



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT

E13-0320

January 23, 2015

██████████ (East Dixfield)

v.

The ██████████ d/b/a ██████████ Inc. (Auburn)

### **I. Complaint:**

Complainant ██████████ alleges that Respondent The ██████████ d/b/a ██████████ Inc. discriminated against him on the basis of age by subjecting him to unlawful pre-employment inquiries and by failing to hire him.

### **II. Respondent's Answer:**

Respondent denied age discrimination and alleged that Complainant was not hired because he failed to meet the minimum required score during his employment interview.

### **III. Jurisdictional Data:**

- 1) Date of alleged discrimination: April 8, 2013.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 1, 2013.
- 3) Respondent employs approximately 453 people and is subject to the Maine Human Rights Act ("MHRA"), the Age Discrimination in Employment Act, and state and federal employment regulations.
- 4) Respondent is represented by ██████████. Complainant is not represented by counsel.
- 5) Investigative methods used: A thorough review of the materials submitted by the parties, a request for further information and documents. 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 case.

### **IV. Development of Facts:**

- 1) The relevant parties, issues, and facts in this case are as follows:

- a) On or around January 31, 2013, Complainant applied for a position as a Plant Technician with Respondent. He was denied employment on or around April 8, 2013. Complainant was 59 years old at the time he applied and was turned down for employment.
- b) Respondent is a company that markets and sells consumer hygiene products internationally. Complainant applied to the Plant Technician position at one of Respondent's manufacturing plants in Auburn, Maine.
- c) The application process to apply for a Plant Technician position is as follows:
  - i) An applicant must submit an online application.
  - ii) If the online application passes pre-screening criteria, the applicant takes an online test.
  - iii) If the applicant passes the online test, the applicant must come in for further in-person testing.
  - iv) If the applicant receives a score of 3 or higher on the in-person test, the applicant is interviewed.
  - v) The interview panel consists of one manager and one Plant Technician. Each interviewer scores the applicant in several categories on a scale of 1-5.
  - vi) If the applicant receives a score of 3 or higher from the interview panel, the applicant is invited for a second interview with a hiring manager.
  - vii) If the applicant receives a score of 3 or higher from the hiring manager, the applicant is offered a position, contingent upon passing a background test.
- d) In August of 2012, Respondent began hiring Plant Technicians to work at the Auburn location, which was understaffed due to a previous hiring freeze. Respondent had hired 30 Plant Technicians by April 8, 2013, around the time that Complainant was rejected from employment. As of September 13, 2013, Respondent had hired a total of 48 Plant Technicians out of approximately 740 applicants.
- e) Complainant went through the above application process until he received a score of 2.6 from the interview panel, and was therefore not invited to move on to interview with a hiring manager.
- f) Respondent submitted a list of the 48 Plant Technicians who were hired during the applicable period. Of this group, three employees were similar in age to Complainant: their ages were 53, 68, and 58. The rest were significantly younger. Respondent also made an offer of employment to another individual who was 58 years old.
- g) At the time Complainant applied for employment, Respondent's online employment application requested that an applicant record the dates of graduation from educational institutions.
- h) When Complainant went for in-person testing during the application process, he was asked for a photo identification. Complainant was also asked to sign a form with his date of birth indicating that he would be willing to take a background check if given a conditional offer of employment.
- i) Complainant alleges that the above pre-employment inquiries are unlawful under the MHRA and that they were used to screen him out due to his age. Respondent alleges that the photo identification was not recorded anywhere, and was used only to make sure the person taking the exam was the person who applied for the position. Respondent further alleges that although Complainant was required to fill out a form for a background check prior to an offer of employment, the check was not run and is never run until an offer of employment has been made.

