Maine Human Rights Commission

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November 14, 2014

INVESTIGATOR'S REPORT
E13 ~~E12~~-0609

[redacted] **(Turner)**

v.

[redacted] **(Illinois)**

I. Complaint:

Complainant alleges that Respondent unlawfully discriminated against him because of his actual or perceived physical disability (rotator cuff injury) by refusing to grant the reasonable accommodation of either temporarily reducing his work schedule to 30 hours per week or granting him unpaid medical leave, and terminating his employment. Complainant further alleges that Respondent discriminated against him because of his prior workers' compensation claim with his former employer.

II. Respondent's Answer:

Respondent denies discrimination and states it terminated Complainant's employment when it learned that he had an undisclosed pre-existing shoulder condition which led to medical restrictions that prevented him from performing the essential functions of his job. It could not have discriminated against Complainant for a prior workers' compensation claim because it did not know of the prior claim when it hired Complainant.

III. Jurisdictional Data:

1) Date of alleged discrimination: 5/17/2013.

2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 10/21/2013.

3) Respondent [redacted] ("[redacted] employs approximately 290 individuals nationwide and is required to abide by the non-discrimination provisions of the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, and state and federal employment regulations.

4) Investigative methods used: A thorough review of the written material 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" in this matter.

5) The Complainant is represented by Rebecca Webber, Esq. Respondent is not represented by legal counsel.

IV. Development of Facts:

1) Complainant was hired by Respondent [redacted] as an "over-the-road" truck driver in January 2013.

2) Respondent is a national motor carrier with a principal place of business in East Dubuque, Illinois.

Complainant's Commission Claims

3) On 1/11/2013, Complainant completed an application for employment with Respondent [redacted]

4) From 1/16/2013 through 1/18/2013, Complainant attended the company's new employee orientation in Iowa. The orientation included completing testing on physical requirements of both [redacted] and the Department of Transportation ("DOT"), including climbing in and out of the back of a trailer. Complainant passed all of the tests they had for determining whether he was capable of doing the job.

5) On 1/16/2013, Complainant underwent a pre-employment medical examination. He disclosed to the doctor that he had a stiff shoulder and showed him a scar on his left shoulder from an injury 18 years earlier. Complainant also showed the doctor a scar from umbilical surgery from the prior year. Complainant further disclosed that he had received treatments for right shoulder impingement, as well as a cortisone shot, which seemed to make his condition better. They also discussed Complainant's diabetes and his use of a CPAP (continuous positive airway pressure) machine for sleep apnea. The doctor tested everything from Complainant's balance and range of motion to his ability to crawl and his lifting capabilities.

6) On one of the employment forms Complainant filled out, he was asked about any illness or injuries occurring in the last five years. Complainant was thinking more about the illness part of the question and did not intend to hide anything from the company or the doctor, which is clear from the fact that he discussed the condition of both of his shoulders with the doctor. Although he was being treated for impingement at the time, a term his doctor has used in 2012, Complainant had not been diagnosed with a rotator cuff disorder or injury. Complainant did tell the company doctor all about the treatments he had received from his doctor for impingement in 2012.

7) On 1/18/2013, Complainant was hired by Respondent [redacted] as a Northeast dedicated regional driver.

8) On or about 4/24/2013, after months of driving [redacted] trucks with no problem, Complainant's right shoulder started to hurt and he decided to have it checked out. He sent his May itinerary, which outlined all appointments and commitments Complainant had for that month, to the two Driver Managers. The itinerary included a medical appointment on 5/14/2013 to have an MRI (magnetic resonance imaging) and a follow up with an orthopedic doctor on 5/17/2013. One Driver Managers confirmed receiving a copy.

