



Maine Human Rights Commission

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February 28, 2014

INVESTIGATOR'S REPORT E12-0392

██████████ (West Gardiner)

v.

██████████ Inc. and ██████████ (Kennebunkport)

I. The Complaint:

Complainant ██████████ alleged that he was unlawfully discriminated against in employment based upon his age and gender when Respondents ██████████ Inc. and ██████████ (the owner of ██████████ made, printed or published or caused to be made, printed or published an unlawful employment advertisement. He asserted that Respondent violated the Maine Human Rights Act by refusing to consider him for an open position because of his sex and age.

II. Respondents' Answer:

Respondents ██████████ Inc. and ██████████ deny any discrimination, explaining that the limitations placed in the job advertisement were included because ██████████ is afraid employing a male in her home due to past trauma. Respondents also asserted that the ad was taken down 2-3 days after its posting.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: June 3, 2012.
- 2) Date complaint filed with the Maine Human Rights Commission: August 10, 2012.
- 3) Respondents, both as company and individual employer, employ approximately one person and are subject to the Maine Human Rights Act ("MHRA") as well as state employment regulations.
- 4) Complainant is represented by ██████████, Esq. Respondents are not represented by counsel.
- 5) Investigative methods used: A thorough review of the written materials 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."

IV. Development of Facts:

- 1) The parties in this case are as follows:
 - a) Complainant ██████████ is a 44 year old male computer programmer.

- b) Respondent [REDACTED] Inc. is a small design studio dedicated to providing custom-branded boutique website designs for spas, beauty, fashion and artistic businesses worldwide. Respondent [REDACTED] is the owner of [REDACTED]
 - c) Third parties: Designer GG; Designer JM; Copywriter RX; Advertiser PO.
- 2) This was offered by Complainant [REDACTED]
- a) On June 2, 2012, he saw an employment advertisement on craigslist entitled: "Seeking Female Design Assistant (Kennebunkport)." The ad was posted overnight on June 2, and contained a craigslist relay e-mail for responses. The text of the ad read:

Growing website and graphic design boutique; catering to luxury spa/beauty/fashion businesses worldwide seeking recent FEMALE college grads preferable with BFA in graphic design, internet design, with knowledge of html, css, php and some my SQL Database. Knowledge of contemporary design practices and classical art history essential! Candidate must be self-motivated, highly proficient in all new media social outlets and capable of maintaining the daily company design blog.

* Strong candidates will also posses [sic] exceptional customer service skills, basic bookkeeping and office management duties will be expected.

The job was located in Kennebunkport, and paid an annual salary of \$32,000.
 - b) Upon information and belief, [REDACTED] Inc. was the company hiring the Design Assistant.
 - c) Mr. [REDACTED] was seeking work and believed that he was well-qualified for the advertised position. He was upset to see that a job that he qualified for was only offered to women. He stated that he responded to the e-mail address in the ad and stated that he was a male and that he was upset about the gender limitation. He said that he thought that the practice of hiring just women was illegal and would consider filing a complaint.
 - d) Mr. [REDACTED] received a reply on June 3, 2012 that read, in relevant part: "I don't doubt your skill set at all . . . I'm just a screener in this process. The owner is a woman and she only wants women. Also, if you had done your homework properly you would know that there a [sic] a lot [sic] of woman only companies throughout the world. Your complaint will go nowhere . . ."
 - e) Despite the stated refusal to hire a man for the position, Complainant still decided to send in his resume, hoping that they would reconsider. He sent his resume on June 4, 2012. He stated that he was not contacted for an interview or hired for the position.
 - f) Mr. [REDACTED] believes Advertiser PO was the "screener" who received his resume and sent him the June 3, 2012 e-mail.
- 3) Respondents [REDACTED] and [REDACTED] provided this reaction to Mr. [REDACTED] complaint:
- a) A casual acquaintance of Ms. [REDACTED] Advertiser PO, posted the job advertisement on craigslist for her. It was Advertiser PO's idea to post an ad for [REDACTED] Respondents did not compensate Advertiser PO, who Ms. [REDACTED] had only met once.

