



Maine Human Rights Commission

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INVESTIGATOR'S REPORT
MHRC Case Number E17-0464-A/B
July 26, 2019

Brent Miller (Clinton)

v.

Acadia Healthcare Company, Inc. (Franklin, TN)
DHG Services, LLC (Bangor)

I. Summary of Case:

Complainant, the former program Director for Discovery House Comprehensive Treatment Center (“Discovery House”) in Bangor, filed his Complaint with the Maine Human Rights Commission (“Commission”) alleging discrimination on the basis of age and retaliation for activity protected under the Maine Whistleblowers’ Protection Act (“WPA”). Discovery House provides outpatient opioid treatment, and is owned by Respondent DHG Services, LLC (“DHG”). DHG is a subsidiary of Respondent Acadia Healthcare Company, Inc. (“Acadia”). Acadia provides behavior healthcare services and operates a network of 576 behavioral healthcare facilities in the United States and United Kingdom. Respondents state that Complainant was discharged for fraudulently signing another employee’s name on an incident report. The Investigator conducted a preliminary investigation, which included reviewing all documents submitted by the parties and holding an Issues and Resolution Conference (“IRC”). Based upon this information, the Investigator recommends that the Commission finds no reasonable grounds to believe that Respondents discriminated against Complainant on the basis of age or retaliated against Complainant for engaging in protected activity.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: April 15, 2016 – April 26, 2017.
- 2) Date complaint filed with the Maine Human Rights Commission (“Commission”): October 16, 2017.
- 3) Respondent Acadia has over 19,000 employees; Respondent DHG has approximately 450. Both Respondents are subject to the Maine Human Rights Act (“MHRA”), the Age Discrimination in Employment Act (“ADEA”), and the WPA, as well as state and federal employment regulations.
- 4) Complainant is represented by Alison Tozier, Esq., and Richard O’Meara, Esq. Respondent is represented by Brittany Stancombe, Esq.

III. Development of Facts:

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

Complainant worked as the Program Director for Discovery House in Bangor. After Acadia purchased Discovery House, he reported to Regional Director. Regional Director asked Complainant in their first meeting how old he was, and over the year she supervised him, repeatedly told him he was hiring staff who were over-qualified. Complainant took this to mean he should hire younger, less experienced staff. Complainant brought a number of concerns to Regional Director. He reported concerns that Discovery House was violating patient confidentiality several times. When Regional Director did not respond, he reported the concerns to senior management, which resulted in Regional Director yelling at him and becoming hostile. Complainant later reported to Regional Director that he believed she was violating the terms of a state contract; when she disagreed, he did not report further because of her previous reaction to his reporting to more senior management. He also complained about high caseloads negatively impacting both staff and patients. Complainant was discharged after he signed the Clinical Supervisor's name (with his own initials in parentheses) to an incident report; he was authorized to sign incident reports, and simply wanted the report – which was already late – to go out quickly. A state employee (“Treatment Specialist”) reviewing the program questioned the signature, and indicated that it could be considered fraudulent. As a result, Regional Director terminated Complainant's employment. After Complainant's discharge, Acadia went on to hire someone much younger to replace him.

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

Complainant signed Clinical Supervisor's name on an incident report without Clinical Supervisor's knowledge or permission. The incident report disclosed the name of the patient involved in the incident, which was a violation of confidentiality rules and procedures, and put Clinical Supervisor's license at risk. Further, Treatment Specialist sent a letter after her investigation stating that Complainant's action could be perceived as fraud. This potentially fraudulent behavior was the reason for the termination of Complainant's employment. The person Respondent hired to replace Complainant was only three years younger than him and was paid more than Complainant. With regard to Complainant's retaliation claims, Complainant did not report everything he alleges to have reported, and what he did report neither was a violation of law nor created unsafe conditions in the workplace. Complainant never raised concerns to Regional Director about the caseload increase; in fact, Complainant submitted the waiver request to allow the increase. Complainant did express his concerns about the intake process, but Regional Director looked into it and assured him that it did not breach confidentiality requirements. Complainant did not like Regional Director's answer and inappropriately went above her head, and ultimately received the same response Regional Director had given him.

