Memo

Date: January 10, 2006

To: Patricia E. Ryan, Executive Director

From: John P. Gause, Commission Counsel

Re: [redacted]
PA05-0373

Hi Pat,

You asked me to look into two issues with respect to the above-referenced charge of discrimination.

I. IS THE AMENDED CHARGE ADDING SEX DISCRIMINATION TIMELY?

Brief answer: Yes, I think it is.

Complainant's requested amendment adds "sex" as a basis of discrimination but otherwise relies on the same facts as are in the original disability discrimination charge. The issue is whether the sex charge (which is untimely) relates back to the filing date of the disability charge (which is timely) because the sex charge alleges "additional acts which constitute unlawful practices related to or growing out of the subject matter of the original complaint. . . ." MHRC Procedural Rule § 2.02(F). In *Caldwell v. Federal Express Corp.*, 908 F. Supp. 29, 35 (D.Me. 1995), the United States District Court for the District of Maine held that an age discrimination claim brought in court had been properly administratively exhausted with the EEOC despite the fact that the EEOC charge did not allege age discrimination (it alleged sex discrimination). The court held that the age claim had been properly administratively exhausted because it alleged the identical set of facts (surrounding a failure to hire) as the sex discrimination claim that had been raised with the EEOC. Accordingly, the Court held that the age claim was "reasonably related to" the sex claim and "grew out of" the same set of circumstances. *See id.* Applying this holding to the present request for amendment, because both the sex and disability claims allege the same set of facts, the sex claim could be considered to allege "additional acts which constitute unlawful practices related to or growing out of the subject matter of the original complaint," MHRC Procedural Rule § 2.02(F), which would justify using the original filing date for the sex claim.

II. SHOULD THE DISABILITY CHARGE BE ADMINISTRATIVELY DISMISSED?

Brief answer: I do not think so.

Respondent has requested that the charge be administratively dismissed pursuant to MHRC Procedural Rules 2.02(H)(1) (lack of jurisdiction) and 2.02(H)(2) (failure to substantiate the complaint of discrimination). The basis for Respondent's request is (1) that Complainant was not, in fact, denied admission, treatment, or medication, (2) that the MHRA does not recognize a claim for denial of mental health services because of mental disability, and (3) that the charge does not identify the nature of Complaint's disability.

The charge of discrimination, which is quite brief, states as follows:

> I believe I was discriminated against because of my mental disability while I was a patient at [redacted] on or about March 17, 2005. I was attacked physically by hospital staff. I was not given proper medication. I was falsely accused of improper conduct. I was refused and denied clearly indicated medical and psychiatric care and treatment among other things. I believe this is a public accommodation claim.

Complainant initially responded to Respondent's request for dismissal by suggesting that she is pursuing a failure to accommodate claim. Specifically, Complainant (through her attorney) wrote that [redacted] discriminated against her "when they failed to understand, diagnose, properly treat [redacted], and physically attacked her because of her mental disabilities. This is not merely a case where a patient was given the wrong treatment or medication. In this case [redacted] was physically attacked by Hospital because they failed to understand, diagnose, treat, or accommodate her mental disabilities."

Later, in response to Brenda's request for dismissal, Complainant appeared to argue that she would be able to show discrimination vis-à-vis people without disabilities and/or people with different types of disabilities: "While one way to prove discrimination on the basis of mental disability is to show that people without disabilities were treated more favorably, discrimination on the basis of mental disability may also be demonstrated by showing that persons with different mental disabilities were treated differently. . . ."

With respect to Respondent's first requested basis for dismissal (that Complainant was not, in fact, denied services) it would be inappropriate to administratively dismiss the case on that ground, as the investigation will sort out what happened. With respect to the third requested basis (that Complainant has not identified the nature of her mental disability), notice pleading only requires that Complainant state that she has a mental disability.

The second basis (that the MHRA does not recognize the claim) is more complicated. The United States District Court for the District of Maine has followed the prevailing view that there is not a claim for discrimination between different types of disabilities under the ADA. *See El-Hajj v. Fortis Benefits Ins. Co.*, 156 F.Supp.2d 27, 29-32 (D.Me. 2001). Not all courts have so held, however, *see Boots v. Northwestern Mut. Life Ins. Co.*, 77 F.Supp.2d 211, 219 (D.N.H. 1999), and the Law Court has not decided the issue. I think the better rule is the one articulated in *Boots* that discrimination because of disability includes discrimination between different types of disabilities.

The court's reasoning in *Boots* is persuasive:

> Blacks and Hispanics are protected against discrimination based on race or national origin by Title VII; forty-five-year-olds and sixty-five-year-olds are protected against discrimination based on age by the ADEA; and schizophrenics and persons confined to wheel-chairs are protected against discrimination based on disability by the ADA. Title VII clearly is violated by a policy that discriminates against Hispanics but favors blacks; the ADEA is violated by hiring a forty-five-year-old over an otherwise qualified sixty-five-year-old based on age. It logically follows that the ADA is violated by a policy that disadvantages schizophrenics based on their disability, despite the fact that individuals confined to wheelchairs are benefitted.