2) Complainant provided the following:

- a) On January 31, 2013, Complainant submitted an online application for employment as a Plant Technician in Respondent's Auburn location. The online application required him to list high school graduation dates, which would allow Respondent to easily assess his age. The MHRA prohibits these types of pre-employment inquiries as they can be used to discriminate on the basis of age.
- b) On March 28, 2013 Complainant went for his in-person testing. When he arrived at the security office, he was required to present his driver's license, which he believes was photocopied. When he proceeded to the testing room, an employee made a written record of his license and date of birth.
- c) Complainant was also required to sign a form allowing Respondent to conduct a background check in the event he was offered employment. While the check was not run, the form required his date of birth. This constituted an unlawful pre-employment inquiry, and Complainant believes that Respondent used dates of birth as a deciding factor in its hiring process.
- d) On April 8, 2013, Complainant appeared for an interview with the panel. Complainant believes that he did very well during the interview panel, and that he gave very detailed answers. The interview notes are brief and do not accurately reflect his interview. He believes that the interview notes were created by Respondent after the interview to support Respondent's pretextual reason for refusing to hire him.
- e) Complainant is highly experienced and qualified for the position of Plant Technician, and he believes that he was rejected because of his age. Several younger applicants with much less experience than he had were hired. He believes this is evidence of age discrimination.

3) Respondent provided the following:

- a) Complainant was not discriminated against on the basis of age. He was not offered employment because he did not pass the interview panel stage of the application process. Applicants are required to receive a score of 3 or higher in order to pass this stage. Complainant received a score of 2.6 from the panelists and was therefore eliminated from further consideration for the position.
- b) Respondent asks for photo identification when an applicant participates in the in-person testing. Identification is looked at only to determine if the person taking the test matches the person on the application. There is no record kept of the photograph or date of birth. The Commission's guidelines prohibit an employer from requesting a photograph "with an application." The guidelines do not prohibit an employer from verifying an applicant's identity in person without recording the information. Regardless, it is clear that this did not affect Complainant, since he progressed to the next stage of the application process (the panel interview) after he was asked for identification at the in-person test.
- c) The fact that Complainant progressed to the panel interview stage also shows that dates of graduation, which were required in the initial online application, were not used to discriminate against Complainant based on his age. These dates were not intended to be used to determine age of applicants, and Respondent has since removed this request from its online application.

- d) The interview panelists had no knowledge of Complainant's date of birth and were not the parties who looked at Complainant's photo identification or background check form.
- e) Respondent offered employment to applicants of a similar age as Complainant around the same time that Complainant was rejected from employment. This shows that age was not a determining factor in hiring for the Plant Technician position.

**V. Analysis:**

- 1) The MHRA requires the Commission 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.

Failure to Hire

- 2) The MHRA provides that it is unlawful, based on age, to refuse to hire or otherwise discriminate against an employee in the terms and conditions of employment. See 5 M.R.S. § 4572(1)(A).
- 3) Because here there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). See *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).
- 4) First, Complainant establishes a prima-facie case of unlawful age discrimination by showing that (1) he applied for and (2) met the minimum objective qualifications for the job sought, (3) he was rejected, and (4) the person hired was of a substantially different age than him. *City of Auburn*, 408 A.2d at 1263; *Maine Human Rights Com. v. Kennebec Water Power Co.*, 468 A.2d 307, 309 (Me. 1983). See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (federal ADEA).
- 5) 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.
- 6) 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.
- 7) Here, Complainant establishes a prima-facie case of age discrimination by showing that he applied for the job of Plant Technician, that he met the minimum qualifications for the position, that he was rejected, and that the majority of the employees hired to the Plant Technician position around the same time were significantly younger than Complainant.