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 was the Program Director at Discovery House from June 2007 through April 27, 2017. He received positive reviews throughout his employment, including at his annual review in January 2017.
- b) On or about November 1, 2015, Acadia purchased DHG.
- c) In March or April 2016, Acadia hired Regional Director, who became Complainant's supervisor.
- d) In May or June 2016, Complainant raised concerns with Regional Director regarding potential privacy issues with Discovery House's intake procedure.
- e) Regional Director spoke to Acadia's Clinical Services Department and was reassured that the intake procedure did not violate applicable laws or regulations. Regional Director relayed this answer to

Complainant.

- f) Complainant was dissatisfied with the response from Regional Director and reached out to Acadia's Vice President of Clinical Services and President of its Comprehensive Treatment Division himself.
- g) Vice President of Clinical Services responded to Complainant that the intake procedures were compliant with applicable laws and regulations.
- h) Regional Director was upset that Complainant approached senior management and expressed this to Complainant. She felt that Complainant had a habit of "harried decision making" and cutting corners when he was concerned about something.
- i) In January 2017, DHG entered into a contract with the State to provide behavioral and medication assisted treatment services to low-income individuals who were eligible under the MaineCare guidelines.
- j) At first, both Complainant and Program Specialist believed that the grant was meant to cover new uninsured patients only, not current patients who were uninsured. Program Specialist spoke to Complainant about this, and Complainant brought it to Regional Director's attention.
- k) In fact, the grant was not meant only for new uninsured patients, and Regional Director instructed Complainant and Program Specialist to continue reaching out to current patients to see if they were eligible. Complainant and Program Specialist did so.
- l) Over the course of the year Regional Director supervised him, Complainant reported to her that the caseloads for individual counselors on staff were too high and could negatively impact patient care. Complainant also reported that Discovery House was out of compliance with state monthly counseling and documentation requirements.
- m) Prior to Regional Director's employment with Acadia, Discovery House had been granted a waiver by the state to allow counselors to have caseloads of up to 150 patients.
- n) Complainant received another waiver for increased caseloads on January 26, 2017.
- o) At some point, Complainant had delegated the review and signing of incident reports to Clinical Supervisor, but Complainant still had the authority to sign incident reports himself.
- p) On or about March 1, 2017, Complainant found an incident report in his mailbox that needed to be signed by a supervisor. The report concerned a patient's death, and the State was required to investigate such reports. These reports were also supposed to be submitted to the State within 24 hours of the incident, and this report was dated February 27, 2017.
- q) Complainant signed Clinical Supervisor's name to the report and put his own initials next to the signature. He then placed the report in the incident report box. It was the practice of the Program Specialist to check this box every day and submit reports to the State.
- r) The person who held the position of Program Specialist went out on leave around this time and did not return. The person who took over the position found the report in her office some time later and faxed the report to the state with a cover sheet explaining where she had found it.

- s) Treatment Specialist conducted a brief investigation of who signed the report when she was at Discovery House for a review on April 19, 2017. She asked Complainant and Clinical Supervisor two or three questions and left it at that. Regional Director was not aware of the incident report at that time.
- t) One or two days later, Regional Director received a phone call from the state about the incident report. The state opined that Complainant's actions could be considered fraud, and implied additional investigations could follow based on his actions.
- u) Regional Director called Complainant, who acknowledged to her that he had signed Clinical Supervisor's name on the incident report. Regional Director was concerned that Complainant did not perceive his actions to be wrong. Regional Director told Complainant she wanted to speak to him in person because she was concerned the state might file charges against Acadia and DHG.
- v) Shortly thereafter, Discovery House received the results of the review. In addressing the signing of the incident report, Treatment Specialist noted that Complainant's actions "could be perceived as fraud" and that Clinical Supervisor could have been held responsible for confidentiality violations since the employee who filled out the report used the patient's name.
- w) Regional Director spoke with Respondents' Human Resources, the President of the Division, corporate attorneys, and the Retail Vice President. There was general consensus that Complainant had seriously exposed Respondents to risk, and Respondents were concerned that Clinical Supervisor could take legal action against them.
- x) On April 27, 2017, Complainant's employment was terminated by Regional Director. Regional Director told him that he was being discharged because his action had put Respondents at legal risk.
- y) Complainant was 63 years old when his employment was terminated. The person hired to replace him was 60 years old.

IV. 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 Maine Revised Statutes ("M.R.S.") § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

Age Discrimination: Termination

- 2) The MHRA states, in part, that it is unlawful, based on age, to "fail or refuse to hire or otherwise discriminate . . . [or] discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S. § 4572(1)(A).
- 3) 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).
- 4) First, Complainant establishes a prima-facie case of unlawful age discrimination by showing that: (1) he

performed his job satisfactorily, (2) his employer took an adverse employment decision against him, (3) his employer continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed, and (4) those who continued to perform Complainant's job duties were a substantially different age than Complainant. *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; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (federal ADEA).

