



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

E16-0393

July 31, 2018

David J. Pelletier (Fort Kent)

v.

Ambulance Service Incorporated (Fort Kent)

Summary of Case:

Complainant, who worked as an Emergency Medical Technician (“EMT”) for Respondent, an ambulance service, alleged that he was subjected to unlawful discrimination in employment because of his association with a person with a disability as well as retaliation for reporting illegal and/or unsafe workplace issues. Respondent denied discrimination or retaliation and stated that he was discharged for criticizing management and coworkers. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and holding a Fact Finding Conference (“FFC”). Based upon this information, the Investigator recommends a finding that there are no reasonable grounds to believe Complainant was discriminated against on the basis of association with a person with a disability, and a that there are reasonable grounds to believe that he was subjected to retaliation for engaging in protected activity.

Jurisdictional Data:

- 1) Dates of alleged discrimination: 11/25/2015.
- 2) Date complaint filed with the Maine Human Rights Commission (“Commission”): 8/11/2016.
- 3) Respondent employs a number of individuals in excess of the jurisdictional requirements of state and federal law, and is subject to the Maine Human Rights Act (“MHRA”), the Americans with Disabilities Act, the Maine Whistleblowers’ Protection Act (“WPA”), and state and federal employment regulations.
- 4) Complainant is represented by Max I. Brooks, Esq. Respondent is represented by Timothy J. O’Brien, Esq.

IV. Development of Facts:

- 1) Complainant provided the following in support of his claims:

Complainant and his wife (“Wife”)¹ worked as EMTs for Respondent for many years. He and Wife

¹ Wife is the complainant in a separate case (E16-0392) based upon the same operative facts. For ease of reference in reviewing both cases, we will refer to Complainant here as “Husband”.

began to report concerns about safety issues and issues they believed violated the laws and regulations applicable to their work. Among the issues they reported were: an ambulance driver ("Driver") administering medicine to a patient; poor care by a paramedic ("Paramedic"); the use of non-EMTs to drive ambulances; and the manner of stocking ambulances. Respondent retaliated by assigning them fewer of the highest-paying ambulance runs; Husband was given a written warning for falsifying a report. Husband and Wife were criticized by Respondent for complaining, told they needed to be "team players," and instructed to put these issues behind them. Husband tried to submit written reports about these incidents, but Respondent discouraged him from doing so. Respondent's actions caused Wife [REDACTED], which resulted in [REDACTED]. Wife was cleared to return to work days later. Respondent requested personal medical information that Wife was not comfortable providing. Two days later, Husband and Wife were informed that they were discharged

2) Respondent provided the following in support of its position:

Husband and Wife complained about many issues over their years of employment, including their subjective opinions about coworkers' skills and management's decisions. Husband complained about an advanced EMT who was selected to be supervisor instead of him. Wife was upset that the scheduling duties she once performed were taken away after coworkers complained that she and Husband were getting most of the on-call shifts. Both of them disagreed with a management decision to assign non-EMT drivers in the ambulances, denying them income, and also routinely complained about and resented the presence of Paramedic; Respondent investigated their concerns, but found that Paramedic had done nothing wrong. Husband received a written warning after he admitted to falsifying a run report. Husband said that he had written complaints with him but never disclosed details. Respondent became aware Wife had [REDACTED] and asked for a doctor's note clearing her to return to work; she returned promptly after providing the note. Wife accused Respondent's deputy director of falsifying a report without substantiation. Husband and Wife were discharged based upon Wife's unsubstantiated accusation and their expressed discontentment with management.

3) The Investigator made the following findings of fact:

- a) Husband began working for Respondent as an EMT in 2002; Wife began working for Respondent in 2006. Respondent pays EMTs who are on-call a flat rate of pay. If the EMT is dispatched on a call, they are paid for that time at a higher rate.
- b) On or about 4/23/2015, Husband and Driver went on a call. The medical situation required Husband to call a physician to obtain permission to administer a medication. While Husband was on the phone awaiting permission, Driver administered the medication to the patient. Driver told Husband that another EMT routinely allowed him to perform such tasks. On the run report that Husband prepared, he falsely wrote that he had been the one who had given the medicine. At the FFC, Husband stated that he had done this to prevent Respondent from getting in trouble with state agencies.
- c) Shortly after that incident, Husband reported concerns about Driver administering the medication, in addition to concerns about the other EMT who allegedly allowed Driver to perform similar tasks. Respondent interviewed Driver and the EMT who allegedly allowed Driver to perform medical tasks. Respondent determined that while Driver had been allowed to gather items and assist in the preparation of certain basic tasks, he was never allowed to perform actual medical procedures. As a result of the investigation, Husband was given a written warning for falsifying a run report. Driver also received a written warning for performing a task he was not licensed to perform.

