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INVESTIGATOR'S REPORT
MHRC No. E17-0292
May 16, 2019

Dawn Rouillard (West Newfield)

v.

Cumberland County (Portland)

I. Summary of Case:

Complainant Dawn Rouillard, who worked as a human resources specialist, alleged that Respondent Cumberland County, a county government, discriminated against her based on disability when it denied her a reasonable accommodation and placed her on "inactive" status which had the effect of discharging her.[1] Respondent denied discrimination and stated Complainant was place on "inactive" status because she had exhausted her Family and Medical Leave Act ("FMLA") leave and could not get doctor clearance to return to work full-time. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, holding an Issues & Resolution Conference ("IRC"), and requesting additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that Respondent discriminated against Complainant based on her disability.

II. Jurisdictional Data:

1) Dates of alleged discrimination: October 7, 2016.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): June 26, 2017.

3) Respondent has 409 employees and is subject to the Maine Human Rights Act ("MHRA") and the Americans with Disabilities Act ("ADA"), as well as state and federal employment regulations.

4) Complainant is represented by Elliott Epstein, Esq. Respondent is represented by Patricia Dunn, Esq.

III. Development of Facts:

1) Complainant provided the following in support of her claims:

Complainant, who suffers from [redacted], and later contracted [redacted] worked for Respondent as a Human Resources Specialist. Complainant was diagnosed with [redacted]

[1] Complainant also alleged her direct supervisor falsified records, but she did not substantiate this allegation with objective evidence or make a specific claim of interference with MHRA-protected rights, *see* 5 M.R.S. ("M.R.S.") § 4633(2), against Respondent or her supervisor. Accordingly, an interference claim is not analyzed in this report.

Disease in 2015 and requested FMLA beginning on October 21, 2015. During the summer of 2016, Complainant contracted the [redacted] and her doctor recommended she take a one-month medical leave from work and then return to work with a reduced schedule [redacted]. Respondent allowed Complainant to take her continuous and intermittent leave allotted under FMLA until Respondent notified her that her FMLA was exhausted. Complainant believed her FMLA hours were not exhausted. Respondent's Human Resources Director ("Supervisor") altered time sheets to inaccurately reflect what leave Complainant had remaining in order to represent her FMLA allotment as exhausted early. Complainant was placed on "inactive" status. Complainant told Respondent about the FMLA hour miscalculation, but Supervisor and the County Manager continued to insist Complainant's FMLA leave was fully depleted. Complainant asked to continue to be allowed to work a reduced schedule until she could attend an upcoming doctor's visit and get her doctor's permission to return full-time to work. Respondent refused to consider this reasonable accommodation request. Respondent's actions effectively discharged Complainant from her employment.

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

Respondent has a long history of granting Complainant the FMLA leave she has requested. After a one-month FMLA continuous leave, Respondent also permitted Complainant to return to work reduced hours using her FMLA time as intermittent leave. Complainant exhausted her FMLA allotment, but she still continued to request to take leave while working part-time. It was unclear whether Complainant would ever be granted clearance by her doctor to return to full-time work. Complainant's reduced schedule significantly impacted Respondent's ability to conduct its business near its busiest time of the year, so Respondent denied Complainant's additional reasonable accommodation request. Complainant's employment was put into "inactive" status and Respondent replaced Complainant with a full-time employee in December 2016; Complainant later resigned.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties and the information gathered at the IRC:

a) Complainant has a disability ([redacted]. *See* 5 M.R.S. § 4553-A(1)(A)(1)&(2). In the summer of 2016, she [redacted] and her recovery time was prolonged [redacted] Complainant also [redacted].

b) On November 13, 2013, Complainant began working for Respondent as a Human Resource Generalist, working part-time, 30 hours a week. On May 12, 2015, Complainant was promoted to Human Resource Specialist, working 37.5 hours a week, which is considered full-time. The job description does not specify an expectation of full-time or part-time employment.