9) On 5/14/2013, Complainant had an MRI, and subsequently met with an orthopedic specialist on 5/17/2013. The MRI results showed that Complainant had a tear in his right rotator cuff in addition to some arthritis in the bones on top of that shoulder. Complainant had not received an MRI for years prior to that and neither he nor anyone else was aware of the tear in his right rotator cuff. The doctor completed First Report of Injury form (for workers' compensation benefits) and imposed a work restriction that Complainant drive no more than 30 hours per week. The doctor also referred Complainant to a surgeon, and an appointment with the surgeon was set for 5/22/2013.

10) Complainant still wanted to work, and the orthopedic specialists had cleared him to work 30 hours per week until he saw the surgeon. Complainant called the Driver Manager to inform him of the work restriction. The Driver Manager told Complainant to fax his restrictions to [redacted] Safety Manager. Complainant did so, and called the Safety Manager to confirm that she had received the form.

11) The Safety Manager then informed Complainant that he could no longer work for [redacted] because anyone working for them had to be at 100%, with no work restrictions. Complainant asked the Safety Manager if his employment was being terminated. The Safety Manager stated in response that Complainant's doctor had signed his termination, and that unless he could get his doctor to clear him 100%, she could not help.

12) Complainant then called the Driver Manager and told him what the Safety Manager had said. Complainant asked the Driver Manager why he could not just shuttle trailers for 30 hours per week. The Driver Manager said he would speak with [redacted] Safety Manager and then get back to Complainant.

13) Emails between the Driver Manager and the Safety Manager include a medical judgment by the Safety Manager that Complainant was "no longer medically able to drive a CMV" (commercial motor vehicle). This was not true, Complainant was only limited to driving no more than 30 hours per week. The Driver Manager specifically asked in an email (attached as Exhibit A) why Complainant could not drive the 30 hours per week that his doctor had approved. The Safety Manager responded in writing, stating, "*You are not listening...policy is...they cannot return to work with any restrictions. It has to say no restrictions. Esp[ecially] with a rotator cuff. We are only asking to inherit an old claim. The doctor marked surgery necessary and we aren't going to expedite the process.*" Copies of these email messages were also sent to Respondent's upper management, including the Vice President of Operations.

14) Complainant got a call from the Driver Manager, who told him to take all of his personal belongings out of the truck as another driver would be coming to pick it up on 5/24/2013. He asked the Driver Manager why his employment was being terminated, if that was what was occurring. Driver Manager said he was going by the Safety Manager's directive and that he could not tell Complainant any more than that.

15) From 5/20/2013 through 5/22/2013, Complainant attempted to contact Safety Manager to ask why he could not shuttle trailers for 30 hours. He left several messages for the Safety Manager but she never returned his calls. He spoke with others in the safety department but they had no idea what the Safety Manager had done because there was no documentation in the computer. They told Complainant that he would need to speak to the Safety Manager and that she was out of town for a week.

16) On 5/22/2013, Complainant met with the surgeon, who suggested surgery to repair the torn rotator cuff and a carpal tunnel issue at the same time. The surgeon issued work restrictions, including no driving a commercial vehicle and no lifting more than five pounds. This note was faxed to the Safety Manager. Since Complainant's employment had already been terminated by Respondent, it did not make any difference if Complainant could work or not, so his surgeon just took him out of work altogether at that point.

17) On 5/23/2013, Complainant again attempted to contact the Safety Manager, but he kept getting her voicemail even when he had been told that she was in the office. Complainant contacted the Safety Manager's supervisor, who forwarded his call to the Safety Manager. Complainant told her that he assumed he no longer had a job since he had been asked to clean out his truck. The Safety Manager told Complainant that she was mad at him because he had lied to the company when he applied for the position by indicating that he had no restrictions or medical issues at that time. The Safety Manager told him that he could not work for the company if he had any kind of medical restriction. Complainant told the Safety Manager that he thought that terminating his employment for this was harsh and that he was just asking for

a medical leave of absence. Complainant asked if he could have a leave of absence or a layoff slip, as well as a letter of explanation as regarding why he had no job so that he could file for unemployment benefits. The Safety Manager told Complainant that she did not have to give him a letter because his doctor essentially wrote Complainant's termination by issuing work restrictions. Complainant then asked the Safety Manager what he was supposed to do about income and insurance. She told Complainant to have his doctor send in another letter indicating he was 100% capable of working without any restrictions.

