Maine Human Rights Commission

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November 15, 2013

INVESTIGATOR'S REPORTS
E12-0031 & E12-0032

[redacted] [redacted]

v.

[redacted] [redacted]

&

Ryan Leighton

I. Complaint:

Complainant alleges that he was subjected to unlawful discrimination in the terms and conditions of employment (vacation classified as medical leave and threatened with termination) due to his disability. Complainant also complains that Respondents ordered him to submit to a medical examination to try to prove that he was not fit for work.

II. Respondents' Answer:

Respondents deny that any discrimination occurred and state that Complainant was not granted vacation time due to a staffing shortage and that leave was only granted after his doctor said it was medically necessary. Respondents state that the medical examination was justified by business necessity due to concerns about Complainant's condition and the amount of time he had missed during the preceding year.

III. Jurisdictional Data:

1) Date of alleged discrimination: 1/11/2012.

2) Date complaint filed with the Maine Human Rights Commission ("MHRC"): 1/24/2012.

3) Respondent [redacted] (hereinafter "the Town") employs approximately 72 individuals and it is required to abide by the non-discrimination provisions of the Maine Human Rights Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, and state and federal employment regulations. Respondent Ryan Leighton is individually subject to the Maine Human Rights Act, which defines "employer," in part, as "any person acting in the interest of any employer, directly or indirectly," 5 M.R.S. § 4553(4), and defines "unlawful discrimination" to include aiding and abetting another to do any type of unlawful employment discrimination. *See* 5 M.R.S. § 4553(10)(D).

4) This preliminary investigation, which included a review of the parties' written submissions and requests for additional information, is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds".

5) Complainant is represented by Attorney Aubrey A. Russell. Respondents are represented by Attorney Roger R. Theriault.

IV. Development of Facts:

1) The Complainant was first hired as the Assistant Supervisor at the Treatment Plant by the [redacted] in May 2001, and worked in that position until September 1990. In 2006, he was hired by the Town as the Treatment Plant Operations Manager, the position he held when the relevant events occurred.

2) Important third parties include Complainant's supervisor, Respondent Ryan Leighton (hereinafter "RL"), the Director of Public Works for the Town, Town Manager "EN," and Complainant's co-worker "IV."

Complainant's MHRC Claims

3) (Complainant, hereinafter "C") I have physical and mental disabilities. I have been employed on and off by the [redacted] for 18 years, most recently as Operations Manager.

4) (C) In spring 2011, I took some time off upon the advice of my pulmonary doctor. Before I took this leave, I met with my supervisors, Town Manager EN and the [then] Town Engineer RL, to discuss the situation. A later letter (4/28/2011) from EN to me stated that I was the Operations Manager and that this would not change until I said so. EN also said that he did not question my ability to continue to perform my duties.

5) (C) In July 2011, RL was given the title of Public Works Director even though he was not qualified for this position. I was then advised that my position had been changed from salary to hourly. Dealing with RL at work was very difficult. RL changed employee's job descriptions without notice and hired/promoted his friends over current staff, etc. If I questioned one of RL's decisions, he would become very angry.

6) (C) In November/early December 2011, I became fatigued and requested vacation time for the latter part of December. I submitted a note from my doctor indicating that I needed to take several weeks off. I gave Town Manager EN this note on 11/23/2011 and he told me to bring it to RL. Since I had already requested vacation time beginning December 28th, we agreed to continue with the plans and dates. I later received an email from RL which I took to mean that I should finish out the day/week and not return to work until 1/11/2012. The vacation time I had requested was then classified as medical leave by the Respondents.

7) (C) RL also sent me a letter on 12/27/2011 which contained an underlying threat of losing my job, which was due to some confusion on both sides as to when I would be taking my leave. I believed this to be very unfair because we had already agreed on my leave previously. RL was also aware that I had medical issues that could be complicated by stress and I feel he deliberately tried to cause problems for me at work.

8) (C) Respondents also scheduled me to see a doctor of their choosing on 1/12/2012 to see if I could perform my job. I had provided medical documents to my employer and I believed this was a tactic by them to obtain an opinion that I was unable to perform my job. On the advice of my attorney, I did not see the doctor. On or about 1/11/2012, RL notified me that the doctor's visit would be rescheduled for a later date.

