



# Maine Human Rights Commission

# 51 State House Station, Augusta, ME 04333-0051

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**Amy M. Sneirson**  
EXECUTIVE DIRECTOR

**Barbara Archer Hirsch**  
COMMISSION COUNSEL

## INVESTIGATOR'S REPORT - REVISED

E13-0352

August 24, 2015

██████████ (Greene)

v.

██████████ (Mooresville, NC)

### I. Complaint:

██████████ alleged that ██████████ discriminated against him on the basis of age by subjecting him to unlawful pre-employment inquiries and by failing to hire him for numerous open positions. Complainant also alleged that Respondent failed to hire him based on his disability. In particular, his claims are against ██████████ stores located in Auburn and Augusta.

### II. Respondent's Answer:

Respondent denied age and disability discrimination and alleged that Complainant was not hired because he was not the strongest candidate for the positions to which he applied.

### III. Jurisdictional Data:

- 1) Dates of alleged discrimination: April 16, 2013 – July 12, 2013, and continuing through April 17, 2014.
- 2) Date complaint filed with the Maine Human Rights Commission (“Commission”): July 23, 2013.
- 3) Respondent employs more than 15 people and is subject to the Maine Human Rights Act (“MHRA”), the Age Discrimination in Employment Act, the Americans with Disabilities Act, and state and federal employment regulations.
- 4) Complainant is represented by ██████████, Esq. Respondent is represented by ██████████ Esq.

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<sup>1</sup> Complainant's charge of discrimination named “██████████ Improvement”; Respondent has stated that its legal name is “██████████ Centers, Inc.”. Because Complainant did not amend his complaint, the original caption provided by Complainant has been retained, and Respondent is referred to as either “Respondent” or “██████████” throughout this report.

- 5) Investigative methods used: A thorough review of the materials submitted by the parties, requests 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.
- 6) An initial Investigator's Report was issued in this case on June 15, 2015, but the case was soon thereafter returned to investigation to address the issue of unlawful inquiries, which had been raised by Complainant and not addressed in the initial report. This Investigator's Report – Revised supersedes and supplants the initial report.

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

- 1) The relevant parties, issues, and facts in this case are as follows:
  - a) Complainant has cancer. Cancer is a *per se* disability under the MHRA. See 5 M.R.S. § 4553-A.
  - b) Respondent operates a large, national chain of stores that sell [REDACTED] products.
  - c) Complainant had previously worked for Respondent as a Customer Service Associate, level 3 ("CSA-3") from approximately April 1, 2012 to May 1, 2012, when he voluntarily resigned due to complications from his cancer. Complainant had worked at Respondent's store in Auburn ("Auburn Store"). Complainant was 64 years old at the time he resigned.
  - d) A year later, in April 2013, Complainant began applying anew for jobs with Respondent. Complainant was 65 years old at that time.
  - e) At the time Complainant applied for employment, Respondent's online employment application requested that an applicant record the dates of graduation from educational institutions.
  - f) Complainant applied for eight similar positions at the Auburn Store in April and May of 2013. Complainant was not selected for an interview in any of the positions. The record reflects that with the exception of the seasonal assembly position, the successful candidates hired had the highest interview score out of those interviewed. Out of the candidates interviewed, there was no apparent pattern of hiring the youngest interview candidate. There is no known disability information for the candidates.
  - g) Complainant applied for 11 similar positions at Respondent's store in Augusta ("Augusta Store") between April and June of 2013. Complainant was interviewed once and his interview score was used for consideration for eight of the 11 positions. The record reflects that of the eight positions Complainant was considered for at the Augusta Store, he did not have the highest interview score. The record also reflects that each of the successful candidates hired to the eight positions was the candidate with the highest interview score. Out of the candidates interviewed, there was no apparent pattern of hiring the youngest interview candidate. There is no known disability information for the candidates.
- 2) Complainant provided the following:
  - a) The online application Complainant filled out required him to list graduation dates from educational institutions. This is an unlawful pre-employment inquiry under the MHRA, because it can be used to determine an applicant's age.

