

Maine Human Rights Commission
51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330
Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711
www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT
E13-0173

November 15, 2013

[REDACTED]

v.

[REDACTED]

I. Complainant's Complaint:

Complainant [REDACTED] (hereinafter "Complainant" or "Mr. [REDACTED]" alleges that Respondent [REDACTED] Inc. (hereinafter "Respondent" or "[REDACTED]" failed or refused to hire him for a courier driver position because of his age (60 years old). Complainant also alleges that Respondent made an unlawful inquiry on the application form by asking for his date of birth.

II. Respondent's Answer:

Respondent alleges that age was not a factor in the selection process and that the successful applicant was 64 years old. Respondent also alleges that applicants are asked for their dates of birth in order to comply with federal regulations which prescribe and fix the qualifications for drivers of commercial motor vehicles.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: January 8, 2013.
- 2) Date complaint filed with the Maine Human Rights Commission: April 5, 2013.
- 3) Respondent has 55 employees and is subject to the Maine Human Rights Act and the Age Discrimination in Employment Act as well as state and federal employment regulations.
- 4) Respondent is represented by John B. Cole, Esq. Complainant is not represented by counsel.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and follow-up requests for information. 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 parties and issues in this case are as follows:
 - a) Mr. [REDACTED] was born in 1952 and was 60 years old at the time of these events.
 - b) [REDACTED] is a trucking company engaged in the transportation of goods and freight for compensation. [REDACTED] primary business involves transportation of goods and freight in interstate commerce using commercial motor vehicles. Another small part [REDACTED] business is the operation of an intrastate courier service.
 - c) In December 2012, [REDACTED] was in need of a courier driver in the Lewiston-Auburn area. On December 4, 2012, [REDACTED] placed advertisements in print and electronic media soliciting applications for the position of courier driver. Within the next week, [REDACTED] received 13 applications. [REDACTED] received an application from Mr. [REDACTED] but did not select him for the position.
 - d) Mr. [REDACTED] alleges that [REDACTED] failed or refused to hire him for a courier driver position because of his age (60 years old). Mr. [REDACTED] also alleges that [REDACTED] made an unlawful inquiry on the application form by asking for his date of birth.
 - e) [REDACTED] alleges that age was not a factor in the selection process and that the successful applicant was 64 years old. [REDACTED] also alleges that applicants are asked for their dates of birth in order to comply with federal regulations which prescribe and fix the qualifications for drivers of commercial motor vehicles.
 - f) [REDACTED] employed 20 courier drivers between January 2011 and mid-May 2013. Of that number, 10 drivers (50%) were over the age of 60, two drivers (10%) were between the ages of 50 and 60, four drivers (20%) were between the ages of 40 and 50; and four drivers (20%) were under the age of 40.
- 2) The following concerns the applicants hired for the position sought by Mr. [REDACTED]
 - a) The qualifications sought by [REDACTED] for the courier driver position were clean license, good work history, delivery or related experience, flexible schedule, and ability to pass a post-offer medical exam and lift assessment.
 - b) [REDACTED] selected eight of the thirteen applications received for further review, based on the appearance of relevant experience. Mr. [REDACTED] appeared qualified for the position and was selected because his resume indicated that at one time he held a Department of Transportation (DOT) license.
 - c) [REDACTED] obtained driver records for the eight applicants. Two candidates were found to have violations on their records and were eliminated from consideration. The remaining six candidates included Mr. [REDACTED]
 - d) Three of the remaining six candidates held commercial driver licenses (CDL). Although the position did not specifically require a CDL license, the three applicants with CDL licenses

stood out both for their experience and for the fact that each of them could be assigned to commercial driving duties, if necessary. Because [REDACTED] did not hold a CDL license and because he did not have delivery experience, he was not selected for an interview.

