Maine Human Rights Commission

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INVESTIGATOR'S REPORT
MHRC Case No. PA17-0239
November 7, 2018

Corey Deveau (West Gardiner)

v.

Bureau of Motor Vehicles (Augusta)[1]

I. Summary of Case:

Complainant Corey Deveau, a [redacted] applicant for a Commercial Driving License ("CDL"), alleged that Respondent Bureau of Motor Vehicles discriminated against him when it denied him a reasonable modification/auxiliary aid necessary to allow him to access its CDL testing services. Respondent, a state agency that licenses drivers, denied discriminating against Complainant and stated that federal law prohibited it from granting the requested modification. The Investigator conducted a preliminary investigation, which included reviewing all of the documents submitted by the parties and requesting additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Respondent discriminated against Complainant based on disability.

II. Jurisdictional Data:

1) Dates of alleged discrimination: April 2016 through current.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): May 17, 2017.

3) BMV is an agency of the State of Maine, and is a "public accommodation" and "public entity" under the Maine Human Rights Act ("MHRA"), and is required to abide by the MHRA and applicable regulations.

4) Complainant is not represented by counsel. Respondent is represented by Kelly Morrell, Esq.

III. Development of Facts:

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

> Complainant, who is [redacted] and uses American Sign Language ("ASL"), has studied to become a CDL driver. He took BMV's CDL test ("Licensing Test") twice, with the assistance of an ASL interpreter. While Complainant failed both tests, he did improve his score and wished to take the test a third time.

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[1] Complainant named Respondent as Bureau of Motor Vehicles ("BMV"). Respondent, a state agency, provided that the department's legal name is State of Maine, Department of Secretary of State, Bureau of Motor Vehicles. Because Complainant did not amend his complaint, the name he used in his complaint were retained.

When Complainant sought a third test, BMV denied him an interpreter because federal regulations no longer permitted the use of interpreters during the exam. Because BMV provides accommodations for Licensing Tests to be administered in foreign languages and in an automated format, it should also offer the test in ASL.

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

BMV is required to administer Licensing Test in accordance with federal regulations. BMV allowed Complainant to take the Licensing Test, twice, with an interpreter, and Complainant failed. Thereafter, BMV was given more guidance on the federal regulations which unequivocally stated interpreters are not permitted. When Complainant requested an interpreter to take Licensing Test a third time, BMV cited federal law and did not schedule a test for Complainant.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties:

a) Complainant is [redacted] and uses ASL as his primary language.

b) In order to obtain a CDL in Maine, drivers must pass Licensing Test administered by the BMV.

c) The administration of Licensing Test is governed by federal regulations promulgated by the Federal Motor Carrier Safety Administration ("FMCSA"). Licensing Test is organized into two parts: a standardized Knowledge Test, and a roadside Skills Test. In order to take the Skills Test, an applicant must first pass the Knowledge Test.

d) Prior to July 2015, the federal regulations were silent regarding the use of interpreters for Licensing Test, so BMV provided interpreters for applicants when requested. FMCSA amended its regulations, effective July 8, 2015, to prohibit the use of interpreters.[2] Because of the ambiguity between the new federal regulations and previous guidance, BMV continued to provide applicants with interpreters, when requested.

e) On January 12, 2016, Complainant took Licensing Test with the assistance of an interpreter, and he did not pass the test.

f) On February 26, 2016, Complainant took Licensing Test, again, with the assistance of an interpreter, and he did not pass the test. He did improve his score.

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[2] The standardized Knowledge Test has typically been administered by the BMV as a written test, however federal regulation 49 Code of Federal Regulations ("C.F.R.") § 383.111(b)(3) states Knowledge Test, "may be administered in written form, verbally, or in automated format and can be administered in a foreign language, provided no interpreter is used in administering the test." The federal regulations also speak to the roadside Skills Test in 49 C.F.R. 383.111(c)(5) to state, "Interpreters are prohibited during the administration of skills tests. Applicants must be able to understand and respond to verbal commands and instructions in English by a skills test examiner. Neither the applicant nor the examiner may communicate in a language other than English during the skills test." Because Complainant has not passed the Knowledge Test, he has not reached the stage for requesting a Skills Test and determining whether or not he requires a modification.