c) In the fall of 2015, Complainant's [redacted] rendered her unable to attend work. She was granted intermittent FMLA leave though early July 2016. Complainant was also granted FMLA leave for a few days in mid-April 2016 to care for her spouse after [redacted]

d) On April 12, 2016, Complainant received a positive performance evaluation. Supervisor rated her job performance as "commendable" and "superior," and stated, "[Complainant] has overall done an amazing job this year despite some outside challenges," and, "[Complainant] get[s] [her] work done with the least amount of resources and disruption of anyone I've worked with—enough said."

e) On June 17, 2016, Complainant was diagnosed with [redacted]. This diagnosis interacted with Complainant's [redacted] and caused her [redacted] In early

July 2016, Complainant notified Respondent of her [redacted] and requested a one-month leave under FMLA. Respondent granted the request; Complainant was out of work from July 6, 2016 until August 8, 2016.

f) When Complainant returned to work on August 9, 2016, she struggled to work a full-time schedule; she worked seven partial days that month. At the same time, she took on additional responsibilities for administering benefits, including reconciliation of benefits billing, which was increased work and a new job duty.

g) According to Complainant, at the end of the summer of 2016, Supervisor and County Manager's attitude toward her changed and Respondent took away certain responsibilities. According to Complainant, this is the first time there were clear indications her job was no longer secure. For more than a year, Complainant worked planning an important training for county supervisory staff. Complainant intended to be the person facilitating the training that was due to begin late September 2016. When Complainant returned from her August 2016 leave, she immediately returned to finalize the training, but Supervisor allegedly told her, "Don't worry about it. We decided to go a different route."[2] Complainant asked why the training was cancelled; Supervisor declined to provide additional information.

h) On September 6, 2016, Complainant requested additional intermittent FMLA leave to work 4-5 hours a day.[3] Respondent's Human Resources Department ("HR") granted Complainant's request in a letter (dated September 7, 2016), which stated Respondent agreed to this part-time arrangement until Complainant could be seen by her doctor again. Complainant's doctor intended to re-evaluate Complainant for imminent return to full-time work. At the time, Complainant's next scheduled doctor's appointment was October 5, 2016. Respondent's letter clearly stated Complainant's intermittent leave would only be permitted until her FMLA was exhausted.

i) On September 15, 2016, Complainant reached out to Respondent to ask when her annual entitlement would be replenished. Respondent notified Complainant that she was scheduled to receive her new 12-week FMLA leave entitlement on October 21, 2016. The employee tracking the FMLA time usage provided occasional updates on Complainant's remaining FMLA time.[4]

j) According to Respondent, Complainant often complained that she was fatigued by her long drive to work and co-workers observed her diminished work capacity, which was described as general lethargy. Respondent purportedly developed concerns about Complainant's job performance; yet did not tell Complainant of its concerns. Respondent could not, and did not, provide evidence it notified Complainant that her part-time work hours were impacting business.

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[2] It is notable this occurred in the last stages of planning, when 15-20 county employees had already registered, with adjusted work schedules had coverage arranged so the supervisors could attend.

[3] During this period, Complainant worked from 10:00 a.m. until 2:00 p.m. each day. Respondent provided that the bulk of Complainant's work at this time of year was answering questions for other county employees; according to Respondent, this typically happened early in the morning or at the end of the day. While this may be true, Respondent never brought this concern to Complainant or discussed adjusting Complainant's part-time hours, as part of the interactive process, to adjust her hours.

[4] As of August 31, 2016, Complainant was told she had approximately 130 hours of FMLA time remaining.

k) According to Respondent, every October HR approached its busiest time of the year with the open enrollment benefit period.

l) On October 5, 2016, Complainant attended her scheduled doctor's appointment and her doctor did not clear her to return to work full-time. He wanted to see her again in one month and expected to provide her with clearance to return to work full-time then.

m) On October 7, 2016, Supervisor and County Manager met with Complainant and ended her employment. Respondent believed that Complainant had exhausted her annual FMLA leave sometime around the end of September. Complainant disagreed with this assessment, asked to see documentation, and requested the record-keeping for her time be audited. Respondent explained to Complainant that, in any case, it needed someone in her position full-time and it was unwilling to wait until Complainant's next doctor's appointment. Complainant requested that her part-time schedule be extended one month as a reasonable accommodation until she could be seen, again, by her doctor. Complainant provided Respondent with a note from her doctor (dated October 5, 2016) reiterating this request. Complainant's next doctor's visit was scheduled for November 5, 2016, which Respondent knew of. Supervisor told Complainant it was her last day and placed her on "inactive" status. [5] Complainant believed her changed status effectively terminated her employment.