- d) On or about 10/7/2015, Husband allegedly reported to Respondent that he had been unable to find a stethoscope during a call because the ambulance was not properly organized.² On or about 10/19/2015, Husband allegedly reported Paramedic's actions on had caused a patient to become agitated to the point of needing police assistance. Respondent denies receiving any report from Husband about the agitated patient. On or about 10/21/2015, Husband allegedly reported that Paramedic had been rough with another patient. Respondent denies receiving any complaint or report from Husband about that incident.
- e) On or about 10/23/2015, Wife told Respondent that she had concerns about two recent calls with Paramedic. The first involved a claim that Paramedic had not properly treated a patient who was having trouble breathing, and the second involved a situation where Paramedic drove the ambulance after he asked Wife to ride with the patient in the back even though Wife felt the patient's life was in danger – in such situations, the individual with the highest degree of licensure is expected to stay with the patient. Because of Wife's report, Respondent amended its policy to require the higher licensed individual to always ride in the back of the ambulance with the patient.
- f) Husband and Wife both voiced dissatisfaction when Respondent changed its policy to allow non-EMT drivers in ambulances. They stated that this placed patients at risk because this would leave the patient unattended if the sole medical care provider, the EMT, had to leave the patient's side. Respondent claims that Husband and Wife disagreed with the policy because it took on-call runs away from them and other EMTs.
- g) On or about the end of October 2015, Respondent instituted a policy that all future complaints should be in writing, allegedly so it could perform more complete investigations. Respondent asserted that despite this change, it would still investigate "good faith" verbal complaints as well.
- h) On or about 11/10/2015, Husband reported to Respondent that he was unable to perform a glucose check on a patient because he was unable to find a lancet in the ambulance. Respondent allegedly reminded Husband that any needle in the ambulance could have been used for the same purpose.
- i) On or about 11/19/2015, Husband and Wife met with Respondent's deputy director and the chairman of Respondent's board of directors. Husband and Wife were allegedly told that they needed to be "team players" and to stop complaining about Paramedic because their concerns had been investigated and determined to be without merit. Husband stated that he had written up concerns about Paramedic and that he had these documents with him. Respondent's deputy director suggested to Husband that he double check the documents, noting that he had previously been disciplined for falsifying a report; Husband decided to retain the reports.
- j) On or about 11/21/2015, Wife experienced [REDACTED] that required [REDACTED] from Fort Kent to Bangor. One of Respondent's ambulances took part in Wife's [REDACTED]. Wife was [REDACTED] and allegedly cleared to return to work by her doctor.
- k) On or about 11/23/2015, Wife met with Respondent's deputy director, who asked her to provide a note from her doctor confirming that she had been cleared to return to work. Wife alleged that she was asked to provide additional details about the medical condition that led to her hospitalization. Respondent disputed this and claimed that no further medical inquiries were made, and that Wife was allowed to work as soon as she provided the note from her doctor.

² Wife made similar complaints about how the ambulances were stocked and organized.

- l) Later that day, Wife had another meeting with the deputy director. During that meeting, the subject of Husband's prior false report came up. Wife then accused the deputy director of also falsifying a report.³ The deputy director then told Wife that she would have to "prove" such as accusation. He brought the office manager into the room and told her of the accusation. Wife was then asked to provide additional details but was unable or unwilling to do so.
- m) On 11/25/2015, Husband and Wife each received identical letters indicating that their "services as an EMT will no longer be required effective this date." In January 2016, in response to a request for reasons for their discharge, Respondent's director wrote, "Over the past months I and the administrative team became concerned about your expressed dissatisfaction with decisions and procedures being implemented by Ambulance Service. As a result, it was felt by us that it was in the best interest of Ambulance Service, Inc. to terminate your employment..."