g) In spring 2016, BMV requested clarification of the federal regulations from FMCSA. FMCSA responded to advise that interpreters can never be used for CDL testing.[3] As a result, after March 2, 2016, BMV denied applicants for Licensing Test use of interpreters as a reasonable modification.[4]

h) In April 2016, Complainant sought to take Licensing Test a third time. Through his Vocational Rehabilitation Counselor ("VR"), he requested an interpreter as a reasonable accommodation for his disability, as he had the two times before. Complainant made his request via email. Respondent replied via email to deny the request, stating, "Unfortunately, interpreters are prohibited for CDL testing, per federal regulation [49 C.F.R. §] 383.133(b)(3). We were informed of this regulation shortly after [Complainant]'s last exam."

i) After Respondent's initial denial of a reasonable modification, it did not offer Complainant an alternate reasonable modification. Instead, it ceased further communication, effectively denying Complainant access to the Knowledge Test.

j) Respondent contracts with a national testing vendor ("Testing Vendor") which provides automated tests for a variety of driver licensing in the form of computer-generated testing. Testing Vendor provides Respondent with automated renditions of the Knowledge test in five different languages.[5] Currently, Testing Vendor does not offer an automated CDL test in ASL.
   i. After the filing of this Commission complaint, on July 2, 2018, Respondent emailed Testing Vendor to ask whether it had developed a CDL test in ASL. The record does not reflect Respondent previously sought this information.
   ii. Testing Vendor replied, "We only have a couple of customers currently using ASL [computer-generated testing], with one using it for a motorcycle exam, and another with their general knowledge test." Testing Vendor further stated, "The cost to implement ASL for CDL would be very high." According to the record, this was the full extent of Respondent's inquiry.

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

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[3] On March 2, 2016, FMCSA responded to an email inquiry by Respondent, citing its regulation 49 C.F.R. § 383.111(b)(3), which provides that "knowledge tests may be administered in written form, verbally, or in automated format and can be administered in a foreign language, provided no interpreter is used in administering the test" (emphasis in original).

[4] Title 29-A Maine Revised Statutes ("M.R.S.") § 1253(2) provides that the "State must comply with…the federal Motor Carrier Safety Improvement Act of 1999…and regulations adopted under those Acts in issuing or suspending a commercial license. In the case of any conflict between the federal statute of regulation and a statute or rule of this State, the federal statute or regulation must apply and take precedence." In addition, 29 C.F.R. § 1630.159e0 (Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act) provides that "it may be a defense to a charge of discrimination under this part that a challenged action is required of necessitated by another federal law or regulation, or that another federal law of regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required." Respondent argued, although this is not an employment discrimination matter, the same defense would apply.

[5] Testing Vendor has provided the Knowledge Test to Respondent in English, French, Spanish, Russian, and Serbo Croatian.

unlawful discrimination has occurred." 5 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 prohibits discrimination on the basis of disability by any public accommodation. Unlawful discrimination includes a "failure to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities". 5 M.R.S. § 4592(1)(B). Unlawful discrimination also includes "[a] failure to take steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services". *Id.* at § 4592(1)(C). Auxiliary aids include "[q]ualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devises, assistive listening systems, telephones compatible with hearing aids, closed captioning, decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments". Me. Hum. Rights Comm'n Reg. Ch. 7, § 7.17(B).

3) To establish a denial of reasonable modification, including the denial of an auxiliary aid, by a public accommodation, Complainant must show that:

(1) He comes within the protections of the MHRA as a person with a disability;
(2) Respondent operates a public accommodation under the MHRA;
(3) Respondent has in effect a policy, practice, or procedure that, directly or indirectly because of Complainant's disability, results in Complainant's inability to access Respondent's goods, services, facilities, privileges, advantages or accommodations;
(4) Complainant requested a reasonable modification in that policy, practice, or procedure which, if granted, would have afforded him access to the desired goods, services, facilities, privileges, advantages or accommodations;
(5) The requested modification—or a modification like it—was necessary to afford that access; and
(6) The Respondent nonetheless refused to modify the policy, practice, or procedure.

See 5 M.R.S. § 4592(1); *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003). In proving that a modification is "reasonable," Complainant must show that, at least on the face of things, it is feasible for the public accommodation under the circumstances. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (employment case). 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.