9) (C) I was able to return to work on 1/9/2012, a little earlier than planned. I believe that I have been unlawfully discriminated against in employment (vacation classified as medical leave, threat of termination) because of my physical and mental disabilities.

The Town's Answer to Complainant's MHRC Complaint

10) (Respondent [redacted] hereinafter "R") The initial issue is whether or not the Complainant can demonstrate that he is physically and mentally disabled and whether or not the Town had any reasonable basis to believe that he suffered from these unspecified disabilities. Complainant has indicated that he is fully capable of performing his job functions. No documents have been provided to the Town, nor is there any indication that the conditions that he lists in his Charge of Discrimination were sufficient to limit one or more of his major life activities. He has never requested any reasonable accommodation.

11) (R) The specific ailments suffered by Complainant are listed in the preamble of his Charge of Discrimination form. While working for the Town, his asthma and chronic obstructive pulmonary disorder ("COPD") were generally referred to but not documented in any detail. In fact, these conditions were the rationale for an extended leave in the spring of 2011. The atrial fibrillation condition, to which he also refers, has only been mentioned in very general terms as "heart issues." The Town received a 12/22/2011 note from Complainant's doctor requesting he be out of work for two weeks for issues "involving both his heart and lungs." His doctor's follow up e-mail did not mention any heart issue at all. Complainant's need for a pacemaker was not known by the Town until February of 2012, significantly after the two actions complained of by Complainant had occurred. Complainant's Charge of Discrimination also refers to PTSD (Post Traumatic Stress Disorder), but the Town had no knowledge that Complainant suffered from PTSD.

12) (R) The Town's classification of leave as medical leave instead of vacation is supported by the documentation [in MHRC file]. Complainant filed an absence request on December 19, 2011 asking for vacation leave from 12/27/2011 to 1/11/2012. He listed as the reason for the vacation "my son and granddaughter are visiting from Florida." RL baulked at granting the vacation leave since it would leave him extremely shorthanded at the Plant and this was due to the fact that another employee (Complainant's co-worker, "Mr. One") was out on medical leave during the same period of time.

13) (R) RL, therefore, questioned the rationale for the leave and asked for further explanation. Complainant then transformed his vacation leave request into a medical leave (sick leave) request, based on a note and an e-mail that he acquired from his physician that indicated that he needed to rest. Both the note and the e-mail are very short on specifics as to why Complainant needed to rest for this specific time frame for which he originally requested vacation leave to be with his family. The only indication was that his condition was worsening. Under these circumstances, the Town would be derelict in its duty to not characterize this leave request as medical leave (sick leave). The leave was granted, based on the doctor's note and probably would not have been granted as vacation leave, based on the manpower shortage. It is hard to imagine how a proper characterization of the nature of the leave can be discriminatory under these circumstances.

14) (R) The second action by the Town that allegedly constitutes discrimination refers to a letter of 12/27/2011 from RL requesting that Complainant submit to an evaluation by Occupational Health Associates of Maine regarding his capacity to perform his job function(s). A review of Complainant's attendance record [in MHRC file] for the previous year raises a legitimate concern regarding his ability to be on the job, going forward *(See* Exhibit 19). This shows his work history for essentially the last 14 months and the reasons that work was missed. From the period beginning 2/5/ 2011 and running through 2/25/2012, Complainant only worked 1,462.25 hours, much of this outside regular business hours.

15) (R) The Town has a legitimate interest in protecting its employees and not placing them in circumstances that would be injurious to their health, especially for someone with pulmonary medical issues in an environment such as a Sewer Treatment Plant. This raises significant performance and liability issues that the Town must address. Similarly, the Town has the right to expect its employees to be on the job during regular business hours. Complainant missed significant time during business hours, enough so as to raise questions as to whether he could/should continue in that position. Under these circumstances, the Town has the right to request medical information and evaluations where the inquiry is job related and consistent with business necessity as it was under these circumstances.