- b) Complainant began applying for jobs with Respondent in April of 2013, after he was cleared to return to work without restrictions following his resignation approximately year earlier. He applied for numerous positions in the Auburn Store and the Augusta Store. Although he was highly qualified for the positions and had previously worked for Respondent, he was not hired to any of them. He believes this is evidence of age and disability discrimination.
  - c) The majority of Respondent's employees are significantly younger than Complainant, and the younger employees who were hired in preference to him could not have had the same amount of experience as he did. Complainant has 40 years of plumbing experience, but was not hired to the positions in the plumbing department he applied to (Plumbing Pro position and Sales Specialist Plumbing position at the Augusta Store) despite his experience and the fact that he had previously held a similar position with Respondent.
  - d) Respondent was aware of Complainant's disability because of his previous employment. Complainant's resignation letter from 2012 disclosed his disability, and management at the Auburn Store was well aware of his medical issues since that was the store at which he had been employed previously. Complainant also disclosed during his pre-hire interview in 2012 that he would be having surgery in the near future because of his disability. When Complainant applied to numerous positions at the same store in 2013, he was not even invited for an interview.
  - e) Complainant believes that the Augusta Store was also aware of his disability because his resignation letter was on file with Respondent. Also, Complainant included in several of his applications that he had previously left employment at the Auburn store due to medical reasons. He believes his disability, in addition to his age, is the reason he was not considered for employment.
  - f) Complainant continued to apply to positions in the Auburn and Augusta Stores and continued to receive rejections.<sup>2</sup>
- 3) Respondent provided the following:
- a) Complainant was not discriminated against on the basis of age or disability with respect to hire. Complainant was not hired for the various positions he applied to because he was not the best candidate.
  - b) Respondent's application form does not specifically request dates of graduation from high school, which could be used to determine an applicant's age. Dates of graduation from other educational institutions vary greatly depending on an individual's experience, and cannot be used to determine an applicant's age. Furthermore, Complainant only recorded his date of graduation from college on his application form, which was in 2001. This could not have been used to determine Complainant's age and is irrelevant to the fact that he was not hired.
  - c) Complainant acknowledged that he was hired by Respondent in the Auburn Store in 2012 after disclosing his disability during his employment interview. This shows that Respondent did not have discriminatory animus toward Complainant due to his disability.

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<sup>2</sup> Investigator's Note: Both Complainant and Respondent were asked for additional information regarding jobs Complainant applied to long after his initial Complaint, but for practical reasons they will not be addressed individually in this report.

- d) Complainant was 64 years old when he was hired at the Auburn Store in 2012. Complainant was only one year older when he applied to jobs in 2013. This does not support the allegation that Complainant was not hired in 2013 due to his age.
  - e) If an employee is selected for an interview, that employee is scored by the interviewers based on a number of performance factors during the interview. The scores are combined and averaged for a final score. Respondent usually hires the candidate with the highest interview scores. At times, management may decide to select a candidate with a lower interview score if that candidate has a specific skill needed.
  - f) Interview scores remain valid for 30 days, which is the reason that Complainant's single interview score from the Augusta Store was considered for eight separate positions.
  - g) Complainant was not selected for an interview for any of the positions he applied to at the Auburn Store in April and May of 2013 because he either did not meet the minimum qualifications for the position (two positions) or he was not one of the best qualified candidates based on the qualification criteria for the position. Because Respondent receives applications from many qualified applicants, it is not uncommon for qualified applicants not to be selected for an interview.
- 4) Investigator's notes:
- a) Complainant applied to a seasonal assembly position at the Auburn Store on April 18, 2013, but was not selected for an interview. The record reflects that the successful applicant did not have the highest interview score of those interviewed. Respondent initially stated that the successful applicant was hired despite this specifically because of his experience with grills. Respondent was asked where this experience was stated on the successful applicant's application, since it could not be located, and because Complainant's application had specifically pointed to his experience with grills. Respondent then stated that the successful applicant did not mention his experience with grills in his application, but noted that he had experience as an overnight assembler, which is why he was hired.
  - b) Later in the investigation, when asked for further detail regarding why Complainant was not considered for an interview in any of the positions he applied to at the Auburn Store in 2013, Respondent stated that Complainant was not selected based on his "performance as assessed by his former managers when he was previously employed at the [REDACTED] Auburn Store and his unprofessional behavior towards store management".