Id. at 219 (citation omitted). *Cf. Olmstead v. L.C.*, 119 S.Ct. 2176, 2186 n.10 (1999) ("The dissent is driven by the notion that 'this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the *same* protected class,' that 'our decisions construing various statutory prohibitions against 'discrimination' have not wavered from this path,' and that 'a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group.' The dissent is incorrect as a matter of precedent and logic.") (citing *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996) (ADEA)).

The District Court in *El-Hajj* articulated the various principles other courts have relied on in reaching the view that the ADA should not recognize claims for discrimination between disabilities as follows:

> (1) the plain language of the ADA does not suggest that it requires equal treatment of the mentally and the physically disabled, see, e.g., EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 149 (2nd Cir. 2000); (2) the ADA's legislative history suggests that Congress did not intend for the Act to establish parity between the treatment of mental and physical disabilities, see, e.g., Wilson v. Globe Specialty Prods., Inc., 117 F. Supp. 2d 92, 96-97 (D. Mass. 2000); (3) congressional action subsequent to the passage of the ADA implies that Congress believes that the ADA does not require equal treatment of mental and physical disabilities, see, e.g., Parker, 121 F.3d at 1018 (citing the Mental Health Parity Act, 42 U.S.C. § 300gg-5); (4) EEOC guidance documents recognize that most insurance plans provide lesser coverage for psychological disabilities, see, e.g., Weyer, 198 F.3d at 1116-17; and (5) requiring insurers to provide equal coverage for different types of disabilities "would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA," e.g., Ford, 145 F.3d at 608. In addition, the Supreme Court has held that the Rehabilitation Act, 29 U.S.C. § 794 et seq., which is the precursor to the ADA, does not require equal treatment of those with

psychological disabilities versus those with physical disabilities. See Traynor v. Turnage, 485 U.S. 535, 549, 99 L. Ed. 2d 618, 108 S. Ct. 1372 (1988); Alexander v. Choate, 469 U.S. 287, 302, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985).

I do not think that these reasons are persuasive or controlling with respect to our interpretation of the MHRA. With respect to the plain language argument, the same could be said for racial or age discrimination, yet clearly it is illegal to fire someone because he is African-American and retain someone who is Caucasian or fire someone because she is 65 and retain someone who is 45. The arguments attributable to the ADA's legislative history, congressional action, and EEOC guidance do not control our interpretation of the MHRA. The argument concerning "destabilizing the insurance industry" is not one that is presented here, so it is unnecessary to address it. Finally, in *Traynor*, the Supreme Court relied on a regulation interpreting the Rehabilitation Act (which does not control our interpretation of the MHRA) that provided "'exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons' is not prohibited." *Traynor v. Turnage*, 108 S.Ct. 1372, 1382 (1988) (quoting 45 C.F.R. § 84.4(c)).

Accordingly, I think that Complainant can permissibly attempt to show unlawful discrimination between her disability and others' disabilities.

With respect to Complainant's attempt to show discrimination vis-à-vis people without disabilities, a problem arises in the present case because [redacted] only treats patients with psychiatric conditions. How, then, can Complainant show that she was treated differently from people without disabilities when Respondent only provides services to people with mental health conditions? In a related context, the District Court (interpreting the ADA) has held that "the State and County cannot discriminate against mental health patients in the provision of mental health services that they provide only to mental health patients." *Buchanan v. State of Maine*, 366 F.Supp.2d 169, 175 (D.Me. 2005) (following *Doe v. Pfrommer*, 148 F.3d 73 (2nd Cir. 1998)).

I think it is conceivable, however, that Complainant could show discrimination compared with people without disabilities in this context. Respondent admittedly only treats people with psychiatric conditions, but not all psychiatric conditions are "mental disabilities." Therefore, it is possible that Respondent treated Complainant (who alleges that she has a "mental disability") differently from other patients who have psychiatric conditions that are not "mental disabilities."

Moreover, Complainant may also pursue a claim that Respondent failed to reasonably accommodate her mental disability, which resulted in inadequate medical care and a physical attack. This type of claim has been recognized by the District Court, and it does not depend on a showing of disparate treatment between people with disabilities and those without them or with different types of disabilities. *See Buchanan*, 366 F.Supp.2d at 176. In *Buchanan*, the Court stated that "the inquiry is not whether the benefits to persons with disabilities and to others are actually equal, but whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled." *Id.* (quoting *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272-73 (2nd Cir. 2003)).

Respondent would be liable if it violated the public accommodations reasonable accommodation standard:

> A failure to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless, in the case of a private entity, the private entity can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations.

5 M.R.S.A. § 4592(1)(B).

Here, giving Complainant the benefit of a liberal construction of her charge, she has stated a failure to accommodate claim under the MHRA.

For all of these reasons, I think that the charge should not be dismissed.