18) Approximately one hour later, Complainant called the Safety Manager to request information on filing a claim for disability insurance. The Safety Manager told him that she was not the one to speak to about that and that Complainant did not have any disability insurance, even though he had pay stubs that reflected weekly deductions for disability insurance. Approximately a half hour later, Complainant received a call from someone at the company asking him if he was looking to open a Workers' Compensation claim. Complainant said that he wanted to open a claim for short-term disability. The company representative told Complainant that she did not think he could get short-term disability because it was a work-related injury but that she would send him the forms to apply. That individual subsequently indicated in an email to a co-worker that Complainant had been "*med-termed until he's got no restrictions*."

19) Respondent's short-term disability insurance carrier subsequently notified Complainant that his claim had been denied because he had a work-related injury. On 7/12/2013, Respondent wrote Complainant a letter which stated that his employment had been "terminated when the Company became aware that [his] doctor restricted [him] from driving a commercial vehicle." On 8/19/2013, Respondent wrote that had Complainant disclosed his earlier injury (which he actually did), he would not have been hired to begin with. Respondent claimed that Complainant's "undisclosed pre-existing condition did not and does not allow him to perform the essential functions of a full-time commercial driver" at [redacted] However, this was not true. Complainant passed his pre-employment physical and was able to perform the essential functions of his job from mid-January 2013 until late April 2013 without any problems.

20) Complainant's employment would not have been terminated except for the shoulder issue from a prior job, which he thought had healed. Respondent discriminated against him for having a prior Workers Compensation claim, by refusing to employee any employee who is not "100%," and by refusing to accommodate his doctor's request that Complainant drive no more than 30 hours per week.

Respondent's Answer to Complainant's Complaint

21) Respondent [redacted] is a motor carrier engaged in domestic interstate commerce transportation for hire. The job Complainant was hired for requires that a driver be able to drive and work up to seven days in any given week, subject to federal regulations. There were no other jobs available for the Complainant except as a full-time over-the-road commercial truck driver.

22) Complainant applied for employment as an over-the-road commercial truck driver on 1/11/2013. The next day, he was extended an offer of employment conditioned on a medical examination to establish that he could perform the essential functions of the position. Complainant stated on his Essential Functions checklist that he was able to complete the functions necessary to operate a commercial vehicle. On 1/16/2013, a medical examiner conducted Complainant's pre-employment medical exam, at which time Complainant provided his health history information. Complainant affirmatively stated that he had not sustained an injury in the last five years, a representation that was later determined to be false, as was his representation that he did not have a previous injury creating work restrictions. Complainant withheld relevant and necessary information about an unresolved pre-existing rotator cuff workplace injury while with his previous employer. Had the company, through its medical examiner, been informed about

Complainant's pre-existing injury, it would have rightfully withdrawn its conditional offer of employment to him due to this unresolved medical condition, which did not allow him to perform the essential functions of the full-time commercial driver position at the company.

23) Complainant began working for the company on or about 1/18/2013. On 5/17/2013, Complainant was examined by a doctor without the company receiving any prior notice of this fact. Medical records for that examination include a finding of a "rotator cuff disorder," with an injury date of "Aug or Sept 2012." Respondent also received another report from the doctor on the same injury with a date of injury of "10/10/12." Both of these dates pre-date Complainant's start of employment with [redacted] in January 2013. Complainant admits that he suffered a right shoulder injury while working for a previous employer.

24) Complainant's medical note dated 5/17/2013 revealed a modified duty work restriction of "*No more than 30 hours driving per week.*" A later note from his doctor dated 5/22/2013 imposed significant restrictions of "*no lifting right arm > 5 lbs; no driving commercial vehicle.*"

25) When [redacted] learned in May 2013 that Complainant was unable to perform the essential functions of the full-time over-the-road commercial truck driver position due to his unresolved pre-existing rotator cuff condition, the company discontinued his employment to protect him from further injury and for the safety of other drivers and passengers on the road. The company could not accommodate Complainant's work restrictions because it does not have any part-time commercial driver positions. Complainant was informed that he could re-apply for a job if a doctor's note later released him to work full duty without restrictions.