V. Analysis:

- 1) The MHRA requires the Commission in this investigation 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 to mean that there is at least an even chance of Complainant prevailing in a civil action.

Retaliation – MHRA⁴/WPA

- 2) The MHRA prohibits retaliation against employees who, pursuant to the WPA, make good faith reports of what they reasonably believe to be a violation of law or a condition jeopardizing the health and safety of the employee or others in the workplace. See 5 M.R.S. § 4572(1)(A)&(B); 26 M.R.S. § 833(1)(A)&(B). The MHRA also makes it unlawful for "an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of [the Act] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S. § 4572(1)(E).
- 3) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that he engaged in activity protected by the WPA, he was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. See *DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. See *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515. The prima-facie case for an MHRA claim is similar, except that the adverse action must be "material". The term "materially adverse action" covers only those employer actions "that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 126 S. Ct. 2405.

³ Wife later provided that the alleged false report involved a run sheet from one or two years earlier when the deputy director allegedly asked her to indicate on a run report that she had been involved in a patient transfer when she was not.

⁴ Wife contends that she engaged in MHRA-protected activity when she refused to provide additional information about [REDACTED] Husband's MHRA retaliation claim is apparently based on his association with Wife's refusal to provide this information, as he has not identified any separate MHRA-protected conduct in which he allegedly engaged.

- 4) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then “produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action.” *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. *See also Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, the Complainant must carry his overall burden of proving that “there was, in fact, a causal connection between the protected activity and the adverse action.” *Id.* Complainant must show that he would not have suffered the adverse action but for his protected activity, although the protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).
- 5) Husband has established a prima facie case of WPA retaliation,⁵ but not of MHRA retaliation. He complained about health and safety issues and/or illegality on multiple occasions, and was discharged shortly after reporting concerns about Paramedic's patient care. Husband's prima-facie case for MHRA-based retaliation fails because he did not establish that he (or Wife) engaged in MHRA-protected activity. The record tends to show that after Respondent asked for a doctor's note clearing Wife for work, she was not asked for additional details of her condition, but rather was promptly permitted to return to work.
- 6) Respondent articulated legitimate, nondiscriminatory reasons for Husband's discharge, specifically his expressed dissatisfaction with recent management decisions and changes in procedure, and Wife's raising a totally unsupported allegation against the deputy director.
- 7) In the end, Husband has been able to establish that protected activity under the WPA was at least a factor in his discharge, with reasoning as follows:
 - a) Some of the complaints Husband made do not appear to involve risks to health and safety. The fact that he did not like the way the ambulances were stocked after a managerial decision to make all stocking uniform is not protected activity, even if there was a small chance that this might affect patient care. The same appears to be true with the complaint about having non-EMTs driving the ambulance. While it would of course be preferable to have two trained medical staff on board rather than only one, Respondent made the business decision that the rare occasion when two medical personnel would be needed was outweighed by the budgetary benefit to having non-EMTs drive.
 - b) However, his complaints about Driver's alleged actions and Paramedic's patient care do appear to rise to the level of protected whistleblower activity, even if Respondent later determined that Paramedic's actions were within the scope of his professional judgment and most of Driver's actions had been appropriate. In each of these cases, there is nothing to suggest that Husband did not report these issues in good faith. Even Husband's report that Driver administered medicine appears to have been made in good faith, despite the fact that Husband was also disciplined for falsifying the run report.
 - c) Shortly thereafter, Respondent had a staff meeting where employees were informed that future complaints should in writing, although Respondent contends that it would still investigate verbal

⁵ In this case, Husband and Wife raised both individual and joint concerns about health, safety, and/or alleged illegality. The WPA provides protection for an employee who makes protected reports themselves and/or on whose behalf such reports are made. 26 M.R.S. § 833(1)(A)&(B). While Husband and Wife did not specifically allege that they were reporting on each other's behalf, it is plain from the record that Husband, Wife, and Respondent each viewed the complaints from Husband and Wife collectively. Accordingly, Wife's complaints have been considered to have been made on behalf of Husband (and vice versa).

complaints that were "legitimate claims that were made in good faith". Both the timing of the instruction and Respondent's characterization suggests that it did not believe Husband's prior verbal complaints about Paramedic and Driver were made in "good faith."