n) Respondent provided it was particularly concerned about the timing of Complainant's last reasonable accommodation request. Respondent gave two different reasons timing was directly at issue. First, Respondent's submissions suggest that HR was about to enter its busiest time of the year during the open enrollment period. HR and adjacent departments were allegedly already struggling to keep up with an increased workload that was in part created by Complainant's various leaves.[6] Then, in a candid statement at the IRC, County Manager testified that Respondent probably chose not to grant Complainant's reasonable accommodation request because Respondent did not want Complainant to receive a new FMLA 12-week entitlement on October 21, 2016. Complainant's next doctor's appointment was scheduled after this date. It is notable that Complainant's entitlement to FMLA leave would be replenished just 16 days after her changed employment status.

o) Complainant's position was posted and filled by a new employee sometime in early December 2016.

p) Respondent listed Complainant's employment as "inactive" for a period of one year, in accordance with Respondent's standard policy. Complainant did reapply for a position, was interviewed, and not hired. On October 7, 2017, her employment was terminated.

IV. Analysis:

[5] Respondent argued that Complainant's employment was on-going because she was an "inactive" county employee. At first Respondent suggested, this was tantamount to a leave of absence, and Complainant could return to her position at any time prior to it being filled. This is disingenuous; in order for Complainant to regain her position, she would have had to have gone through the same hiring process as any other candidate. Respondent's "inactive" status only ensured that Complainant retained certain earned benefits for a limited period so that she would not lose them, should Respondent decide to rehire her.

[6] The IRC was the first time Respondent developed its undue burden defense with any specific detail. Respondent did so broadly through witness testimony that described the administrative workings of its HR office and related county departments. Respondent provided no supporting documentation.

1) The MHRA provides 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 this standard to mean that there is at least an even change of Complainant prevailing in a civil action.

Disability Discrimination: Denial of a Reasonable Accommodation

2) Pursuant to the Maine Human Rights Act, 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. §§ 4553(2)(E), 4572(2).

3) 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 she 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.*

4) 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. § 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. § 4553(9-A).

5) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable her to perform the essential functions of her 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. § 4553(9-B).

6) 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

7) It is found that Respondent unlawfully denied Complainant a reasonable accommodation for her disability, with reasoning as follows:

   a) Complainant has a disability and she requested to temporarily work reduced hours as a reasonable accommodation. Her continued "leave of absence" was actually a request to work part-time for an additional month; requests for a part-time schedule are specifically included in the definition of "reasonable accommodation". 5 M.R.S. § 4553(9-A)(B). She performed the essential functions of her job while on that schedule. Complainant received glowing performance reviews, and was never disciplined, reprimanded, or counseled during the period she utilized FMLA. In fact, following a month-long leave, Complainant took on additional job duties that she had never performed before. Respondent

gave ex post facto reasons why Complainant's reduced schedule was an administrative burden but failed to provide objective evidence to support its witnesses' generalized claims.

b) Providing additional leave to an employee who is unable to give a fixed return date can be a form of reasonable accommodation.[7] Respondent's correspondence with Complainant on September 7, 2017 suggests an early decision to disregard all requests for additional leave time outside of FMLA legal protections. Supervisor stated Complainant's intermittent leave would be permitted until the FMLA entitlement had been used in full. Around the same time, and without explanation, Supervisor cancelled the training that Complainant worked on for more than a year to organize and lead. Taken together, this evidence tends to suggest Respondent was preparing to change Complainant's employment status as soon as her FMLA was exhausted. The records reflects that Respondent was never willing to even *consider* an additional request for leave as a reasonable accommodation unless required by federal law.

c) Respondent alleged that additional leave created an undue hardship. According to Respondent, Complainant's additional leave was an undue hardship because it would occur in the fall, leading up to Respondent's busiest time of the year, yet it provided no supporting documentation to support its claim. Even assuming the timing was an issue, County Manager's statement at the IRC is disturbing. He testified that Respondent "probably" denied Complainant's request for a reasonable accommodation and changed her employment status on October 7, 2016 because it did not want Complainant to receive a new FMLA 12-week entitlement on October 21, 2016. Based on the chronology in this case and Respondent's own admissions, it is more likely than not the County did not meaningfully consider Complainant's request because it did want her to obtain new FMLA leave eligibility.