26) Because the company does not have part-time commercial driver positions, it is the company's policy that applicants who suffer from pre-existing conditions must present a doctor's opinion that the condition from which they suffer has been resolved, or that the person has reached maximum medical improvement, describing what the permanent restrictions, if any, may be. However, if an individual applies for work with properly documented permanent restrictions, those restrictions would be examined to determine if they would interfere with the applicant's ability to perform the essential functions of the position.

Complainant's Reply to Respondent's Answers

27) Complainant was working as a full-time truck driver with his previous employer until 12/24/2012, only weeks before he applied to work for Respondent. He was not out on Workers Compensation leave and he was performing all functions of a full-time truck driver. Although Complainant received some treatment for his rotator cuff in October 2012, he thought he had the issue taken care of and had healed due to shots and therapy. Complainant was seen by his doctor on 1/14/2013 and no restrictions were recommended by him.

28) During the pre-employment physical, [redacted] doctor relied upon the forms Complainant filled out, a medical examination and physical performance tests. Complainant was singled out by the doctor for these additional physical tests because he had disclosed his shoulder condition. Complainant had also passed the DOT physical exam in November 2012. The fact that Complainant drove full-time for [redacted] for approximately three months demonstrates that he could perform the essential functions of the position.

29) It is true that after several months driving Respondent's trucks, which had manual/standard transmissions,[1] the problem in Complainant's right shoulder returned. Despite Respondent's claim to the contrary, there

[1] Complainant claims that trucks he drove for his previous employer had automatic transmissions.

was work at a level of 30 hours per week that Complainant's own supervisor wanted him to be able to do. His dispatcher wanted Complainant to pick up the loads in Maine and bring them to a truck stop in New Hampshire where the trailers would be switched. Complainant would then bring the empty truck back to the warehouses and bring back another loaded one down. The drivers who could drive longer would pick up a truck in New Hampshire and go from there. Complainant's supervisor knew that Complainant knew all the companies in Maine and where to go. Complainant could have shuttled trailers from Kingston, Poland, and Hollis, Maine, to Greenland, New Hampshire, to switch with other drivers.

30) [redacted] also did not grant Complainant's request for a leave of absence, even though he asked for that as an alternative to having his employment terminated. Although he did not qualify for leave under the Family Medical Leave Act ("FMLA") because he had not worked for the company long enough, Respondent's written policy allows for a leave of absence that is not limited to those who qualify for leave under FMLA.

V. Analysis and Conclusions

1) The MHRA requires the Commission here 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.

Disability Discrimination – Failure to Accommodate

2) The MHRA provides that it is unlawful to discriminate against an employee because of physical or mental disability. *See* 5 M.R.S. § 4572(1)(A). Pursuant to the MHRA, unlawful discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity." 5 M.R.S. §§ 4553(2)(E), 4572(2).

3) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that he is a "qualified individual with a disability" within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant's physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent's failure to do so affected the terms, conditions, or privileges of Complainant's employment. *See id.*

4) Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies". 5 M.R.S. § 4553(9-A).

5) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable [him] to perform the essential functions of [his] job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." *See Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm'n Reg. 3.08(D)(1) (July 17, 1999). The term "undue hardship" means "an action requiring undue financial or administrative hardship." 5 M.R.S. § 4553(9-B).

6) The phrase "terms, conditions or privileges of employment" is broad and not limited to discrimination that has an economic or tangible impact. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (interpreting Title VII of the Civil Rights Act of 1964); *King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992).

7) Here, Complainant alleges that [redacted] unlawfully discriminated against him because of his actual or perceived physical disability (rotator cuff) by refusing to grant the reasonable accommodation of temporarily reducing his work schedule to no more than 30 hours per week, or by granting him unpaid medical leave.