- 8) Respondent articulated a legitimate, nondiscriminatory reason for rejecting Complainant, namely that he scored a 2.5 in the interview panel stage of the application process, and therefore did not meet the required score of 3 or above to advance to the next stage of the process.
- 9) In the end, Complainant was unable to show that Respondent's reason was pretextual or irrelevant, and that he was not offered employment because of his age. Reasoning is as follows:
  - a) Complainant alleges that the fact that he was made to reveal his age at various points of the application process is evidence that Respondent's stated reason is pretext and that Respondent uses age as a determining factor in its hiring process. Complainant could not show, however, how the inquiries with respect to date of birth influenced Respondent's decision not to hire him. Complainant was required to provide high school graduation dates in his online application, but passed that stage of the process and was invited for in-person testing. Complainant was asked to provide photo identification at his in-person testing, but passed that stage and advanced to the interview panel. There is no evidence that the pre-employment inquiries with respect to age factored into the application process. Furthermore, Respondent stated that the members of the interview panel were not the same as the personnel who collected a photo identification and background consent form from Complainant, and Complainant could not show otherwise.
  - b) It is undisputed that Complainant scored a 2.5 from the interview panel and therefore did not meet the required score of at least 3 to advance in the application process. Respondent submitted interview notes of other applicants who were offered employment who met this requirement.
  - c) Complainant alleges that he did well in the interview, and that the notes of the panelists do not accurately reflect his interview. He further alleges that the notes were fabricated to support Respondent's pretextual reason for not hiring him. There is no evidence, however, to support this claim.
  - d) While the majority of the Plant Technicians hired were significantly younger than Complainant (ages of the overall applicant pool were not obtained for comparison), it is undisputed that four other applicants passed the interview panel and were offered employment around the same time that Complainant was rejected, and were of similar age to Complainant: ages 53, 58, 58, and 68. The fact that others of a similar age as Complainant were hired or offered employment does not support Complainant's allegation that he was refused employment because of his age.
- 10) It is not found that Respondent discriminated against Complainant on the basis of his age when it did not hire him for a Plant Technician position.

#### Unlawful Inquiry

- 11) The MHRA provides that it is unlawful employment discrimination for an employer, prior to employment or admission to membership of any individual, to "[e]licit or attempt to elicit information directly or indirectly pertaining to protected class." This includes the use of any form or application for employment containing questions directly or indirectly pertaining to protected class (in this case age). 5 M.R.S. § 4572(1)(D)(1).
- 12) The Commission has published guidance which states that questions asking for an applicant's age or date of birth prior to employment are unlawful. Examples of unlawful requests include requests for dates of graduation from educational institutions or requests for a photograph with an application. An

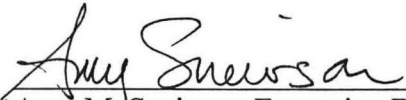
applicant's date of birth (even for the purposes of a background check) may only be requested after an offer of employment has been made.

- 13) It is undisputed that at the time Complainant applied for a position, Respondent's online application required dates of graduation from educational institutions. This constitutes an unlawful pre-employment inquiry. While Respondent states that this request has since been removed, it does not exempt Respondent from liability for its unlawful inquiry in this case.
- 14) It is also undisputed that at some point during the application process, Complainant was required to provide his date of birth to consent to a criminal background check. While Respondent alleges that the date of birth was only to be used for a criminal background check in the event Complainant was offered employment, it still constitutes an unlawful pre-employment inquiry, as it is information that can be used to discriminate in the application process with respect to age.
- 15) Finally, while Respondent had a nondiscriminatory reason for requesting Complainant's license (or other photo identification, this too amounts to an unlawful inquiry, since Respondent specifically requested a document containing Complainant's age.

#### **VI. Recommendation:**

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following findings:

- 1) There are **No Reasonable Grounds** to believe that Respondent discriminated against Complainant on the basis of age by failing to hire him, and this claim should be dismissed in accordance with 5 M.R.S. § 4612(2).
- 2) There are **Reasonable Grounds** to believe that Respondent discriminated against Complainant on the basis of age by subjecting him to unlawful pre-employment inquiries, and conciliation on this claim should be attempted in accordance with 5 M.R.S. § 4612(3).

  
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Amy M. Sneirson, Executive Director

  
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