#### **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.
- 2) The MHRA provides that it is unlawful, based on age or disability, to refuse to hire or otherwise discriminate against an employee in the terms and conditions of employment. 5 M.R.S. § 4572(1)(A).

#### Age Discrimination – Failure to Hire

- 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 established a prima-facie case of age discrimination by showing that he applied for numerous jobs for which he met the minimum qualifications (undisputed), that he was rejected, and that the majority of the successful candidates were significantly younger than him (also undisputed).
- 8) Respondent articulated a legitimate, nondiscriminatory reason for hiring persons other than Complainant, namely that he was not the best qualified candidate for the positions to which he applied.
- 9) While Respondent's nondiscriminatory reason is flawed (see analysis below), Complainant could not prevail by showing that, were it not for his age, he would have been hired. Reasoning is as follows:
  - a) As stated above, the record does not show a pattern of Respondent hiring the youngest candidate selected for an interview in both the Auburn and Augusta Stores. The age of the successful candidates compared to the pool of those selected for interviews varied.
  - b) In the Augusta Store, where Complainant was interviewed for 8 of the positions, although there were no successful candidates older than him, all of the successful candidates had the highest interview scores of those interviewed, regardless of age.
  - c) Complainant was hired in the Auburn Store in 2012 at the age of 64. Given that there was no significant difference in age when he applied in 2013 at 65, this evidence does not support Complainant's allegation of age discrimination in the Auburn Store.

- 10) It was not found that Respondent discriminated against Complainant on the basis of age by failing to hire him.

Age Discrimination – 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.
- 13) It is undisputed that at the time Complainant applied for a position, Respondent’s online application requested dates of graduation from educational institutions. As stated above, this constitutes an unlawful pre-employment inquiry, because it is a question that indirectly pertains to a protected class.
- 14) While Respondent alleged that the application was irrelevant in this case because Complainant only recorded his recent date of graduation from a university in 2001, this does not change the fact that Respondent’s application contained an unlawful inquiry.
- 15) It was found that Respondent discriminated against Complainant on the basis of age by subjecting him to an unlawful pre-employment inquiry.

Disability Discrimination

- 16) Following the same burden-shifting framework above, Complainant establishes a prima-facie case of unlawful discrimination by showing that (1) he belongs to a protected class, (2) that he applied and (3) met the minimum objective qualifications for the job sought, and (4) that he was rejected. *City of Auburn*, 408 A.2d at 1263.
- 17) Here, Complainant establishes a prima-facie case by showing that he has a disability as defined by the MHRA, he applied to numerous jobs for which he met the minimum qualifications, and he was rejected.
- 18) Respondent articulated a legitimate, nondiscriminatory reason for rejecting Complainant, namely that he was not the best qualified candidate for the positions to which he applied.
- 19) In the end, Complainant did show that Respondent’s reason is false or irrelevant, and that, if it was not for his disability, he would likely have been hired to one of the positions to which he applied at the Auburn Store. Reasoning is as follows:
- a) Complainant had previously worked as a CSA – 3 at the Auburn Store in 2012. The fact that he was hired shows that he was qualified for that position. In April and May of 2013, Complainant applied to eight positions that were at the same level or lower than his previously held position (for example CSA -1). Despite the fact that he was qualified for these (or the majority of these) positions, Complainant was not even selected for an interview.