- d) Further, just a week prior to Husband's discharge, he and Wife were essentially told to stop complaining about Paramedic because all prior complaints about him had been investigated. Husband and Wife expressed that they remained concerned about Paramedic's patient care. Husband then produced written complaints detailing incidents and concerns that he still had with Paramedic, in apparent full compliance with Respondent's newly instituted written complaints policy. However, rather than accepting the complaints, Respondent's deputy director dissuaded Husband from leaving the documents by advising him to "double check" them for accuracy, noting that Husband had been previously disciplined for filing a false report. This strongly suggests that Respondent had little if any interest in investigating whatever these written complaints contained.
 - e) The following week, after Wife returned to work from her [REDACTED], she had another meeting with Respondent's deputy director. At some point, Husband's prior false report came up, prompting Wife to accuse the deputy director of doing the same. While it is unclear from the record whether this report was a "good faith" complaint, it would clearly demonstrate to Respondent that neither Husband nor Wife was willing to stop "complaining" about what they believed to be illegal and/or unsafe activity.
 - f) Respondent does not dispute that it was this final accusation and the prior week's expressed dissatisfaction with managerial decisions and Paramedic's behavior that led to the discharge decision. Indeed, when asked for the reasons for its decision to discharge Husband, Respondent provided that it was due to Husband's "expressed dissatisfaction" with Respondent's actions.
 - g) In sum, while it is possible that some of the concerns Husband raised may have been motivated by factors other than an effort to make a "good faith" report of an illegal or unsafe condition or activity, it appears that the majority of his complaints about Paramedic's patient care and medical decisions were based solely upon Husband's attempt to call Respondent's attention to what he believed to be potentially unsafe and/or illegal activity.
- 8) Retaliation in violation of the WPA is found; retaliation in violation of the MHRA is not found.

Disability – Discharge

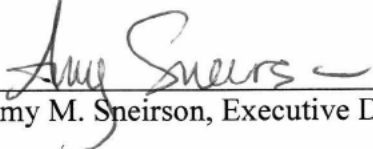
- 9) The MHRA provides that it is unlawful to discharge a qualified individual with a disability because of physical or mental disability, or because one is associated with an individual with a disability. See 5 M.R.S. § 4572(2).
- 10) Because here there is no direct evidence of discrimination, the analysis 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).
- 11) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) he belonged to a protected class, (2) he performed his job satisfactorily, (3) his employer took an adverse employment decision against him, and (4) the employer continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); cf. *City of Auburn*, 408 A.2d at 1261.

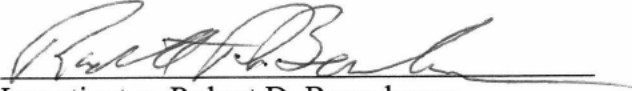
- 12) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent 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. 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. *Id.* 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
- 13) Husband has not established his prima-facie case because he has failed to establish that he is associated with an individual who has a disability, for the following reasons:
- a) Wife's assertion of having a disability is based solely upon the [REDACTED] that occurred the weekend prior to her discharge. This single event, without more, does not appear to be a disability within the meaning of the MHRA, in that there is no indication in the record that Wife was substantially limited in performing a major life activity or that she had a condition that significantly impaired her health and was expected to last for at least six months. *See 5 M.R.S. § 4553-A.*
 - b) Further, Respondent would have no reason to even regard or perceive Wife to have a disability, or be "damaged goods," based upon [REDACTED], especially given that she was cleared to return to work a day or two later, with no work restrictions. The evidence in the record does not support a finding that Wife was perceived to be disabled.
- 14) Discrimination on the basis of disability is not found.

VI. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that Ambulance Service, Inc., retaliated against David Pelletier for engaging in protected activity under the WPA, and conciliation of this claim should be attempted in accordance with 5 M.R.S. § 4612(3); and
- 2) There are **No Reasonable Grounds** to believe that that Ambulance Service, Inc., retaliated against David Pelletier for engaging in protected activity under the MHRA, and this claim should be dismissed in accordance with 5 M.R.S. § 4612(2); and
- 3) There are **No Reasonable Grounds** to believe that Ambulance Service, Inc., discriminated against David Pelletier on the basis of association with an individual with disability (discharge), and these claims should be dismissed in accordance with 5 M.R.S. § 4612(2).


Amy M. Sneirson, Executive Director


Investigator, Robert D. Beauchesne