16) (R) The Complaint focuses on what Complainant characterizes as a threat of termination. However, one searches the correspondence of 12/27/2011 from RL for any threat which jeopardizes Complainant's continued employment. What RL did say is that he found unacceptable and grounds for disciplinary action that Complainant was on the job on 12/23/2011, when he was not supposed to be, per his doctor's note. Under no stretch of the imagination can this be considered a threat to his continued employment.

RL's Response to Complainant's MHRC Complaint:

17) (Respondent RL) I am currently the Town Engineer and the Director of Public Works for the [redacted] I have been employed by the Town since 2001. I have been an administrator and supervisor in the Department of Public Works since that date. I am well familiar with the Department personnel.

18) (RL) Complainant has generally discussed his ongoing health issues. It is unclear to me if these issues classify him as disabled, and I have seen no medical documentation that clarifies or elaborates on his condition as a disability. He has never claimed to be disabled and has always insisted that he could do his job. He has never asked for any accommodation due to any medical condition.

19) (RL) Complainant has been employed by the Town since 2006. From 1981 to 1990, he worked for the Town as the Assistant Supervisor at the Treatment Plant. While he did perform his job satisfactorily, over the past couple of years he has given the impression he is not invested in the job and seems disinterested in the day to day operations. As described to me by fellow staff, he is constantly on his computer generating letters and reports which in most cases appear to be strictly busy work. His job description[1] is attached [in MHRC file] and he has been unable to perform the physical aspects of his job for quite some time.

20) (RL) At the beginning of April 2011, Complainant requested and received time off to spend with his son and to rest up based on his ongoing health issues. He was unable to return to work on the advice of his Doctor, and indicated he would be out of work indefinitely. Complainant's co-worker, IV, was placed in charge of the Treatment Plant Operations during Complainant's absence. Once Complainant heard this, he became paranoid and assumed he was being replaced and insisted he was still the Operations Manager even though he was unable to work or perform essential functions of the job. In order to ease Complainant's concerns, the Town Manager and I met with him to clarify that IV was going to be in charge during Complainant's absence since we still needed a functioning management structure, and upon his return, Complainant would resume his duties as Operations Manager. He sent a letter to the Town Manager about

[1] Under the Physical Demands section of the Operations Manager Job Description the requirements include that an "employee frequently required to stand talk and hear. The employee is occasionally required to walk; sit; climb or balance; stoop, kneel, stoop, or crawl; and smell. The employee must frequently lift and/or move 10 pounds and occasionally lift and/or move up to 35 pounds."

this on 4/21/2011, which prompted the Manager's letter of 4/28/2011. At that point there was no significant concern that following treatment Complainant would not be able to return to work and perform his job as required.

21) (RL) My becoming Public Works Director, in addition to my duties as Town Engineer, was part of a restructuring by the Town Manager. If he thought I was not qualified, he would not have appointed me. Complainant's opinions on my qualifications are his own and are not shared by my supervisor. Based on the restructuring all Operations, Department Managers were made hourly employees. I discussed this in person with Complainant. With respect to promotions and job descriptions changes, Complainant fails to mention that the same week he went out on medical leave in April/May; another employee also went out on medical leave and never returned. IV and another co-worker were left to handle sewer department daily operations alone. IV was responsible for doing his job as Chief Mechanic, plus the job of the employee who never returned, and Complainant's job as Operations Manager. Initially, another employee was responsible for doing his job as Operator/Laborer and that also assumed some of the Chief Mechanic responsibilities. The Town had to eventually hire two part time laborers to help as well. Based on IV's performance during this time and because he was still doing the departed employee's job, IV was promoted

22) (RL) Complainant filed an absence request dated 12/19/2011, asking for leave from 12/27/2011 through 1/11/2012, with the stated reason of "my son and granddaughter are visiting from Florida." The leave that he requested was vacation. There is no indication in this request that it was based on fatigue or any medical reason. An amended request, dated the same date, was filed. This also requested vacation leave and listed the dates of December 28th and 29th, 2011 and January 3rd through the 6th and 9th and 10th of 2012, with no other reason for the absence. Again, there was no reference here to any physical or medical issue. Several days later, I believe 12/22/2011, I received a very brief handwritten note from Complainant's doctor, indicating that "the situation is worsening at this time involving both his heart and lungs. I advise him to be out of work for two weeks." This was followed up with an e-mail from his doctor dated 12/23/2011 simply indicating Complainant had "multiple, complex and difficult to treat medical problems." Again, his doctor recommended that Complainant be out of work for two weeks with no further explanation. Based on the doctor's note, we felt compelled to grant the leave recommended by his doctor.