- b) Respondents' understanding was that the advertisement was taken down 2-3 days later, as Ms. [REDACTED] didn't want to hire anyone.
 - c) Respondents denied having any application materials submitted for the Design Assistant position by Mr. [REDACTED] and all other applicants. Ms. [REDACTED] identified herself as the hiring decision-maker and asserted that she had never interviewed or hired anyone.
 - d) [REDACTED] has only one employee: Ms. [REDACTED]. Ms. [REDACTED] is a single mother and works from home.
 - e) Ms. [REDACTED] is a violence survivor, and has symptoms of post-traumatic stress disorder as a result. Because of this, Ms. [REDACTED] included in the advertisement the statements about "female" design assistant description, as she would never have a man she did not know work in her home with her.
 - f) Ms. [REDACTED] was offended to be accused of discrimination; she is a supporter of human rights.
- 4) Advertiser PO provided the following in response to Mr. [REDACTED] charge¹:
- a) Advertiser PO knew Ms. [REDACTED] for about 10 days, and went on two dates with her. Ms. [REDACTED] asked him to help her with an ad on craigslist for her business. He wrote the ad based on what she wanted, and screened potential candidates for one day from his home. He then cancelled the ad.
 - b) Advertiser PO wrote the ad, posted it, and changed the ad after Mr. [REDACTED] complained. He asserted that all of this occurred within 24 hours, and that he had no records of this at all. He stated that he played a very small role in this very quick process, receiving e-mail responses and forwarding them to Ms. [REDACTED]. According to Advertiser PO, Ms. [REDACTED] "quickly found someone she liked and it was in her hands from there."
 - c) Advertiser received no compensation and is not affiliated with [REDACTED]. He has not been in contact with Ms. [REDACTED] since the ad was taken down.
- 5) Further investigation reveals:
- a) Respondents stated on January 16, 2013, that Ms. [REDACTED] was [REDACTED] only employee. She asserted that she did not interview or hire anyone, and that she had never hired anyone.
 - b) A December 19, 2012,² visit to the [REDACTED] website, which had a positioning line on the header, "Female Design Team, Glamorous Girl Designers, X-Girls," revealed that the studio employed not only Ms. [REDACTED] but also two other designers and a copywriter. [REDACTED] promoted itself, at that time, as "an online boutique for exquisite website and graphic design". The site stated: "Our luxurious style and attention to detail put our website design in a class of its own. For 15 years, we have been the original go-to design boutique for glamorous, hip design for feminine entrepreneurs worldwide." The site went on to provide: "We have blossomed into an exclusive online design boutique committed to setting the bar for beauty, cosmetic and fashion industry designs. International spas are our new niche but we love all women entrepreneurs with an eye for beauty."

¹ Complainant has also filed a separate charge of discrimination against Advertiser PO for his role in this matter.

² As of mid-February 2014, [REDACTED] website identifies two employees: [REDACTED] and Designer GG.

c) The [REDACTED] website continued, "When it comes to exquisite design, the gals at [REDACTED] have all the talent and tools needed to draw you in and never let you go. From sumptuous spas to lush cosmetics, delectable cake bars to sassy boutiques, [REDACTED] is the cornerstone of all things glamorous."

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, in part, that it is unlawful for an employer to "fail or refuse to hire or otherwise discriminate . . . [or] discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." because of sex and age. 5 M.R.S. § 4572(1)(A).
3. The MHRA further provides, in relevant part, that it is unlawful for an employer to "[p]rint, publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination based upon . . . sex . . . [or] age". 5 M.R.S. § 4572(D)(4).
4. Mr. [REDACTED] alleges that he was discriminated against on the basis of his sex and age. He claims that Respondents' advertised preference for female employees who were recent college graduates resulted in his being overlooked for as a potential candidate for [REDACTED]'s designer position, which he sought and for which he was well qualified. Respondents deny any discrimination, and state that due to past trauma, Ms. [REDACTED] was unable to work in her home with a male.
5. As an initial matter, there is no evidence that Respondents discriminated against Complainant because of his age. While the advertisement posted did refer to a "recent college graduate," that statement, standing alone, does not support a claim of age discrimination. Individuals of any age can attend and graduate from college. It does not appear that Respondents were even aware of Complainant's age at any point in the process. Rather, Respondents were clearly focused on Complainant's gender. Accordingly, the charge of age discrimination is not substantiated, and will not be investigated further.

Discriminatory advertising

6. The Employment Regulations of the MHRC provide the following with regard to discriminatory advertising:

It shall be an unlawful employment practice for any person to print or publish or cause to be printed or published any notice or advertisement relating to employment or membership in a labor organization indicating any preference, limitation, specification or discrimination based upon race or color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin or age unless there is a bona fide occupational qualification for such preference, limitation, specification or discrimination

MHRC Rules, Chapter 3, § 3.04(A).

7. The Commission's rules further provide, with regard to discrimination based on sex:

Section 4572(1)(A) of the Act provides an exception to the prohibition of discrimination in employment on account of sex when such discrimination is based on a bona fide occupational qualification (BFOQ). The Commission construes the BFOQ provision very narrowly and requires an employer to prove that all or substantially all members of one sex would be unable to perform the normal duties of the job involved.