4) The Commission's regulations further explain that "[i]f provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods, service, facilities, privileges, advantages, or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with physical or mental disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation." Me. Hum. Rights Comm'n Reg. Ch. 7, § 7.17(G). Notably, when the public accommodation is also a public (as is the case here) , it cannot claim that the provision of an auxiliary aid is an undue burden. *See* 5 M.R.S. §§ 4592(1)(B)&(C) (providing for undue burden defense only when the public accommodation is a private entity).

5) The process for identifying alternative aids and services is parallel to that for identifying an alternative accommodation in the employment context. Accordingly, failure by the public accommodation to engage

with the individual requesting an auxiliary aid or modification to identify an alternative may be a significant factor when considering whether the public accommodation failed to provide a reasonable accommodation. *See Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 515 (1st Cir. 1996). In determining responsibility for a breakdown in the interactive process, courts consider good faith and reasonable efforts in light of all the circumstances. *Goonan v. Federal Reserve Bank of N.Y.*, 12-CV-3859, Opinion and Order (SDNY 2014); *citing Beck v. University of Wisc. Bd. Of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996). Liability requires a "finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation". *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 91 (1st Cir. 2012); *see also Kvorjak v. State of Maine*, 259 F.3d 48, 52 (1st Cir. 2001).

6) Complainant has established that Respondent discriminated against him on the basis of disability by denying him a reasonable modification/auxiliary aid, with reasoning as follows:

   a) Complainant established that he is disabled, and he requested a reasonable modification of Respondent's policy of denying the use of an interpreter during its CDL examinations. He further established that the modification was necessary to allow him full and fair access to the CDL licensing procedure.

   b) Respondent took the position that Complainant's request was unreasonable, because providing an ASL interpreter would violate applicable federal regulations, which specifically prohibit the use of interpreters during the test.[6] While this position may appear reasonable at first look, ultimately this reasoning is flawed.

   c) First, Respondent took no further steps to try to identify an alternate modification or auxiliary aid it could provide that would allow Complainant to access the CDL examination. The MHRA places an affirmative burden on public accommodations to provide an alternative auxiliary aid "if one exists". Here, Respondent did not explore whether one existed at all until July 2018, well after this complaint was filed. Upon learning that its testing vendor provided automated ASL testing to at least a couple of its other clients, it opted not to pursue this option due to unspecified "high" costs.

   d) Most telling, though, is the position taken by the federal agency which promulgated the rule prohibiting interpreters for CDL testing. This agency ("Agency") began providing waivers of its [redacted] requirements to [redacted] drivers in February 2013. On December 29, 2017, it published responses to the most recent public comments on its continued practice of allowing such waivers. With regard to the prohibition on interpreters, Agency noted that its testing and training organizations were bound to follow the ADA and pointed out several possible options for providing the test to applicants without use of an interpreter, including "[u]se of a skills test examiner who is capable of communicating via American Sign Language". *Fed. Reg., Vol. 82, No. 249 at 61811.* Agency went on to state that "[t]he question of reasonable accommodation for a deaf or hard of hearing applicant is highly fact specific, for both the applicant and the examining entity." *Id. at 81812.* Notably, this guidance from Agency was published several months before Respondent contacted its testing vendor about producing an automated ASL test.

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[6] It also posited that offering the test in ASL in some format other than via simultaneous interpretation, would be an undue burden because it would be costly. Respondent is a public entity, and accordingly, as noted above, it cannot refuse to provide a reasonable modification or an auxiliary aid because doing so would be an undue burden. Even if this defense were available, Respondent did not establish an undue burden, since it offered only its bare assertion that its test provider said that the cost for generating an ASL test would be "very high".

e) Because Respondent made no effort to provide an alternative auxiliary aid or reasonable modification, and because the record shows that it would have been possible to identify and provide a modification that would have allowed Complainant full access to the CDL test, it is more likely that not that Complainant can establish his claim in court.

7) Discrimination based on disability in public accommodation is found.

V. <u>Recommendation:</u>

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

> There are **Reasonable Grounds** to believe that Bureau of Motor Vehicles discriminated against Corey Deveau due to his disability, and the claim should be conciliated in accordance with 5 M.R.S. § 4612(3).

Amy M. Sneirson, Executive Director

Jenn Corey Meehan, Investigator