23) (RL) Complainant requested time off the same day that Mr. One indicated he would be out of work until after the New Year due to medical reasons. Complainant's initial request was for December 27th until January 11th. IV and TL had requested time off on December 27th. My email to Complainant on December 20th indicated that we needed to discuss his vacation due to the circumstances with Mr. One and the time off requests made prior to his. At no point was his request denied. We emailed back and forth regarding this issue, rather than being able to discuss the details and come up with a plan that worked for everyone, Complainant presented a hand written note from his doctor dated 12/22/2011 indicating he needed to be out of work for two weeks. As a result, we were no longer discussing a vacation time: Complainant was being directed by his doctor to be out of work, which made it a medical leave. At this point, I followed up with an email of our conversation and indicated his medical leave would begin that day and continue through to 1/11/2012, based on the two weeks as advised by his doctor. At no point did I indicate one way or the other about finishing out the day on 12/23/2011, which was a mistake on my end.

24) (RL) My letter of 12/27/2011 was drafted based on conversations with the Town Attorney and the Town Manager. Considering it appeared Complainant obtained a doctor's note to be out over the holidays rather than work with everyone to determine a schedule that was fair for all employees, that his doctor said he had "complex medical problems" which may impact his ability to perform the physical aspects of his job while we are still without the Operator/Laborer position, and concerns raised by other employees onsite about him being a safety liability in the field, we needed to assess his ability to be at work and perform the functions of

the job as related in his job description. I later rescinded the request. At no point was his job threatened. Disciplinary action as outlined in the personnel policy does not support termination based on the issues at hand. The reference to disciplinary action had to do with Complainant being on site and at work after his leave had begun and was directly contrary to our understanding as to how the leave was going to be handled. In fact it was counter to a direct order. This is the only disciplinary action and there is nothing in my letter that threatened his employment for any reason whatsoever.

25) (RL) The reason for scheduling a review with Occupational Health Association outlined in my 12/27/2011 letter was twofold. First, we felt that Complainant was playing games with us. His initial request of was for vacation leave to accommodate visiting family members. When I questioned whether or not we could accommodate this request, based on the fact that it would leave us down two employees for that period of time, due to the absence of another employee on medical leave, the request all of the sudden became a request based on medical need substantiated by a note from his doctor that, to say the least, is less than specific. Second, we reviewed Complainant's attendance record and the time he had missed during the prior year and the doctor's concern and this caused the Town to be very concerned about his continuing ability to do the job and whether he had the work capacity to perform the job functions. Employers have the right to seek medical evaluations based on business necessity and that certainly was the case here.

Complainant's Reply to Respondents' Answers

26) (C) I had been providing RL an upcoming monthly report since July of 2011. I also provided the Town Manger with a weekly and monthly report since I began working here in 2003. One of the reports deals with Medical Appointments and Vacations. RL and Town Manager EN knew that I was taking vacation. Relatives from out of state visiting during the holidays had nothing to do with my poor pulmonary function test. I do not think family get-togethers during the holidays are unusual or relevant in this instance.

27) (C) The Respondents allege that I *transformed* my vacation to *"sick leave."* This also suggests that they think that I faked my poor pulmonary test .The test occurred after the 19th and it is a fact that I was feeling run-down and fatigued. My absentee request for vacation was revised based upon the request of RL.

28) (C) Our Department consists of four full-time and one or two part-time seasonal employees. We have a one-year wall calendar in a hallway. We write down the vacations we plan to take. The four full-time employees discuss this and agree that it is "fine" or "may be a problem." My vacation was scheduled on that board in November and no co-worker voiced any concern or problem with this. RL has never had an issue with vacations except with me. The Absentee Request Form has always gone to the Town Office and I have not received any back. The four full-time employees agree to the time off internally and we go on vacation. Of course there will always be a "short-handed" situation during this time off. My weekly reports to the Town Manager for December 2011 each referred to my upcoming vacation later that month.

