Maine Human Rights Commission

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January 24, 2014

INVESTIGATOR'S REPORT
E12-0314

[redacted]

v.

[redacted]

I. Complaint:

Complainant alleges that the Respondent unlawfully discriminated against him because of his physical disability (diabetes) by refusing to grant the reasonable accommodation of working no more than two nights per week for a period of two months.

II. Respondent's Answer:

Respondent denies that Complainant had a disability. Even if he did, Complainant's requested accommodation was denied because a doctor determined that his blood sugar spikes were largely due to his own poor food choices and did not appear to warrant any modification in his work schedule.

III. Jurisdictional Data:

1) Date of alleged discrimination: 5/9/2012.

2) Date complaint filed with the Maine Human Rights Commission ("MHRC"): 6/29/2012.

3) Respondent employs approximately 85-100 individuals (depending on the season) and 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.

4) Investigative methods used: A thorough review of the written material provided by the parties. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this matter.

5) The Complainant is not represented. Respondent is represented by Mark Franco, Esq.

IV. Development of Facts:

1) Complainant was hired as a Paramedic Firefighter for the Respondent's Fire and Ambulance Department in February 2011.

2) Important third parties include Fire Chief "SS," Doctor "ER," and Doctor "JD."

Complainant's MHRC Claims

3) Complainant has diabetes. He was employed as a Paramedic Firefighter from September 2011 until his resignation, which was submitted on May 11, 2012, with an effective date of May 31, 2012.

4) In March 2012, Complainant submitted a 3/28/2012 note from his doctor, Dr. ER, to his supervisor; the note stated that Complainant would need to "limit work to 2 nights per week for medical reasons for next two months." In response to Respondent's request for additional information, Dr. ER submitted another note, dated 4/17/2012, which stated that Complainant "needs to limit night shift to two days per week due to poorly controlled blood sugars."

5) On 4/27/2012, Respondent required Complainant to undergo a fitness-for-duty evaluation by Dr. JD. Shortly thereafter, Complainant received a letter from Respondent which reported that Dr. JD had stated that Complainant's high blood sugar levels were due to his own poor diabetes management, specifically with regard to the food he was eating during his shifts. The letter also stated that Dr. JD determined that Complainant's condition did not pose a public safety risk and that it was not a work related condition. As a result, Respondent stated that there was no accommodation that it should provide. The letter directed Complainant to immediately resume his prior schedule of working three nights per week.

6) Complainant did not believe that Respondent granting the accommodation would have been a hardship, because it was only for two months. On 5/9/2012, Complainant submitted his written resignation, effective 5/31/2012, due to Respondent's failure to grant a reasonable accommodation for his disability.

Respondent's Answer to Complainant's MHRC Complaint

7) Complainant's regular work schedule required him to work Thursday, Friday, and Saturday nights from 6:00 PM to 5:00 AM the following morning.

8) Complainant had never requested an accommodation for any medical condition until he provided his supervisor with a medical note dated 3/28/2012, which stated that he needed to work only two nights per week for the next two months "for medical reasons". When Complainant was asked for further information regarding the medical reasons for the reduction in schedule, his doctor provided another letter, dated 4/17/2012, which stated that the need for the reduced schedule was "due to poorly controlled blood sugars."

9) Complainant was allowed to stay on medical leave for three weeks following his initial request for a schedule modification. Because Complainant serves in a position which is highly safety-sensitive and because the medical information received from his doctor was lacking in detail, Respondent asked Complainant to see a doctor of its choosing. Complainant agreed and was seen by Dr. JD on 4/27/2012.

10) Dr. JD's subsequent report ("Exhibit A") indicated that Complainant has non-insulin-dependent diabetes mellitus, and stated that when his blood sugars are high he is somewhat short-tempered, but suffers no performance issues. Dr. JD also determined that Complainant's condition did not pose a public safety risk, and noted that the fact that his blood sugar "tends to be higher when his sleep patterns change is not a work related condition, and is not uncommon among diabetics."

11) Dr. JD confirmed in a follow up conversation with the City Manager and City Attorney that Complainant's blood sugar spikes during work hours largely because he makes poor food choices during work hours. Therefore, according to Dr. JD, Complainant's high blood sugar is a condition that could be kept under control through better self-management, and did not appear to require any modification in schedule. Based upon the information received from Dr. JD, Complainant's supervisor, Fire Chief SS, sent Complainant a letter ("Exhibit B") in early May 2012, which stated that he would be required to resume his schedule of working three nights each week as of 5/10/2012.