8) As a threshold matter, [redacted] does not appear to contest that Complainant has a "disability" under the MRHA. For purposes of this analysis, it will be assumed that Complainant has an actual or perceived disability for MHRA purposes.

9) To prevail, Complainant needs to demonstrate that Respondent denied him a reasonable accommodation, and that the denial affected the terms and conditions of his employment.

10) On 5/17/2013, Complainant requested the accommodation of driving no more than 30 hours per week, or alternatively a medical leave of absence as an accommodation. Respondent took the position that neither request was not reasonable, because it had no commercial driver positions that were not full-time and because no one could work for [redacted] with medical restrictions.

11) The requested accommodation(s) is/are found to be reasonable, and not an undue burden on Respondent, with reasoning as follows:

a) 30-hour/week accommodation:

i. Although Respondent claims that the reason why it could not grant Complainant's requested accommodation was because no part-time truck driver positions with the company existed, there is little if any evidence indicating that any evaluation occurred as to whether Respondent could have found enough driving work for Complainant to do during the period of his temporary work restriction. Instead, as the email exchange between Complainant's supervisor and the company's Safety Manager makes clear, the decision to deny him temporary part-time hours was not due to lack of available work, but instead due to the fact that he had *any* restriction, "esp[ecially] with a rotator cuff".

ii. Simply put, it is unlawful under the MHRA for an employer to refuse to hire or to discharge a current employee simply because that individual may be subjected to temporary work restrictions. An employer cannot require that an employee be no less than "100%" in order to eligible to work; rather, the employee must be able to perform the essential functions of the position, with (or without) reasonable accommodation.

iii. While it is true that Respondent's doctor restricted Complainant from any commercial driving (in addition to a five pound right arm lifting restriction) just the following week, Respondent had no way of knowing this at the time Complainant requested an accommodation. The employer did not actually do any analysis of the restrictions posed as compared to the essential elements of the position; it flatly rejected Complainant as an employee because he had any restrictions at all.

iv. The record in this case demonstrates that Respondent was unwilling to consider accommodating Complainant. When Safety Manager was questioned about allowing Complainant to work 30

hours per week, she responded unequivocally that employees "cannot return to work with any restrictions. It has to say no restrictions."

v. Since Respondent apparently did not even consider the requested accommodation, it cannot show that it determined the accommodation to be an undue hardship. There is no evidence in the file to suggest that Complainant could not have been allowed to work 30 hours per week for a period of time without Respondent suffering an undue financial or administrative hardship.

b) Unpaid leave of absence: Respondent offered no explanation as to why Complainant's request for an unpaid leave of absence was not considered, nor any explanation of why such a request would have been unreasonable or posed an undue hardship. It is possible that this request was not considered because Respondent believed Complainant had been dishonest during his pre-employment medical examination and declined to retain him as an employee in any capacity for this reason. However, consideration of the requested accommodation must be based upon whether it is reasonable under the circumstances, given the essential functions of the position, and not denied solely because an employer believes that an employee may have been less than truthful during the pre-employment process.

c) Respondent's submissions in this case continue to argue the need for its continued adherence to its 100% policy here. [redacted] stated in its submission that "[i]t is the Company's policy not to place persons with unresolved physical condition(s) to work unless and until such condition(s) are fully resolved and documented as such by a doctor" and insisting that it "cannot knowingly hire and put to work a person who may suffer injury as a result of a pre-existing unresolved medical condition." *See file.* These statements and policies fail to take into account the fact that not every unresolved physical condition prevents an employee from performing the essential elements of a job with or without accommodations; they also fail to take into account the MHRA's clear prohibition barring employers from making decisions based on assumptions about the abilities of persons with disabilities (or the "risks" perceived in employing them), which is exactly what [redacted] policy and actions did. [2]

12) Disability discrimination in the failure to accommodate Complainant is found in this case.