8) Denial of a reasonable accommodation in violation of the MHRA is found.

Disability Discrimination: Dismissal

9) The MHRA provides that it is unlawful to discharge an employee on the basis of physical or mental disability. *See* M.R.S. § 4572(1)(A).

10) Because here there is no direct evidence of discrimination,[8] 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) she belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against him, and (4) her employer continued to have her duties performed by a

[7] In *Carnicella v. Mercy Hospital,* 2017 ME 161, the Law Court found that "additional leave" was not a reasonable accommodation as a matter of law given the MHRA defense that an employer is not liable for discharging an employee who is "unable to be at, remain at or go to or from" the place where the work is performed. 5 M.R.S. § 4573-A(1-B); *see Carnicella*, 2017 ME 161, ¶ 22. In that case, the employee had been on leave for more than six months when her position was filled and she was placed on per diem status; she still had not been cleared to return to work two years later. *Id.* at ¶ 12. Even in light of *Carnicella*, some periods of leave may be considered a reasonable accommodation when the leave will enable the employee to return to work and perform the essential functions of their position in the foreseeable future.

[8] "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination. . . ." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. County Manager's statement at the IRC is not considered direct evidence here because it was not made on or before Complainant's discharge and, in any event, the result is the same using the more rigorous burden-shifting standard.

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); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261.

12) Once Complainant establishes 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; *City of Auburn*, 408 A.2d at 1262, 1267-68. 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.

13) Complainant established a prima-facie case by showing that she is a person with a disability, she performed her job satisfactorily, she was effectively discharged when her employment changed to "inactive", and Respondent had a continuing need for human resources help. Respondent provided a legitimate, nondiscriminatory reason for Complainant's discharge/actions, namely that Complainant's doctor had not released her to return to full-time work and she exhausted her FMLA leave.

14) In the final analysis, Complainant met her burden to show that the real reason for her discharge/adverse employment decision was her disability, with reasoning as follows:

a) Respondent argued that Complainant's doctor's failure to give her clearance to return to full-time work made the temporary nature of her accommodation request unclear. "[A]t the risk of stating the obvious, attendance is an essential function of any job." *Mulloy v. Acushnet Co.,* 460 F.3d 141, 153 (1st Cir. 2006). In this case, Complainant's "leave" was actually a request for a temporary part-time schedule; even characterizing it as "leave", the leave was intermittent. She was still working in the office and received absolutely no feedback she was underperforming. In the early fall, Complainant's doctor told Respondent that he believed Complainant's full-time return to work was imminent. Respondent was willing to accommodate the request until (but not beyond) October 21, 2017. It would not permit her to remain employed in an active status until her November 5, 2016 doctor's appointment because she would become eligible for additional FMLA time.

b) The sole reason for Complainant's changed employment status was based on her request to work a reduced, part-time, schedule (a reasonable accommodation for her disability). Respondent changed her employment status after it believed that she exhausted her FMLA entitlement and then refused to meaningfully consider a request for accommodations outside of the protections of FMLA. "But for" Complainant's disability, she would still be working full-time in Respondent's employ. Respondent changing Complainant's employment status effectively discharged her from her employment, despite its arguments to the contrary.

15) Discrimination on the basis of disability is found.

V. Recommendation:

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

1) There are **Reasonable Grounds** to believe that Respondent Cumberland County discriminated against Complainant Dawn Rouillard on the basis of disability by denying her a reasonable accommodation;

2) There are **Reasonable Grounds** to believe that Respondent Cumberland County discriminated against Complainant Dawn Rouillard on the basis of disability by discharging her; and

3) The claims should be conciliated in accordance with 5 M.R.S. § 4612(3).

Alice A. Neal, Chief Investigator
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