- b) Respondent initially stated that Complainant was not selected for an interview in these positions because he was not the most qualified candidate based on the applicable qualifications for the position. A review of those selected for interviews, however, does not show that Complainant was less qualified than these applicants, especially considering his previous employment with Respondent and his years of experience.
  - c) Respondent was asked for further information to support why Complainant was not selected for interviews in the Auburn Store despite his qualifications, as it was not clear from the record. Respondent then stated that Complainant was not considered for employment in that store because of his past work performance and behavior toward management. Not only is this an entirely different reason than initially stated, but Respondent provided no explanation or evidence to support this claim.<sup>2</sup> There is no evidence in the record regarding poor work performance by Complainant in the month he was employed in 2012, and Respondent provided no details to elaborate. This shifting reason by Respondent can be seen as evidence of pretext.
  - d) As stated above, Respondent was asked to provide additional information supporting the Auburn Store's reason for hiring another applicant, who was not the highest-scoring in the interview, to the seasonal assembly position in April of 2013 despite his interview score and the lack of evidence supporting his experience with grills (in contrast to Complainant). Respondent then stated that that this applicant had not mentioned his experience with grills, and that it was his past experience as a former assembler that made him the successful candidate. This shifting reason by Respondent can be seen as additional evidence of pretext.
  - e) It is undisputed that the Auburn Store was aware of Complainant's disability and the fact that he had resigned for medical reasons. Respondent alleges that Complainant was hired after disclosing his disability in his employment interview in 2012, and that this shows that Respondent did not discriminate against Complainant based on his disability. While Complainant may have stated the existence of a disability in his interview, this was before Complainant experienced significant complications with his disability that prevented him from working almost immediately after hire, and that led to his resignation a month later. It is plausible, given the information above, that Respondent did not want to hire Complainant again due to his disability.
  - f) There is insufficient evidence to show that the Augusta Store discriminated against Complainant on the basis of disability. Complainant was interviewed and considered for eight of the 11 positions he applied to, and the record reflects that each of the successful candidates had the highest interview score out of those interviewed, including Complainant. There was no evidence to show that Complainant was not hired because of his disability, rather than the fact that he did not have the highest interview score for any of the positions.
- 20) It was found that Respondent (the Auburn Store specifically) discriminated against Complainant on the basis of disability by failing to hire him.

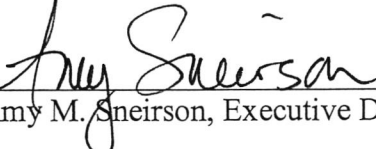
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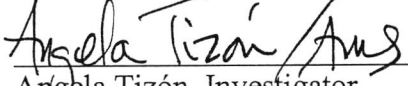
<sup>2</sup> Respondent did provide an e-mail from an employee of the Auburn Store detailing an encounter with Complainant at a job fair, stating that it made her uncomfortable. This e-mail was dated September 8, 2014, which is well after any of the applications at issue here. Respondent may take the position that this new reason related only to more recent applications – for example, it is raised in connection with two applications in April 2014. It is worth noting that the reason for rejecting Complainant even in these later applications could not have been related to the job fair incident, which had not yet taken place.

**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 [REDACTED] [REDACTED] discriminated against Complainant [REDACTED] 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).
- 3) There are **Reasonable Grounds** to believe that Respondent [REDACTED] [REDACTED] [REDACTED] discriminated against Complainant [REDACTED] on the basis of disability by failing to hire him, 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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Angela Tizon, Investigator



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT E13-0352

June 15, 2015

██████████ (Greene)

v.

██████████ ██████████ (Mooresville, NC)

### **I. Complaint:**

██████████ alleged that ██████████ discriminated against him on the basis of age and disability by failing to hire him for numerous open positions. In particular, his claims are against ██████████ stores located in Auburn and Augusta.

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

Respondent denied age and disability discrimination and alleged that Complainant was not hired because he was not the strongest candidate for the positions to which he applied.