Disability Discrimination - Termination

13) The MHRA provides that it is unlawful to terminate an employee because of physical or mental disability. *See* 5 M.R.S.. § 4572(1)(A).

14) As noted above, it will be assumed that Complainant has an actual or perceived disability for MHRA purposes.

15) 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

[2] Respondent's statement that it "discontinued [Complainant's] employment so as to protect him from further injury" (see file) does little to help it.

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]

16) Here, there is direct evidence of discrimination, because Respondent clearly and explicitly ended Complainant's employment solely because of his physical condition – it considered him unable to perform the essential elements of his job because he was not "100%" – he needed accommodations to do the job. 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).

17) The MHRA does not prohibit an employer from discharging or refusing to hire an individual with a physical or mental disability when the employer can show that the employee or applicant, "because of the physical or mental disability, is unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or others. . . ." 5 M.R.S. § 4573-A(1-B).

18) The defense requires an individualized assessment of the relationship between an employee or job applicant's physical or mental disability and the specific legitimate requirements of the job. *See Higgins v. Maine C. R. Co.*, 471 A.2d 288, 290 (Me. 1984); *Maine Human Rights Com. v. Canadian Pacific, Ltd.*, 458 A.2d 1225, 1234 (Me. 1983). The defense imposes upon the employer the burden of establishing that it had a factual basis to believe that, to a reasonable probability, the employee or job applicant's physical or mental disability renders him or her unable to perform the duties or to perform them in a manner that would not endanger the health or safety of the employee or job applicant or others. *See Canadian Pacific, Ltd.*, 458 A.2d at 1234. An employer cannot deny an employee or applicant an equal opportunity to obtain gainful employment on the mere possibility that a physical or mental disability might endanger health or safety. *See id.*

19) In this case, given these facts, Respondent has failed to establish that Complainant "because of the physical or mental disability, [was] unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or others."

   a. The defense requires an individualized assessment of the relationship between an employee or job applicant's physical or mental disability and the specific legitimate requirements of the job. *See Higgins v. Maine C. R. Co.*, 471 A.2d 288, 290 (Me. 1984); *Maine Human Rights Com. v. Canadian Pacific, Ltd.*, 458 A.2d 1225, 1234 (Me. 1983). The defense imposes upon the employer the burden of establishing that it had a factual basis to believe that, to a reasonable probability, the employee or job applicant's physical or mental disability renders him or her unable to perform the duties or to perform them in a manner that would not endanger the health or safety of the employee or job applicant or others. *See Canadian Pacific, Ltd.*, 458 A.2d at 1234.

   b. Here, Respondent did not perform an individualized assessment of the relationship between Complainant's physical disability and limitations and the specific legitimate requirements of the job. It

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[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.

instead applied a blanket policy to him, without individually considering his medical limitations, accommodation request or ability to do the essential elements of the job.

c. Here, Respondent did precisely what it should not have done: denied an employee an equal opportunity to retain employment on the mere possibility that a physical disability might endanger health or safety.

20) Disability discrimination in Complainant's termination from employment is found in this case.[4]

Workers' Compensation Retaliation

21) Complainant has also claimed that he was subjected to workers' compensation retaliation by Respondent. The MHRA prohibits termination of employment because of Complainant's previous assertion of a workers' compensation claim or right against a different Respondent under former Title 39 or Title 39-A. *See* 5 M.R.S. § 4572(1)(A); 39-A M.R.S. § 353.

22) Because 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). First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) he belonged to a protected class, (2) he performed his job satisfactorily, (3) his employer took an adverse employment decision against him, and (4) his employer continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261.

23) 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 with affirmative evidence of pretext or by the strength of Complainant's evidence of unlawful discriminatory motive. *See City of Auburn*, 408 A.2d at 1262, 1267-68.

24) 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.

25) Complainant did set forth a prima facie claim of workers' compensation retaliation, as he belonged to a protected class (filed a workers' compensation claim against a prior employer), he performed his job satisfactorily, Respondent terminated his employment, and Respondent continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed.

