Complainant was able to do the job as a Corrections Officer with or without accommodations. It is, instead, about whether Complainant was given the opportunity to even be considered for hire in a disability-neutral fashion that provided accommodations for his disability.
- 4) The MHRA provides that unlawful 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 applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity." 5 M.R.S.A. §§ 4553(2)(E), 4572(2).
- 5) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. See *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that he is a "qualified individual with a disability" within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant's physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent's failure to do so affected the terms, conditions, or privileges of Complainant's employment. See *id.*
- 6) The term "qualified individual with a disability" means "an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." 5 M.R.S.A. § 4553(8-D). Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob

restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . ." 5 M.R.S.A. § 4553(9-A).

- 7) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable him to perform the essential functions of his job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." See *Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm'n Reg. 3.08(D)(1) (July 17, 1999). The term "undue hardship" means "an action requiring undue financial or administrative hardship." 5 M.R.S.A. § 4553(9-B).
- 8) Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. See *Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.
- 9) Here, Complainant was able to establish a claim that he was denied a reasonable accommodation that affected the terms and conditions of his employment with respect to hire. Reasoning is as follows:
 - a) Complainant provided Respondent with a request from a medical provider stating the nature of Complainant's disability and requesting a modification of the entrance exam for the corrections officer position. Although the medical provider did not provide a specific modification that was medically necessary in this document (the 1 mile walk in 20 minutes was Complainant's suggestion to the physician, see Exhibit A), it was clear that Complainant needed some modifications in order to be able to take the exam due to his disability.
 - b) As stated above, reasonable accommodations include "appropriate adjustment or modifications of examinations" for qualified individuals with disabilities. In this case, while there was no research conducted by Respondent to determine whether Complainant was a qualified individual with a disability in that he could perform the essential functions of the position, Respondent at no point contested this. It was therefore Respondent's burden to provide Complainant with a reasonable accommodation as requested, unless Respondent could show that the requested accommodation was unreasonable in that it posed an undue hardship on Respondent, or that no reasonable accommodation existed.
 - c) In this case, it appears that Respondent did not flatly deny Complainant's request for an accommodation, and contacted Complainant's medical provider for details as well as the MCJA to discuss modifications to the entrance exam (it is clear that Respondent was using the Cooper Standard as a guide in this case). However, Respondent's offer of a modification to the entrance exam, as shown in Exhibit B, is perplexing in that it is unreasonable on its face. Respondent offered Complainant a modified physical fitness exam of walking 1.39 miles instead of running 1.5 miles, but his expected pace to complete the distance was increased from 9.1 minute miles to 8.6 minute miles.
 - d) Respondent stated that the proposed accommodation was the result of consulting with the MCJA, and that the accommodation of walking instead of running was reasonable because Complainant's doctor specified that Complainant had trouble with running due to trouble with balance and coordination. It does not make sense, however, Complainant would be expected – as an

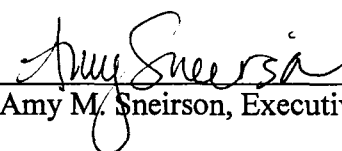
accommodation for his balance and coordination issues – to walk faster than non-disabled applicants were expected to run. Furthermore, it is clear that the MCJA would not have recommended a faster pace as an alternative to the Cooper Standard. Although there is no specific standard applied to corrections officers, Academy Officer stated that a possible alternative would be shortening the length of the run while keeping the same pace (the applicant could either walk or run), not shortening the length and quickening the pace.