12) Respondent's determination was made because Complainant's temporary blood sugar spikes appeared to be influenced primarily by his own food choices, and because the underlying condition of Type II diabetes did not interfere with his basic life activities or job performance, with or without accommodation. According to Respondent, the requested schedule modification was not necessary to allow Complainant to perform his job. Under the circumstances, where Complainant did not need the accommodation in order to perform his job functions, allowing the schedule change would have placed an undue burden on the City: the Fire and Ambulance Department has only three employees, including Complainant, and must provide 24-hour coverage.

13) Complainant subsequently refused to return to work under his former schedule, and he did not provide any further information regarding the medical necessity for the requested schedule modification. Instead, he provided a resignation letter dated 5/11/2012, which would be effective 5/31/2012, when he had used all of his accrued sick and vacation time. Complainant never stated that he resigned due to his medical condition or because his request for accommodation was refused. He also never submitted a grievance under Respondent's personnel policy.

14) Respondent's position is that Complainant does not have a disability because, although he has been diagnosed with diabetes, the medical evidence did not demonstrate that his condition substantially limits one or more of his life activities or significantly impairs his physical health.

15) Respondent further believes that the accommodation Complainant requested was unnecessary, as it was clear from the medical evidence provided that his blood sugar issues were due more to his poor blood sugar management than to his work schedule. Finally, even if accommodation was necessary, the requested schedule would have placed an undue burden on the City, since it needed to cover his shift, and it would have been nearly impossible and/or impracticable to hire someone to fill in one night per week for just a few weeks.

Complainant's Reply to Respondent's Answers

16) Complainant notes that there was a second paramedic on duty with him on Thursday nights, so the request to work only two nights per week would not have left Respondent without a paramedic on duty for any shift. Complainant also stated that there was at least one person available to cover the shift – this person did not have an EMS license, but could drive the ambulance, and had covered Complainant's shifts before. Finally, Complainant questions the plausibility of Respondent's claim of undue burden, since it responded to his request for accommodation by taking him out of work altogether, meaning that it needed to cover all of his shifts.

17) Complainant never contended that his blood sugar levels were just spikes. They had been climbing for the past year that he worked for the City. It is a medical fact that blood sugar levels tend to be higher when sleep patterns change. In Dr. JD's medical report he agreed that the Complainant and his doctor had a plan in place to try to bring his blood sugar levels down on a long-term basis.

18) Respondent also claims that there are only three members in Complainant's department, but in fact there are four full-time Paramedics as well as several on-call and part-time Paramedics. When a holiday schedule occurred, Respondent never filled his shift (or any other full-time Paramedic's) with another full-time Paramedic. Many of the holidays that Complainant had off were filled with a non-EMS provider driver.

19) The wording of that letter makes clear that Respondent did not believe Complainant, his doctor, or Dr. JD. Respondent felt that Complainant had no medical issues at all. After several conversations with the City Manager, and the letter that the Fire Chief signed, it was clear to Complainant that it was a hostile work environment and that his health was at risk, so he had choice except to resign.

V. Analysis and Conclusions

1) The Maine Human Rights Act ("MHRA") 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.

2) 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).

3) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that he is a "qualified individual with a disability" within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant's physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent's failure to do so affected the terms, conditions, or privileges of Complainant's employment. *See id.*

4) Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . ." 5 M.R.S. § 4553(9-A).

5) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable [his] to perform the essential functions of [his] job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." *See Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm'n Reg. 3.08(D)(1) (July 17, 1999). The term "undue hardship" means "an action requiring undue financial or administrative hardship." 5 M.R.S. § 4553(9-B).

6) 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).

7) It is a violation of the MHRA if, although not formally terminated, an employee has no reasonable alternative to resignation because of intolerable working conditions. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "The test is whether a reasonable person facing such unpleasant conditions would feel compelled to resign."

8) In this case, the Complainant alleges that the Respondent unlawfully discriminated against him because of his physical disability (diabetes) by refusing to grant reasonable accommodation of working no more than two nights per week for two months due to poorly controlled blood sugars. Respondent denies that Complainant had a disability at all; even if he did, Complainant's requested accommodation was denied because a doctor determined that his blood sugar spikes were largely due to his own poor food choices and did not appear to warrant any modification in his work schedule.

9) As a threshold matter, Respondent contests that Complainant has a "disability" under the MRHA, even though Respondent does acknowledge that diabetes is a *per se* disability that entitles a person to protection under the MHRA. 5 M.R.S. § 4553-A(1)(B). Respondent argues that Complainant's diabetes does not entitle him to the MHRA's protections in this case because his condition did not "substantially limit one or more of [his] life activities" or "significantly impair[his] health." *Id.* Respondent's argument is not persuasive. In this case, Complainant's doctor provided evidence that Complainant's diabetes was in fact significantly impairing his health. Complainant has a disability for MHRA purposes.

10) To prevail, Complainant needs to demonstrate that Respondent denied him a reasonable accommodation, and that the denial affected the terms and conditions of his employment.