- e) Three candidates were interviewed and one of them was offered the job, and hired on December 28, 2012. The successful candidate was 64 years old.
- 3) After reviewing Respondent's answer, Mr. [REDACTED] indicated that he agrees that the failure to hire was not because of his age. He continues to maintain that the application form for courier drivers contains an unlawful question.
- 4) [REDACTED] provided the following with regard to the application form:
 - a) Until recently (2009) nearly all of [REDACTED] driving positions were commercial driving jobs. Federal Motor Carrier Safety Regulations require that the company obtain the applicant's date of birth among other mandated data. 49 CFR §391.21 (b). It didn't occur to the company to modify the application form for the courier driving positions.
 - b) Furthermore, because [REDACTED] would like to hire applicants for its courier positions who are able, if needed, to assume the duty of commercial drivers, it was not inappropriate for [REDACTED] to utilize the traditional federal application form mandated by §391.21, requiring the applicant to state his (sic) date of birth. [REDACTED] would not be able to engage a courier driver holding an appropriate CDL license in occasional service as a commercial driver in interstate commerce in the absence of such a completed application on file and of record, as this is required by the federal regulation as a precondition to employment of such a driver in interstate commerce.

V. Analysis:

- 1) The Maine Human Rights Act (MHRA) provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA also provides, in part, that it is unlawful employment discrimination to fail or refuse to hire an employee because of age, *see* 5 M.R.S. § 4572(1)(A), or elicit or attempt to elicit information directly or indirectly pertaining to age prior to employment, *see* 5 M.R.S. § 4572(1)(D)(1).
- 3) Complainant here alleges in his complaint that Respondent failed or refused to hire him for a courier driver position because of his age (60 years old). After learning that the successful applicant for the position was 64 years old, Complainant indicated that he no longer believes that age discrimination in the failure to hire occurred. Complainant continues to assert his claim that Respondent made an unlawful inquiry on the application form by asking for his date of birth.
- 4) Respondent denies that the failure to hire Complainant was based on age, which is no longer in dispute. Respondent also alleges that applicants are asked for their dates of birth in order to

comply with federal regulations which prescribe and fix the qualifications for drivers of commercial motor vehicles.

- 5) Analysis of the information provided by Respondent shows that the application form for courier drivers violates the MHRA, with reasoning as follows:
 - a) The application form asks applicants for courier driver jobs to report their dates of birth, which is an unlawful inquiry that directly pertains to age.
 - b) The federal regulations cited by Respondent as the rationale for asking for dates of birth at the application stage apply to employees who apply to drive commercial motor vehicles in interstate commerce, not local deliveries made by courier drivers. The position at issue in this case is for a courier driver to make local deliveries, not a commercial interstate driver.
 - c) The qualifications sought by Respondent for the courier driver position did not include a CDL license and the ability to drive commercial motor vehicles.
 - d) Respondent prefers to hire courier drivers who have a CDL license so that if necessary the driver can be assigned to commercial driving duties. However, Respondent did not allege or prove that all courier drivers are also employed as commercial drivers.
 - e) Respondent could accomplish its goal of hiring courier drivers who also qualify as commercial drivers by asking applicants for courier driver positions if they have CDL licenses.
 - f) Respondent currently uses the applicant's date of birth in order to check the applicant's driving record. Respondent could accomplish its goal of hiring drivers with clean driving records by making a conditional offer of employment, then asking for date of birth and checking the conditional employee's driving record. The offer of employment could be withdrawn if the driving record is not acceptable.
 - g) Respondent indicates that prior to 2009, all of its drivers were governed by federal regulations that mandate asking for dates of birth at the application stage. Even though it appears to be an oversight, when Respondent started hiring courier drivers that are not subject to federal regulations, it should have modified its application form for courier drivers to comply with the MHRA.
- 6) In conclusion, the claim that Respondent failed or refused to hire Complainant because of his age is unfounded but the claim that Respondent used an application form that contains an unlawful inquiry based on age has merit.

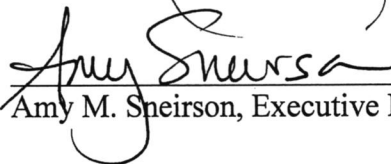
VI. RECOMMENDATION:

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

1. There are No Reasonable Grounds to believe that Respondent [REDACTED] Inc. failed or refused to hire Complainant [REDACTED] because of his age;

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2. That portion of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).
3. There are Reasonable Grounds to believe that Respondent [REDACTED] Inc. used an application form that elicited information pertaining to age prior to Complainant's employment;
4. Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Amy M. Sneirson, Executive Director



Barbara Lelli, Chief Investigator