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

- 1) Dates of alleged discrimination: April 16, 2013 – July 12, 2013, and continuing through April 17, 2014.
- 2) Date complaint filed with the Maine Human Rights Commission (“Commission”): July 23, 2013.
- 3) Respondent employs more than 15 people and is subject to the Maine Human Rights Act (“MHRA”), the Age Discrimination in Employment Act, the Americans with Disabilities Act, and state and federal employment regulations.
- 4) Complainant is represented by Verne Paradie, Esq. Respondent is represented by Trish Wray, Esq.

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<sup>1</sup> Complainant's charge of discrimination named “██████████ ██████████ ██████████”; Respondent has stated that its legal name is “██████████ ██████████ Centers, Inc.”. Because Complainant did not amend his complaint, the original caption provided by Complainant has been retained, and Respondent is referred to as either “Respondent” or “██████████” throughout this report.

- 5) Investigative methods used: A thorough review of the materials submitted by the parties, requests 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) Complainant has cancer. Cancer is a *per se* disability under the MHRA. See 5 M.R.S. § 4553-A.
  - b) Respondent operates a large, national chain of stores that sell [REDACTED] products.
  - c) Complainant had previously worked for Respondent as a Customer Service Associate, level 3 ("CSA-3") from approximately April 1, 2012 to May 1, 2012, when he voluntarily resigned due to complications from his cancer. Complainant had worked at Respondent's store in Auburn ("Auburn Store"). Complainant was 64 years old at the time he resigned.
  - d) A year later, in April 2013, Complainant began applying anew for jobs with Respondent. Complainant was 65 years old at that time.
  - e) Complainant applied for eight similar positions at the Auburn Store in April and May of 2013. Complainant was not selected for an interview in any of the positions. The record reflects that with the exception of the seasonal assembly position, the successful candidates hired had the highest interview score out of those interviewed. Out of the candidates interviewed, there was no apparent pattern of hiring the youngest interview candidate. There is no known disability information for the candidates.
  - f) Complainant applied for 11 similar positions at Respondent's store in Augusta ("Augusta Store") between April and June of 2013. Complainant was interviewed once and his interview score was used for consideration for eight of the 11 positions. The record reflects that of the eight positions Complainant was considered for at the Augusta Store, he did not have the highest interview score. The record also reflects that each of the successful candidates hired to the eight positions was the candidate with the highest interview score. Out of the candidates interviewed, there was no apparent pattern of hiring the youngest interview candidate. There is no known disability information for the candidates.
- 2) Complainant provided the following:
- a) Complainant began applying for jobs with Respondent in April of 2013, after he was cleared to return to work without restrictions following his resignation approximately year earlier. He applied for numerous positions in the Auburn Store and the Augusta Store. Although he was highly qualified for the positions and had previously worked for Respondent, he was not hired to any of them. He believes this is evidence of age and disability discrimination.
  - b) The majority of Respondent's employees are significantly younger than Complainant, and the younger employees who were hired in preference to him could not have had the same amount of experience as he did. Complainant has 40 years of plumbing experience, but was not hired to the positions in the plumbing department he applied to (Plumbing Pro position and Sales Specialist



Plumbing position at the Augusta Store) despite his experience and the fact that he had previously held a similar position with Respondent.