- 5) Here, Complainant cannot establish his prima-facie case. The person DHG hired to replace Complainant was 60 years old at her date of hire. Complainant was 63 years old when he was terminated. There is no substantial age difference between the two.
- 6) Even if Complainant had established his prima-facie case, he would not have been able to carry his ultimate burden of establishing that Respondents' reason for his discharge – his signing another employee's name on a state-mandated report – was pretext and that his age was the cause of his discharge. As noted above, his replacement was of a similar age as Complainant, as was Regional Director, who made the discharge decision. Other than the mere fact of his age, Complainant has not provided any evidence to suggest that his age was a factor in his discharge.¹
- 7) Discrimination on the basis of age is not found.

WPA Retaliation: Termination

- 8) 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); 26 M.R.S. § 833(1)(A)&(B).
- 9) 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. One method of proving the causal link is if the adverse job action happens in “close proximity” to the protected conduct. *Id.* at 1998 ME 227, ¶ 16, 719 A.2d at 514-15.
- 10) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA 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 employment action.” *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. 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 employment action.” *Id.* In order to prevail, Complainant must show that Respondent would not have taken the adverse employment action but for Complainant's protected activity, although protected activity need not be the only reason for the decision. *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).
- 11) Complainant has established his prima-facie case. He made good faith reports of what he reasonably

¹ Complainant claimed that he was asked how old he was on one occasion, but did not connect the question to his discharge approximately one year later. He also claimed he was encouraged to hire employees with less experience, which he equated with youth. Assuming these comments were made, the record does not support a correlation between age and experience here.

believed to be intake procedures that violated federal regulations about patient privacy, instructions from his supervisor that he believed directly contradicted a state contract, and caseloads that put patient care in jeopardy. All of these reports happened within a year of when his employment was terminated. Complainant provided evidence, including a sworn statement from Program Specialist, that Regional Director was hostile toward Complainant and treated him unprofessionally after he made the first report about the intake procedure to her higher-ups.

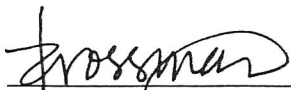
- 12) Respondent has provided a nondiscriminatory reason for Complainant's termination, namely, that he signed another employee's name to an incident report. This was fraudulent, and not only put Clinical Supervisor's license at risk, but also left Respondents open to legal action by both the state and Clinical Supervisor.
- 13) Complainant cannot meet his burden of proving that he would not have been fired but for his protected activity, with reasoning as follows:
 - a. While Regional Director was upset that Complainant went to more senior management, when she did not agree with his concerns about confidentiality, the problem does not appear to have been that Complainant reported a perceived confidentiality breach, but rather the manner in which he chose to try to go around Regional Director when they disagreed. Ultimately, senior management agreed with Regional Director, and there were no adverse consequences to Complainant.
 - b. Complainant's report about an alleged contract violation was apparently without merit, as was his complaint about staffing levels. With regard to the staffing levels in particular, the state had approved a waiver – that Complainant himself applied for – meaning that the patient load did not violate state laws or rules. There is no evidence in the record to show that the patient load caused unsafe conditions in the workplace; increased stress, by itself, is insufficient here.
 - c. Finally, even if the perception that Complainant's signing another employee's name on a state-mandated form was fraudulent was ultimately erroneous, the record reflects that Respondents believed Complainant's actions exposed them to significant legal risk. In particular, the state had opined that the signature could be perceived as fraud, could place Clinical Supervisor's license at risk, and might lead to further investigation. It is far more likely that this was the cause of Complainant's discharge, rather than his earlier reporting.

14) Retaliation in violation of the WPA is not found.

V. Recommendation:

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

- 1) There are **NO REASONABLE GROUNDS** to believe Acadia Healthcare Company, Inc. and/or DHG Services, LLC discriminated against Brent Miller on the basis of age;
- 2) There are **NO REASONABLE GROUNDS** to believe Acadia Healthcare Company, Inc. and/or DHG Services, LLC retaliated against Brent Miller for engaging in WPA-protected activity; and
- 3) The complaint should be dismissed in accordance with 5 M.R.S. § 4612(2);



Kit Thomson Crossman, Investigator