



Maine Human Rights Commission

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INVESTIGATOR'S REPORT MHRC Case Number: E17-0473 June 15 2018

Pamela J. Ainsworth (Sanford)

v.

Corning Incorporated (Kennebunk)

I. Summary of Case:

Complainant, a machine operator, alleged that Respondent, a manufacturer, discriminated against her on the basis of disability by denying her request for a reasonable accommodation. Respondent denied discrimination and stated that Complainant was unable to perform the essential functions of her job with or without an accommodation. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and issuing requests for additional information to Respondent. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that Respondent discriminated against Complainant based on disability.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: March 2017 to the present.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): December 18, 2017.
- 3) Respondent is subject to the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act ("ADA"), as well as state and federal employment regulations.
- 4) Complainant is not represented by counsel. Respondent is represented by Stephen J. Jones, Esq.

III. Development of Facts:

- 1) Complainant provided the following in support of her claim:

Complainant worked in Respondent's factory and was required to stand while she performed her job. After she was diagnosed with a physical disability, Complainant was no longer able to stand while working. Respondent provided Complainant with a temporary position that allowed her to sit; after a year, Respondent told her the temporary position was no longer available and placed her on leave. However, other factory workers had positions that permitted them to work while sitting. While on

leave, Respondent hired other employees for jobs Complainant could have performed. Respondent discriminated against Complainant because it failed to assign her to factory positions that allowed her to sit and because Respondent did not place her in several open positions at factory.

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

After it was determined Complainant could not perform the essential functions of her job in the factory without accommodation, Respondent assigned Complainant to a temporary project (“Factory Project”) as an accommodation for her disability. When Factory Project ended, Respondent provided Complainant with additional leave because there were no open positions that were consistent with her sitting restrictions. Complainant subsequently applied for an open position, but she was not selected because she was not the most qualified candidate. Complainant continued to inquire about available positions, but the only open positions required employees to stand. Complainant remains on leave and was not discharged. Respondent did not discriminate against Complainant because of her disability.

3) The Investigator made the following findings of fact based on the information in the record:

- a) Respondent manufactures specialty glass, ceramics, and products for life sciences industries. Complainant worked as a Filter Operator in the factory Respondent operated in Maine. The parties initially did not dispute that the Filter Operator position could only be performed while standing.
- b) In April 2015, Complainant took short-term leave for [REDACTED] related to pain in her [REDACTED]. In September 2015, Complainant returned to work without restrictions, but continued to have pain in her [REDACTED]. Complainant took additional leave and returned to work in January 2016. Shortly thereafter, she was diagnosed with [REDACTED]; because of this condition, Complainant was unable to stand for long periods of time without suffering extreme pain. There is sufficient evidence in the record to conclude Complainant’s medical condition qualified as a disability under the MHRA.
- c) In February 2016, Respondent assigned Complainant to the Factory Project, which was a special project designed to improve factory production. During the same time, Complainant also assisted with a document control system (the “Document Project”). The Document Project ended in December 2016; Complainant’s assignment to the Factory Project ended in February 2017 when her role in that project was completed.
- d) Complainant remained unable to return to her role as a Filter Operator when her roles in the projects concluded. Respondent placed Complainant on additional leave and informed her that it would contact her if any positions became available that were consistent with her restrictions.
- e) In April 2017, Complainant applied for an Inspector position, which was a role that would have permitted Complainant to sit. The parties disputed how Complainant became aware of the open Inspector position; Respondent stated that its Human Resources Department contacted Complainant to tell her about the position, while Complainant alleged she found out about the position from coworkers.
- f) Respondent interviewed six candidates for the open Inspector position, including Complainant. The parties did not dispute that Complainant was qualified for the Inspector position. Respondent chose another candidate to fill the position (the “Successful Candidate”); Respondent stated that Complainant was its second choice for the Inspector role. Complainant alleged that she was the most qualified applicant for the position. Complainant further stated that when a Manager informed her she did not get

the position, he stated that the only reason she was not chosen was because he did not understand her response to a question related to her “proudest accomplishment” at factory; Complainant argued that Manager would have understood her response if he had a background in quality control.¹ Respondent stated that the Successful Candidate was more qualified than Complainant and argued that requiring it to place Complainant in the open Inspector position over a more qualified candidate would not have been a “reasonable” accommodation.

- g) Throughout 2017, Complainant continued to contact Respondent about potential open positions, including visiting the factory in August 2017 to discuss returning to work with the factory’s newly hired Human Resources Manager. Respondent stated that the only positions open during this period were factory positions, which required employees to stand while performing their job duties.
- h) In her written submissions, Complainant suggested that Respondent could have let her work as Filter Operator solely on a machine that allowed her to sit. Respondent stated that Complainant failed to request such an accommodation. Respondent further stated that it required all Filter Operators to rotate between departments and machines to alleviate the physical toll on said employees, as well as because many production lines lied dormant for weeks or months at factory. Respondent stated that the ability to operate multiple machines was therefore an essential function of the Filter Operator position.
- i) Complainant also claimed that Respondent previously permitted certain Filter Operators not to rotate between departments or machines, which allowed these employees to work while sitting. Respondent denied this allegation and provided detailed information about the many machines each employee Complainant identified worked on; Respondent stated that all employees Complainant identified performed job duties while standing, as well as occasionally sitting.
- j) Complainant further alleged that Respondent hired two contractors to perform information technology duties she could have performed. Respondent disputed this allegation, stating that these positions were not open because they were occupied when Complainant was returned to leave in February 2017. In addition, Respondent stated that Complainant was not qualified for the positions. In support of this assertion, Respondent outlined the credentials required for the information technology positions; Complainant did not possess the requisite credentials for the two positions she identified as being open. As of the filing of her Complaint, Complainant remained on leave and Respondent had not discharged her. Complainant remained unable to stand for long periods of time because of her disability.