29) (C) I have COPD and atrial fibrillation and everyone who knows me knows that. The Town Manager and RL knew it because we discussed it at our meeting last year prior to my taking medical leave. I had an Income Protection Insurance Plan and the Town has those records. My doctor has to file the reports to enable me to receive insurance benefits. I had three cardio-versions[2] in the fall of 2011. If Respondent did not know this, then they were not reading the reports I sent them. For Respondent to claim astonishment

[2] Complainant indicated that this test involved stopping his heart and starting it again.

that I have heart problems/ breathing problems as if they had no idea about my conditions is preposterous. Keep in mind that they already had medical records from my Medical Leave in spring of 2011

30) (C) I have pulmonary function tests on a regular basis. When I had one on December 22nd, it was an extremely bad test. When I talked to my doctor he told me that he was *"very concerned with my test results."* I asked him what I should do and he said that I needed rest. I informed him that I was already scheduled for vacation beginning the day after Christmas, which was 12/27/2011. He provided a note based upon the results of my test and his recommendation. I did not fabricate this nor did I fail my test intentionally as the Town suggests. After meeting with RL on the 23rd, I offered to come in on the 27th and perform his friend IV's job thereby allowing his friend to have his day off.

31) (C) I exchanged e-mails with RL regarding my vacation on 12/23/2011 but I could see that we were not communicating. I went directly to the Town Manager EN with my doctor's note and tried to explain that my test was not good, and that I was afraid that I may have lung cancer. EN told me to go see RL.

32) (C) I spoke with RL and provided him with my doctor's note. My notes of our discussion reflect that RL had a concern with his friend IV not being able to take the 27th off from work as he planned to. I suggested that I come in and do IV's job on the 27th and start my vacation on the 28th. RL appeared fine with that and I left. He never once told me to go back to the plant and go home. Keep in mind that he agreed to phone or meet with me regarding this type of issue just a few hours prior to his e-mail.

33) (C) I did not transform anything and I did not change my request to a medical leave request. My vacation was in place as it always was in the past. My pulmonary test occurred after my request. This big concern of being short-handed is unfair. We had no major work scheduled because of the holiday season. I told co-workers that I would be around to back them up if necessary and they did not have a problem with this. RL had a pool of equipment and at least one experienced worker at the Public Works Department who could have filled in for the eight days I was on vacation. Further, every fourth week, when we are on-call, we are alone, shorthanded, and this has also never been a concern in the past.

34) (C) Respondent also tries to justify RL's threatening letter to me because I was at work on the 23rd. My attorney's letter to the Town pointed out *"there was no 'emergency', but rather a recognition that my client had already acknowledged. He needed some breathing room."* I tried to explain this via e-mail and went to see the Town Manager and RL on the 23rd, which was a scheduled workday. The date of the note was the 22nd and the 23rd was the earliest opportunity for me to present it. I had volunteered to work on the 27th and begin my vacation on the 28th. RL verbally agreed to this and never told me to go directly home. He sent an e-mail, I finished what I needed to do, and went home. He sent the letter in part because I did not leave on the 23rd. Was RL contemplating canceling my vacation in the final minute of the final hour on 12/23/11 before he informed me? RL could have waited for my return to work and addressed this with me verbally. He chose to send this harassing and discriminatory letter knowing full well that my health had flared up

35) (C) I came back to work earlier than planned because RL's threatening letter had stated that my last day off would be 1/6/2012. I ended up taking 8 days of vacation and then RL acted surprised when I was at work on 1/9/12. A co-worker did become ill the same time I did in April of 2011. I had no control over his illness or mine. I also had no control over a fellow employee's illness in December of 2011. However, when the health issues with me and my co-worker occurred in April of 2011, as RL pointed out, they were short handed and dealt with it. Why was I harassed and discriminated against with my vacation?

36) (C) I responded to Respondent's reasons for scheduling a medical examination (as noted in my attorney's letter of 1/6/2012) as follows:

> The very idea of an employer scheduling an employee evaluation appointment without rationalization and without adequate warning is totally inappropriate. My client's medical records support our position that he is more than capable of fulfilling his obligations. Your demand that [Complainant] go to a doctor he does not know, for a purpose that is ill-defined at best, makes no sense to me. Whether it is your intention or not. This reeks of discrimination against an individual who has medical problems."