- c) Respondent was aware of Complainant's disability because of his previous employment. Complainant's resignation letter from 2012 disclosed his disability, and management at the Auburn store was well aware of his medical issues since that was the store at which he had been employed previously. Complainant also disclosed during his pre-hire interview in 2012 that he would be having surgery in the near future because of his disability. When Complainant applied to numerous positions at the same store in 2013, he was not even invited for an interview.
  - d) Complainant believes that the Augusta Store was also aware of his disability because his resignation letter was on file with Respondent. Also, Complainant included in several of his applications that he had previously left employment at the Auburn store due to medical reasons. He believes his disability, in addition to his age, is the reason he was not considered for employment.
  - e) Complainant continued to apply to positions in the Auburn and Augusta stores and continued to receive rejections.<sup>2</sup>
- 3) Respondent provided the following:
- a) Complainant was not discriminated against on the basis of age or disability with respect to hire. Complainant was not hired for the various positions he applied to because he was not the best candidate.
  - b) Complainant acknowledged that he was hired by Respondent in the Auburn Store in 2012 after disclosing his disability during his employment interview. This shows that Respondent did not have discriminatory animus toward Complainant due to his disability.
  - c) Complainant was 64 years old when he was hired at the Auburn Store in 2012. Complainant was only one year older when he applied to jobs in 2013. This does not support the allegation that Complainant was not hired in 2013 due to his age.
  - d) If an employee is selected for an interview, that employee is scored by the interviewers based on a number of performance factors during the interview. The scores are combined and averaged for a final score. Respondent usually hires the candidate with the highest interview scores. At times, management may decide to select a candidate with a lower interview score if that candidate has a specific skill needed.
  - e) Interview scores remain valid for 30 days, which is the reason that Complainant's single interview score from the Augusta Store was considered for eight separate positions.
  - f) Complainant was not selected for an interview for any of the positions he applied to at the Auburn Store in April and May of 2013 because he either did not meet the minimum qualifications for the position (two positions) or he was not one of the best qualified candidates based on the qualification

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criteria for the position. Because Respondent receives applications from many qualified applicants, it is not uncommon for qualified applicants not to be selected for an interview.

4) Investigator's notes:

- a) Complainant applied to a seasonal assembly position at the Auburn Store on April 18, 2013, but was not selected for an interview. The record reflects that the successful applicant did not have the highest interview score of those interviewed. Respondent initially stated that the successful applicant was hired despite this specifically because of his experience with grills. Respondent was asked where this experience was stated on the successful applicant's application, since it could not be located, and because Complainant's application had specifically pointed to his experience with grills. Respondent then stated that the successful applicant did not mention his experience with grills in his application, but noted that he had experience as an overnight assembler, which is why he was hired.
- b) Later in the investigation, when asked for further detail regarding why Complainant was not considered for an interview in any of the positions he applied to at the Auburn Store in 2013, Respondent stated that Complainant was not selected based on his "performance as assessed by his former managers when he was previously employed at the [REDACTED] Auburn Store and his unprofessional behavior towards store management".

**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.
- 2) The MHRA provides that it is unlawful, based on age or disability, 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).

Age Discrimination

- 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 numerous jobs for which he met the minimum qualifications (undisputed), that he was rejected, and that the majority of the successful candidates were significantly younger than Complainant (also undisputed).
- 8) Respondent articulated a legitimate, nondiscriminatory reason for hiring persons other than Complainant, namely that he was not the best qualified candidate for the positions to which he applied.
- 9) While Respondent's nondiscriminatory reason is flawed (see analysis below), Complainant could not prevail by showing that, were it not for his age, he would have been hired. Reasoning is as follows:
  - a) As stated above, the record does not show a pattern of Respondent hiring the youngest candidate selected for an interview in both the Auburn and Augusta stores. The age of the successful candidates compared to the pool of those selected for interviews varied.
  - b) In the Augusta Store, where Complainant was interviewed for 8 of the positions, although there were no successful candidates older than him, all of the successful candidates had the highest interview scores of those interviewed, regardless of age.
  - c) Complainant was hired in the Auburn store in 2012 at the age of 64. Given that there was no significant difference in age when he applied in 2013 at 65, this evidence does not support Complainant's allegation of age discrimination in the Auburn store.
- 10) Age discrimination was not found.

#### Disability Discrimination

- 11) Following the same burden-shifting framework above, Complainant establishes a prima-facie case of unlawful discrimination by showing that (1) he belongs to a protected class, (2) that he applied and (3) met the minimum objective qualifications for the job sought, and (4) that he was rejected. *City of Auburn*, 408 A.2d at 1263.
- 12) Here, Complainant establishes a prima-facie case by showing that he has a disability as defined by the MHRA, he applied to numerous jobs for which he met the minimum qualifications, and he was rejected.
- 13) Respondent articulated a legitimate, nondiscriminatory reason for rejecting Complainant, namely that he was not the best qualified candidate for the positions to which he applied.