- e) Complainant responded immediately to Captain's accommodation offer, and stated that he could not perform the physical fitness exam in 12 minutes, and that he needed more time (Exhibit B). Captain did not respond. While it is undisputed that Complainant did not follow up after receiving this email, considering the accommodation offered was unreasonable on its face, it is plausible that Complainant took this as a rejection of his accommodation request (as Complainant alleges), and did not feel that further discussion was beneficial. Had Respondent's accommodation offer been at least reasonable on its face, it would arguably be up to Complainant to follow up with Respondent after hearing no response, especially given the language in Captain's email indicating that the offer was not final (Exhibit B). Given that Respondent's offer appeared to be unreasonable, and one which Complainant plausibly might have seen as a disingenuous attempt to weed him out from applying or qualifying, it is being considered a denial of a reasonable accommodation.
 - f) Respondent did not even attempt to prove that no reasonable accommodation existed, or that providing the accommodation Complainant requested would have been an undue hardship.
 - g) Whether or not Complainant was qualified for the Corrections Officer position itself, Respondent should have provided him with an opportunity to be considered for hire that included an accommodation for his disability that was reasonable.
- 10) Because Complainant reasonably believed that he would not be offered a reasonable accommodation to enable him to take the entrance exam required for employment, it is found that Complainant was discriminated against in the terms and conditions of his employment with respect to hire.


VI. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that [REDACTED] [REDACTED] discriminated against [REDACTED] on the basis of disability by denying him a reasonable accommodation for his disability in its applicant testing, resulting in his inability to secure employment; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Amy M. Sneirson, Executive Director



Angela Tizón, Investigator

Danvers, MA 01923

RE: [REDACTED]
DOB: 10/06/1986

To whom it may concern,

I have seen [REDACTED] in my office today for a letter in the Correction Officer testing process accommodations request letter. [REDACTED] was looking for two accommodations.

One of them on the written exam. He needed extended test time due to a learning disability which takes him longer to read over the questions on tests and he has fine motor skills trouble. His fine motor skills limit him performing handwriting as fast as everybody without a problem.

A second accommodation he needed was on the 1.5 mile run. He wanted to see if you would be able to allow him walking a mile in 20 minutes instead as stated by the academy in the past. He has trouble with running due to balance and coordination difficulties.

As a medical professional, it is hard to state the duration of Jeffrey's handicap. For example, the symptoms Jeffrey has, were not suspected before having his surgery. This is a 1 in a 10 chance issue of having trouble with balance, coordination, and speech. He is changing everyday. For example, he used to be in a wheelchair, walker, and walked with a cane. He now uses no devices and is able to walk now with no devices. I can say though, I am optimistic he will make a full recovery overtime by having a job.

Sincerely,

JMD

From: jf [REDACTED] m]
Sent: Wednesday, September 05, 2012 12:29 PM
To: [REDACTED]
Subject: Re: Accommodations

Hi, yeah the written accommodation will work for me. But it may take me a few extra for the walk in that time. I can walk the 1.39 miles fine but not in 12 mins.

I can also walk a 1.5 mile if thats the case but it requires more time. I will get better as time goes on from working. My main problem right now is from going to the gym every day because I have nothing to do. At the gym, I do mostly cardio so I can go their and watch the tv.

-----Original Message-----

From: [REDACTED]
To: [REDACTED]
Sent: Wed, Sep 5, 2012 11:24 am
Subject: Accommodations

Dear Mr. [REDACTED] and Dr.

I am writing in response to the request for accommodation in connection with the testing requirements associated with a position as a corrections officer for [REDACTED]. As part of the interactive process of designing an appropriate accommodation, we have reviewed the medical information that was provided and consulted with the Maine Criminal Justice Academy (which uses the standards on which [REDACTED] are based) to help us determine what might be appropriate in this situation. Based upon a review of the information that we have received, [REDACTED] proposes the following accommodations:

1. The time allotted for the standardized test will be increased by 45 minutes from 1.5 hours to 2.25 hours.
2. The run will be replaced with a walk of 1.39 miles. The time that the applicant would be expected to complete the walk is 12 minutes.

Please let us know if you agree that these accommodations are reasonable. If you have additional suggestions or any other information, we will certainly consider them as part of this process. Our objective is to structure a reasonable accommodation that is appropriate under the circumstances.

[REDACTED] Sheriff's Office
Alfred, ME 04002

The Information contained in this email is for the intended recipient only. If you received this in error, please notify the sender and delete all copies of this message.