V. Analysis and Conclusions

1) The Maine Human Rights Act 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 standard to mean that there is at least an even chance of Complainant prevailing in a civil action. More particularly, "reasonable grounds" exists when there is enough admissible evidence, or there is reason to believe that formal litigation discovery will lead to enough admissible evidence, so that there is at least an even chance of Complainant proving in court that unlawful discrimination occurred. Complainant must prove unlawful discrimination in a civil action by a "fair preponderance of the evidence." 5 M.R.S. § 4631.

2) The Maine Human Rights Act provides, in part, as follows:

> It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of . . . physical or mental disability . . . discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ."

5 M.R.S. § 4572(1)(A).

3) The phrase "terms, conditions or privileges of employment" is broad and not limited to discrimination that has an economic or tangible impact. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (interpreting Title VII of the Civil Rights Act of 1964); *King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "An employee has suffered an adverse employment action when the employee has been deprived either of 'something of consequence' as a result of a demotion in responsibility, a pay reduction, or termination, or the employer has withheld 'an accouterment of the employment relationship, say, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.'" *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 20 (citations omitted). An abusive reprimand may also be actionable. *See King,* 611 A.2d at 82 (telling an employee who had requested a smoke-free environment as a reasonable accommodation that "she should look for another job if she couldn't stand the smoke").

4) The Maine Human Rights Act, 5 M.R.S.A. § 4553-A, defines "physical or mental disability," in relevant part, as follows:

> **1. Physical or Mental Disability, defined.** Physical or mental disability" means:
> A. A physical or mental impairment that:
> (1) Substantially limits one or more of a person's major life activities;
> (2) Significantly impairs physical or mental health; or
> (3) Requires special education, vocational rehabilitation or related services;
> B. Without regard to severity unless otherwise indicated: absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary

disease; Crohn's disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson's disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury;

C. With respect to an individual, having a record of any of the conditions in paragraph A or B; or

D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A or B.

2. Additional terms. For purposes of this section:

A. The existence of a physical or mental disability is determined without regard to the ameliorative effects of mitigating measures such as medication, auxiliary aids or prosthetic devices; and

B. "Significantly impairs physical or mental health" means having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population.

5) 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).

6) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that he (1) was a member of a protected class, (2) was qualified for the position he held, (3) suffered an adverse employment action, (4) in circumstances giving rise to an inference of discrimination. *See Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). *Cf. Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1st Cir. 2002).

7) 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; *City of Auburn*, 408 A.2d at 1262, 1267-68. 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. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.

8) 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.

9) In this case, Complainant alleges that he was subjected to unlawful discrimination in the terms and conditions of employment (vacation classified as medical leave and threatened with termination) due to his disabilities.

10) Respondents deny any discrimination occurred and state that Complainant was not granted vacation time due to a staffing shortage and that leave was only granted after his doctor said it was medically necessary.

11) The Complainant did establish some elements of a prima-facie case in that he is a member of protected class due to the existence of a number of disabilities, at least one of which, COPD, is a *per se* disability under 5 M.R.S. § 4553-A. Complainant has also established that he was performed his job satisfactorily for the position he held. Although Respondents did argue that Complainant's job performance may have deteriorated over the last couple years of his employment, there is little evidence that the Complainant's job was in jeopardy because of these reasons at the time the alleged discriminatory events occurred.

12) It is arguable whether any of the Respondents' alleged acts of discrimination rise to the level of an adverse employment action.

a. The first alleged act of discrimination, having Complainant's requested leave changed from "vacation" to "medical leave," still resulted in the Complainant having virtually the same time off that he had originally requested. He stated that he nevertheless was injured by this action because having the leave classified as vacation would have resulted in it being paid leave while medical leave was unpaid; it is hard to view this as adverse to Complainant. Complainant also noted that having the time off as medical leave reduced the amount of future medical leave that may be available to him. Respondents stated in response that since the Complainant did not have any available sick time to use in late December 2011/early January 2012, vacation leave was in fact used.