11) Complainant requested the reasonable accommodation of working only two night shifts for a two-month period, in order to get his blood sugar under control. Respondent took the position that the request was not reasonable, because Complainant's problems were caused by his own food choices and he could still perform his job functions, and because it would be unduly burdensome on the City to modify Complainant's schedule.

12) The requested accommodation is found to be reasonable, and not an undue burden on Respondent, with reasoning as follows:

    a) Respondent's position appears to be that since Complainant could control some aspects of his condition, it had no need to make any accommodation for his disability. This position is unsupportable.

        i. Even if Complainant's food choices did contribute to his elevated blood sugar levels, it is undisputed that Complainant's doctor opined that he needed to cut back to two night shifts per week for the next two months. It is also clear that both doctors here agree that changing sleep patterns is a factor in elevated blood sugar levels in diabetics.

        ii. The doctor selected by Respondent also never stated that the requested accommodation should not be granted. Dr. JD stated specifically in his report that Complainant and his doctor "were following a course now that may or may not be successful." The purpose of Complainant's visit with Dr. JD was, according to his report, purely to evaluate whether the Complainant's condition rendered him unfit for duty or posed a public safety risk. The fact that Complainant's medical condition posed no safety threat should have not have been factor in the entirely separate question of whether he

required an accommodation.[1] In fact, Dr. JD stated specifically that "the decision how to treat and whether to accommodate can safely be made by the patient, his PCP (primary care physician), and his employer."

iii. Dr. JD also noted that while the Complainant had been on temporary medical leave that his blood sugar levels were falling, so it appears that the working fewer night shifts did have the desired medical result, at least on a short-term basis.

b) Respondent's contention that it would have been an undue burden to grant Complainant's request for one fewer night shift per week for two months due to staffing concerns is not persuasive.

i. It does not appear that staffing concerns were raised at the time the request was being considered, or when the Complainant received a letter from Fire Chief SS stating why the request was being denied. In fact, that letter specifically states the reason for denying the request was "the City finds that you do not have medical condition nor is there a work related condition such that there is any form of accommodation that the City should provide to you. To the contrary, it appears that you are fully in control of the spikes in your blood sugar level due to your eating choices…" Nowhere in the letter does Respondent assert that staffing considerations played any part whatsoever in the decision. While this does not necessarily mean that potential staffing concerns were not also being considered at the time the decision was made, there is little if any evidence to support Respondent's claim that this was even a minor consideration when the requested accommodation was denied.

ii. Even if one does accept the premise that on the issue of staffing was a factor in the denial of the requested accommodation, it is difficult to conclude that accommodating the Complainant's request for a relatively short two-month period would have constituted an undue hardship. As Complainant noted, after Respondent received his initial doctor's note, he was placed on administrative leave for three weeks, meaning that rather than only having to worrying about covering one of the Complainant's shifts per week, Respondent in fact had to cover all three shifts during this period. Therefore, it appears that Respondent covered nine of the Complainant's shifts during that three week period, whereas granting Complainant's requested accommodation would only have required that Respondent cover eight shifts over a two month period.

iii. Complainant has also asserted in his reply to Respondent's Answer that the City actually had four full-time paramedics, in addition to several others who were on-call or part-time. Complainant also claimed that Respondent routinely left shifts uncovered when a holiday schedule occurred or had the shift filled with non-EMS drivers, and referred to a particular individual, who had filled in for him on many other shifts. None of this information has been refuted by Respondent.

iv. Respondent has not established that granting Complainant's request for accommodation would have presented an undue hardship to Respondent under these circumstances.

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[1] Dr. JD noted that Complainant's blood sugar levels tended to be higher when his sleep patterns changed, and that the condition was not a work-related; that work-relatedness may be relevant for purposes of workers' compensation benefits but is not relevant for purposes of this MHRC case. The MHRA does not require that a medical condition be "work related" before an employer has an obligation to grant a requested accommodation.

13) Finally, Complainant has established that the denial of his requested accommodation affected the terms and conditions of his employment. Complainant was placed in the position of having to endanger his health, and ignore his doctor's advice, if he wanted to continue working for Respondent. He made several attempts to speak with his supervisor and the City Manager, to no avail. Under the circumstances, it was reasonable for Complainant to decide that he had no choice but to resign in order to safeguard his health.

14) Disability discrimination is found in this case.

VI. Recommendations

Based upon the information contained herein, the following recommendation is made to the Maine Human Rights Commission:

1. There are **REASONABLE GROUNDS** to believe that the Complainant was subjected to disability discrimination (failure to accommodate) by Respondent; and

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

Amy M. Sneirson
Executive Director

Robert D. Beauchesne
MHRC Investigator