- 14) In the end, Complainant was able to show that Respondent's reason is false or irrelevant, and that, if it was not for his disability, he would likely have been hired to one of the positions to which he applied at the Auburn Store. Reasoning is as follows:
- a) Complainant had previously worked as a CSA – 3 at the Auburn Store in 2012. The fact that he was hired shows that he was qualified for that position. In April and May of 2013, Complainant applied to eight positions that were at the same level or lower than his previously held position (for example CSA -1). Despite the fact that he was qualified for these (or the majority of these) positions, Complainant was not even selected for an interview.
  - b) Respondent initially stated that Complainant was not selected for an interview in these positions because he was not the most qualified candidate based on the applicable qualifications for the position. A review of those selected for interviews, however, does not show that Complainant was less qualified than these applicants, especially considering his previous employment with Respondent and his years of experience.
  - c) Respondent was asked for further information to support why Complainant was not selected for interviews in the Auburn Store despite his qualifications, as it was not clear from the record. Respondent then stated that Complainant was not considered for employment in that store because of his past work performance and behavior toward management. Not only is this an entirely different reason than initially stated, but Respondent provided no explanation or evidence to support this claim.<sup>2</sup> There is no evidence in the record regarding poor work performance by Complainant in the month he was employed in 2012, and Respondent provided no details to elaborate. This shifting reason by Respondent can be seen as evidence of pretext.
  - d) As stated above, Respondent was asked to provide additional information supporting the Auburn Store's reason for hiring another applicant, who was not the highest-scoring in the interview, to the seasonal assembly position in April of 2013 despite his interview score and the lack of evidence supporting his experience with grills (in contrast to Complainant). Respondent then stated that that this applicant had not mentioned his experience with grills, and that it was his past experience as a former assembler that made him the successful candidate. This shifting reason by Respondent can be seen as additional evidence of pretext.
  - e) It is undisputed that the Auburn Store was aware of Complainant's disability and the fact that he had resigned for medical reasons. Respondent alleges that Complainant was hired after disclosing his disability in his employment interview in 2012, and that this shows that Respondent did not discriminate against Complainant based on his disability. While Complainant may have stated the existence of a disability in his interview, this was before Complainant experienced significant complications with his disability that prevented him from working almost immediately after hire, and that led to his resignation a month later. It is plausible, given the information above, that Respondent did not want to hire Complainant again due to his disability.

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<sup>2</sup> Respondent did provide an e-mail from an employee of the Auburn Store detailing an encounter with Complainant at a job fair, stating that it made her uncomfortable. This e-mail was dated September 8, 2014, which is well after any of the applications at issue here. Respondent may take the position that this new reason related only to more recent applications – for example, it is raised in connection with two applications in April 2014. It is worth noting that the reason for rejecting Complainant even in these later applications could not have been related to the job fair incident, which had not yet taken place.

- f) There is insufficient evidence to show that the Augusta Store discriminated against Complainant on the basis of disability. Complainant was interviewed and considered for eight of the 11 positions he applied to, and the record reflects that each of the successful candidates had the highest interview score out of those interviewed, including Complainant. There was no evidence to show that Complainant was not hired because of his disability, rather than the fact that he did not have the highest interview score for any of the positions.

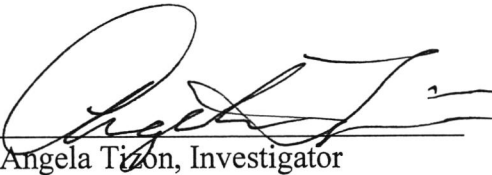
15) It was found that Respondent (the Auburn Store specifically) discriminated against Complainant on the basis of disability by failing to hire him.

**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 [REDACTED] discriminated against Complainant [REDACTED] 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 [REDACTED] discriminated against Complainant [REDACTED] on the basis of disability by failing to hire him, 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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Angela Tizon, Investigator