b. The second alleged act of discrimination, the "threat of termination" in RL's 12/27/2011 letter, was also by both Complainant's and RL's account a misunderstanding that arose because RL failed to tell the Complainant that he needed to leave the workplace immediately after his time off was classified as medical leave on December 23rd due to the contents of the doctor's note dated December 22nd that indicated leave was as of that date. While the "threat" of discipline did appear to be somewhat excessive for Complainant's unintentional violation of Respondent's rule about being in the workplace while on medical leave, Respondents' stated reason for the warning - potential legal liability for allowing the Complainant to be at work after his doctor had ordered medical leave - appeared to be legitimate business concern as well.

c. Nonetheless, for the purposes of this analysis it is assumed that each of these actions is sufficiently "adverse" to support Complainant's *prima facie* case.

13) Because Complainant has arguably stated a *prima facie* case, and Respondents have provided legitimate non-discriminatory reasons for their actions, the burden is on Complainant to prove that he would not have suffered these employment actions but for his disability.

14) Complainant has not met his burden to show that Respondents' reclassifying his time off as medical leave rather than as vacation leave was discriminatory.

a. While it is disputed precisely when the Complainant first requested time off for vacation in late December 2011/early January 2012, it does not matter here; whether it occurred in November or mid-December, the granting of such discretionary leave (as opposed to medically mandated leave) would reasonably be dependent upon other then-existing staffing concerns.

b. Respondents claimed that the requested vacation was not immediately granted due to significant staffing issues. Complainant did not dispute that others had also requested some of the same days off, but rather argued than even if they had, Respondents still could have made do with limited staff as it had done on certain occasions when short-staffed in the past. Respondent is not required to do that when presented with a request for discretionary leave.

c. Complainant also argued that he had never been denied vacation leave in the past. In this scenario, that allegation is neither dispositive nor particularly relevant. This could reflect the fact that there were no staffing conflicts in the past just as easily as anything else.

d. It was reasonable for the Respondents to treat the time off as medical leave in that it was undisputedly the doctor's note that directly led to the Complainant being granted leave. His request for vacation time was still being discussed – and had not been approved – at the time the doctor's note was submitted. Complainant was informed that his leave was being considered to be medical leave in RL's 12/23/2011 email. Complainant admitted that "...frankly, he thought that part of the reason [RL] finally gave him an answer about the vacation request was because of the doctor's note."

e. If there was confusion over how the leave should be classified, it was Complainant himself who injected the uncertainty into the situation by requesting medical leave for time that he believed he already had been granted as vacation time. It also does not appear that Complainant suffered any injury as a result of the leave classification: Complainant did not have available accumulated sick time in late December/early January 2012, and he therefore used vacation time for his medically-mandated leave in any event.

15) Complainant also failed to support his burden to show that RL's threat of possible discipline if the Complainant returned to the workplace during his medical leave was discriminatory.

a. Although the "threat" may have been excessive under the circumstances, there is little evidence suggesting that RL's warning was because of the Complainant's disability rather than because of a legitimate concern that the Respondents were potentially liable if they allowed the Complainant to be in or remain in the workplace after his doctor ordered that he be on medical leave.

b. Further, RL's letter speaks only of unspecified potential "disciplinary action," which would presumably include many forms of discipline far short of termination, including a mere written warning or counseling.

16) In his MHRC charge, Complainant stated his belief that Respondents attempted to force him to undergo a medical examination so that his employer could obtain a medical opinion that he was unable to perform his job, which we interpret to state a claim for disability discrimination. Complainant did support his burden to show that he was subjected to unlawful discrimination when his employer attempted to force him to undergo a medical examination[3] after he disclosed in a doctor's note dated 12/22/2011 that he needed medical leave due to unspecified "worsening" medical problems "involving both his heart and lungs." Reasoning is as follows:

a. Under 5 M.R.S. § 4572, "A covered entity may not require a medical examination and may not make inquiries of an employee as to whether the employee is an individual with a disability or as to the nature

[3] This appointment apparently never occurred due to Respondent receiving a letter from Complainant's attorney which questioned the necessity and legality of the proposed fit-for-duty examination. However, the fact that Respondent subsequently capitulated on this request does not mean that the request was not discriminatory. Accordingly, it is analyzed below.