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.
- 2) The MHRA provides that it is “unlawful employment discrimination, in violation of this Act . . . for any employer to . . . discriminate with respect to the terms, conditions or privileges of employment or any other

¹ Complainant did not allege that Respondent failed to hire her for this position *because of* her disability, though arguably there are *some* facts in the record that might support such a claim. However, without more evidence from Complainant, there is not sufficient reason to conclude such a claim could be substantiated. Accordingly, the Investigator will not analyze a separate failure to hire claim in this Report.

matter directly or indirectly related to employment. . .” because of physical or mental disability. 5 M.R.S. § 4572(1)(A).

- 3) Pursuant to the MHRA, 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).
- 4) 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.*
- 5) 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).
- 6) 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). The term “undue hardship” means “an action requiring undue financial or administrative hardship.” 5 M.R.S. § 4553(9-B). 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) The MHRA lists “reassignment to a vacant position” as a form of reasonable accommodation. 5 M.R.S. § 4553(9-A)(B). Additionally, “[t]he ADA specifically lists ‘reassignment to a vacant position’ as a form of reasonable accommodation. This type of accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation.” *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, <https://eoc.gov/policy/docs/accommodations.html> (last visited June 8, 2016) (citations omitted). An “employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position.” *Id.* The EEOC Enforcement Guidance further states that an employee need not compete for an open position, stating that “[r]eassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.”² *Id.*

² In support of its position, the EEOC notes that in *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1300-01, (D.C. Cir. 1998) and *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 678 (7th Cir. 1998) two circuit courts issued decisions that interpreted the ADA to require an employer to accommodate an employee by reassigning the employee to an open

- 8) Here, Complainant could not establish that she was denied reasonable accommodations when Respondent denied her the opportunity to return to her previous Filter Operator position and when Respondent did not assign her to perform information technology work. However, Complainant did establish that Respondent denied her a reasonable accommodation when it failed to reassign her to the open Inspector position, with reasoning as follows:
- a) There is insufficient evidence to conclude that Complainant could have returned to her role as Filter Operator at any time after early 2016. Though Complainant argued that she could perform some of the duties required of a Filter Operator while sitting, the information she offered in support of this argument was anecdotal and was raised *after* Complainant initially conceded that standing was required for the position. In contrast, Respondent provided detailed information about the Filter Operator position and persuasive evidence that standing, rotating between machines, and rotating amongst production lines are essential functions of the Filter Operator position. There is no dispute that Complainant was, and remains, unable to perform these essential job functions because of her disability.
 - b) Similarly, Respondent provided compelling evidence to show that the information technology positions were unavailable in 2017, despite Complainant's argument to the contrary. Complainant also failed to provide sufficient evidence – or argument – to show that she was qualified for these two positions.
 - c) However, with respect to the Inspector position in April 2017, it is apparent that Respondent failed to meet its obligation to accommodate Complainant by reassigning her to this open position. There is no dispute that Complainant was qualified for the Inspector position (she was Respondent's second choice for the position out of six candidates); there is also no dispute that Complainant was actively seeking to return to work *in any capacity* after her work on the projects ended in February 2017. Although the courts are split as to whether an employer must reassign an employee to an open position without competition, this fact strongly helps Complainant reach the "at least an even chance" standard threshold in this case, particularly given that the First Circuit has not ruled on the issue and the EEOC has taken a position that is favorable to Complainant. Based on these facts and the plain language of the MHRA, Respondent should have reassigned Complainant to the open Inspector position as an accommodation for her disability without making her compete against other candidates.
 - d) It must be noted that Respondent provided Complainant with 12-months of temporary work on the projects as an initial accommodation for her disability. It is also apparent that Respondent continued to proactively communicate with Complainant about potential open positions throughout the entirety of her time on leave. While such facts do not relieve Respondent of its obligation to provide additional accommodations to Complainant – such as reassignment – these facts do tend to suggest that Respondent may not have intentionally failed to accommodate Complainant in this case. As noted above, Complainant need not establish intent to discriminate on the basis of disability in order to establish her claim here.

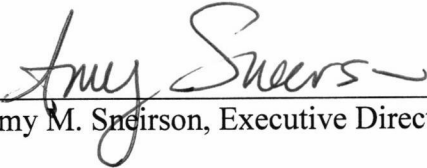
position if the employee is qualified for the job. In *Aka*, the court also addressed the issue of giving preference to employees with disabilities, explaining that "[a]lthough the ADA's legislative history does warn against 'preferences' for disabled applicants, it also makes clear that reasonable accommodations for existing employees who become disabled on the job do not fall within that ban." *Aka*, 156 F.3d at 1300-1301 (D.C. Cir. 1998) (citations omitted). However, the United States Court of Appeals for the Eleventh Circuit disagreed with the EEOC's interpretation, holding that the ADA does not require reassignment to a vacant position without competition. *E.E.O.C. v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333 (11th Cir. 2016). The United States Court of Appeals for the First Circuit ("First Circuit") – which covers the geographic area that includes Maine – has not ruled on this issue.

9) Discrimination on the basis of disability is found in this case.

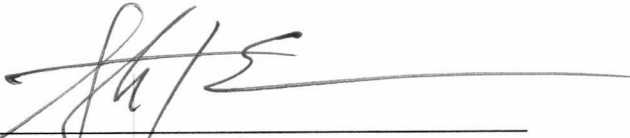
V. Recommendation:

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

There are **Reasonable Grounds** to believe that Corning Incorporated discriminated against Pamela J. Ainsworth on the basis of disability by failing to reasonably accommodate her by reassigning her to an open position in April 2017, and the complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneider, Executive Director



Stuart W. Evans, Investigator