26) Respondent provided a reason for the termination which is not discriminatory on the basis of

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[4] The result here would be the same if this claim had been analyzed under a non-direct evidence standard pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).

Complainant's prior workers' compensation claim, namely its belief that Complainant was not able physically to perform the essential elements of the position for which he'd been hired because he had not been cleared to work at 100% capacity.[5]

27) In the final analysis, Complainant did not show that he would not have been terminated but for his filing of a workers' compensation claim against a prior employer.

a. Respondent's emails do suggest that the company may have been concerned about Complainant filing a new workers compensation claim if he exacerbated his pre-existing rotator cuff condition. This makes for a close call on this claim.

b. It is evident that Respondent would have refused to hire Complainant if he had disclosed a prior injury; Respondent did indicate in its submission that it would likely not have hired Complainant if he had disclosed that he had "unresolved pre-existing workplace injury from a previous employer."

c. Overall, the facts indicate clearly that Respondent's concern was not the fact of the prior workers' compensation claim, but the fact of the underlying injury and any lingering impact it may have had on Complainant's functioning and on Respondent's liability for any exacerbation of the injury.

28) Because it does not appear that Respondent's actions were based on whether or not Complainant had filed a prior claim for Workers' Compensation benefits, but rather on Complainant's rotator cuff injury itself and Respondent's insistence that he be at 100% in order to be allowed to work at all, Complainant has not established a prima-facie case of Workers' Compensation discrimination.

VI. Recommendations

Based upon the information contained herein, the following recommendation is made to the Maine Human Rights Commission:

1. There are **REASONABLE GROUNDS** to believe that the Complainant was subjected to disability discrimination (failure to accommodate) by Respondent; and conciliation should be attempted on this claim in keeping with 5 M.R.S. § 4612(3).

2. There are **REASONABLE GROUNDS** to believe that the Complainant was subjected to disability discrimination (termination) by Respondent; and conciliation should be attempted on this claim in keeping with 5 M.R.S. § 4612(3).

3. That there are **NO REASONABLE GROUNDS** to believe that Complainant was subjected to workers compensation retaliation by Respondent; and this claim should be dismissed in keeping with 5 M.R.S. § 4612(3).

Amy M. Sneirson
Executive Director

Robert D. Beauchesne
MHRC Investigator

[5] Respondent's belief was not based in fact and, as discussed in detail above, made improper assumptions based on Complainant's disability status. Looking solely at the workers' compensation retaliation claim, however, Respondent's proffered reason is nondiscriminatory *on that basis*.

[redacted]

From: [redacted]
Sent: Friday, May 17, 2013 4:32 PM
To: [redacted]
Cc: [redacted]
Subject: RE: 22144 [redacted]

Is he qualified enough to bring the truck back to the Springfield terminal or do we have to go recover it?

[redacted]
Office: 402.404.2193 Fax: 402.404.2393
Email: [redacted]@Hirschbach.com

From: [redacted]
Sent: Friday, May 17, 2013 3:11 PM
To: [redacted]
Cc: [redacted]
Subject: RE: 22144 [redacted]

You are not listening....policy is....they cannot return to work with any restrictions. It has to say no restrictions. Esp with a rotator cuff. We are only asking to inherit an old claim. The doctor marked surgery necessary and we aren't going to expedite the process

[redacted]
Safety Manager

Hirschbach
Motor Lines, Inc
18355 U.S. Hwy 20 West
East Dubuque, IL 61025
Phone: 402.404.2271
Fax: 402.404.2471
email: [redacted]irschbach.com

From: [redacted]
Sent: Friday, May 17, 2013 3:10 PM
To: [redacted]
Cc: [redacted]
Subject: RE: 22144 [redacted]

Doesn't his dr note say he is eligible to work 30 hrs per week?

[redacted]
Office: 402.404.2193 Fax: 402.404.2393
Email: [redacted]irschbach.com