or severity of the disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity."

b. Respondents were asked to clarify what specific factors went into the decision to schedule the exam. They stated that the decision was based in part upon information received from the Complainant's doctor in late December 2011 which referred to a "situation worsening at this time involving both his heart and lungs." An email sent by the doctor to the Respondents the following day also referred to the Complainant having "multiple, complex and difficult to treat medical problems," and that he was "in the middle of a flair of these at the moment." Respondents also stated that the examination was also based in part on the fact that the Complainant had missed significant time due to medical issues over the prior year. Finally, RL stated that one of the reasons for the exam was because they believed Complainant was playing games with them when he requested medical leave after learning that his vacation request might be denied.

c. Respondents did not establish that ordering an examination at that time was job-related or consistent with business necessity. The Complainant was apparently performing his job without difficulty during the weeks that preceded his requested time off, and there is no evidence that any of his disabilities rendered him unable to perform his job duties on a long-term basis. Instead, the Complainant's doctor simply indicated that he was experiencing a "flare" up of certain medical conditions for which he had been treated for well over a year. Nor was there any indication that the Complainant would likely need any longer than the suggested two weeks off to address the then-existing problems. Further, while Respondents' records do reflect that the Complainant did miss a good deal of time due to medical issues during the preceding year, this would not be unexpected for someone who suffered from a variety of ongoing chronic medical conditions. Respondents also had the ability to ask the Complainant's doctor for additional information if they believed that the current medical information they had from him raised legitimate concerns about Complainant's ability to perform his job.

d. In this case, it appears that one of the more likely reasons for Respondents' decision to order the exam was because of their belief that the Complainant was, as RL put it, "playing games with us" after he was not given the vacation time he requested. Respondents had ample reason to question the timing of Complainant's doctor's note, given that it was produced only after the Complainant had been informed that his vacation request might be problematic due to a staffing shortage around the holidays. While the Complainant has suggested that this exam was likely called in order to receive an opinion that he was unable to perform his job, it seems just as likely that the exam was scheduled because Respondents harbored understandable skepticism that the time off was medically necessary, as opposed to a "Plan B" once Complainant's vacation request was in doubt. This suspicion does not provide justification for sending Complainant for a medical examination.

e. The fact that the examination was subsequently cancelled and never rescheduled also calls into question how necessary it was to begin with. One would assume that if Respondents had legitimate concerns about the Complainant's ability to perform his job due to the recent doctor's notes, and/or the Complainant's record of missing work the preceding year, that neither of these concerns would have changed in any way simply on the basis of the Complainant's attorney writing a letter complaining about the need for the exam. Instead, it appears that the Respondents rethought their decision based upon the concerns raised in Complainant's attorney's letter. While Respondents stated that they capitulated on this demand because they "did not want to fight that battle at that point in time," in this case the cancellation of the exam may have also have occurred because Respondents questioned their own ability to justify the examination.

f. For these reasons it is found that the Respondents did engage in disability discrimination when it scheduled the Complainant for an independent medical examination which was not consistent with business necessity. Respondents had no reason to believe that Complainant could not perform the essential function of his position at the end of the two-week medical leave that his doctor had mandated. If Respondents doubted the authenticity of the Complainant's note or believed that he was "gaming" them, they could have conducted an investigation, and then imposed appropriate discipline if Complainant was found to have been less then forthright. However, Respondents still had no business necessity requiring that Complainant submit to a medical examination.

VI. Recommendations

Based upon the information contained herein, the following recommendations are made to the Maine Human Rights Commission:

1. There are **NO REASONABLE GROUNDS** to believe that Complainant was subjected to disability discrimination in either the characterization of his leave or in an alleged threat to his employment; and

2. These claims should be dismissed in accordance with 5 M.R.S. § 4612(2).

3. There are **REASONABLE GROUNDS** to believe that the Complainant was subjected to disability discrimination when Respondents [redacted] and Ryan Leighton required him to undergo an independent medical examination; and

4. That conciliation should be attempted in keeping with 5 M.R.S. § 4612(3).

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