MHRC Rules, Chapter 3, § 3.07(A)(1).

8. The rules also specifically provide that “[i]ndividual preference is not a BFOQ.” *Id.* at § 3.07(A)(2)(b).
9. Respondents caused the advertisement for a female designer to be published. The advertisement clearly stated a preference for a female employee, and Advertiser PO screened Complainant’s inquiry out because of Respondents’ expressed preference.
10. Respondents appear to have taken the position that sex is a BFOQ in this instance, because Ms. ██████ background makes her unwilling to work in her home with a man she does not know. However, while Ms. ██████ situation is sympathetic, the preference of the employer for a female worker is not a BFOQ. *Id.* at § 3.07(A)(2)(b). In this case in particular, Respondents clearly do business with clients over the internet; Respondents could have worked with Complainant via the internet, or met in public locations if Ms. ██████ was not comfortable having a man in her home.
11. Discrimination on the basis of sex through unlawful advertising is found.

Discrimination on the basis of gender: failure to hire

12. Complainant also alleges that he was not considered for ██████ advertised position due to his sex. He submitted his resume despite the expressed preference for a female employee, and was not contacted regarding his application.
13. A mixed-motive analysis applies in cases involving “direct evidence” of unlawful discrimination. *Doyle v. Dep’t of Human Servs.*, 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. “Direct evidence” consists of “explicit statements by an employer that unambiguously demonstrate the employer’s unlawful discrimination. . . .” *Id.* Where this evidence exists, Complainant “need prove only that the discriminatory action was a motivating factor in an adverse employment decision.” *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Doyle*, 2003 ME 61, ¶ 14, n.6, 824 A.2d at 54, n.6. Upon such a showing, in order to avoid liability, Respondent must prove “that it would have taken the same action in the absence of the impermissible motivating factor.” *Id.*; *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 276-77, 109 S. Ct. 1775, 1804 (1989) (O’Connor, J., concurring).³
14. In this case, Respondents’ advertisement unambiguously demonstrates discriminatory intent, direct evidence of unlawful discrimination. Their advertisement stated that only female applicants were desired, and Respondents followed through on their statement by screening out Complainant’s

³ The continued application of the mixed-motive analysis has been called into question as a result of the U.S. Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2348 (2009), in which the Court held that the burden of persuasion does not shift to defendant even with “direct evidence” of unlawful discrimination in a federal Age Discrimination in Employment Act case. That decision did not interpret the Maine Human Rights Act, however, and the guidance from the Maine Supreme Court in *Doyle* will continue to be followed.

application. Advertiser PO, who had written the text of the ad pursuant to Respondents' instructions, responded to Complainant's initial inquiry by confirming "[t]he owner is a woman and she only wants women", further direct evidence of Respondents' intent to discriminate on the basis of sex.

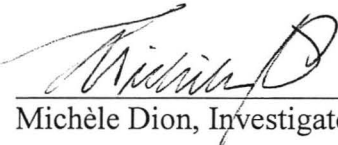
15. As noted above, *see* Paragraph 10, sex is not a BFOQ for this position: individuals of any gender could perform the work. The decision to seek only female employees was based upon the employer's personal preference.
16. Respondents stated that they did not hire any employees, so Complainant would not have been hired in any event. In the final analysis, however, Respondents did not prove that they would have made the same decision in the absence of the impermissible motivating factor, with reasoning as follows:
 - a. Respondents claimed that Ms. [REDACTED] was the only employee of Phrizbee. This apparently is untrue. In January 2012, the [REDACTED] website listed three additional employees; in February 2014, it listed one additional employee. All of the additional employees are women.
 - b. In addition, Advertiser PO stated that Ms. [REDACTED] "quickly found someone she liked and it was in her hands from there." This suggests that Ms. [REDACTED] at least considered hiring an employee as a result of the Craigslist ad, and that Complainant himself was not even considered due to his gender.
17. Discrimination on the basis of sex is found.

VI. Recommendation:

1. For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following findings:
2. There are **Reasonable Grounds** to believe that Respondents [REDACTED] Inc. and [REDACTED] [REDACTED] discriminated against Complainant [REDACTED] in employment due to sex (unlawful advertising, failure to hire);
3. Conciliation of that claim should be attempted in accordance with 5 M.R.S. § 4612(3).
4. There are **No Reasonable Grounds** to believe that Respondents [REDACTED] Inc. and [REDACTED] [REDACTED] discriminated against Complainant [REDACTED] because of his age, and;
5. That claim should be dismissed in accordance with 5 M.R.S. § 4612(2).



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Michèle Dion, Investigator