Maine Human Rights Commission

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INVESTIGATOR'S REPORT
E14-0343

June 15, 2015

[redacted] ([redacted])

v.

[redacted] **Inc.** [redacted]

I. Complaint:

Complainant alleges that Respondent[1] unlawfully discriminated against him because of his disability (cancer) when it refused to grant reasonable accommodations of extending his medical leave by three weeks and allowing him to work reduced shifts for his first two weeks back to work, and when it terminated him from his Assistant Manager position. Complainant also alleges that Respondent's immediately terminating him from the Assistant Manager position when Complainant requested accommodations was retaliation for asserting his rights under the Maine Human Rights Act ("MHRA") and federal employment laws.

II. Respondent's Answer:

Respondent denied disability discrimination or retaliation. Respondent states that Complainant's requested accommodations were denied because they would have created an extreme hardship given the critical nature of his position that had been unfilled for approximately four months.

III. Jurisdictional Data:

1) Date of alleged discrimination: 9/15/2013.

2) Date complaint filed with the Maine Human Rights Commission ("MHRC"): 7/9/2014.

3) Respondent employs more than 500 people and is required to abide by the provisions of the Maine Human Rights Act, the [redacted] with Disabilities Act, 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 represented by [redacted] Esq. Respondent is represented by [redacted], Esq.

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[1] Respondent asserts that Complainant was actually employed by [redacted], not [redacted]s. Complainant did not amend his complaint to that effect, so we will continue to refer to the case as originally captioned and refer to "Respondent".

IV. Development of Facts:

1) Respondent is a freight railroad that operates throughout the Northeast.

2) Complainant began working as a Machinist at Respondent's Waterville, Maine location on or about 7/5/2012. He was promoted to Assistant Manager on or about 10/5/2012.

3) Important third parties include Respondent's Superintendent of the facility, the Assistant Superintendent, and the Vice President of the Mechanical Department ("VPMD").

Complainant's MHRC Claims

4) Complainant performed his job duties well and did not receive any discipline or warnings while employed by Respondent. He was promoted within three months of his hiring date.

5) Beginning on or about 5/25/2013, Complainant went out on medical leave of absence to undergo treatment, namely chemotherapy radiation for cancer. On or about 6/10/2013, Complainant received a letter from his employer granting him a leave of absence until 9/16/2013.

6) On 9/13/2013, Complainant advised the Superintendent and Assistant Superintendent that he would be able to return to work in three weeks. Complainant also advised them that for the first two weeks after he returned to work, his doctor limited his shifts to four days per week, at no more than eight hours per day. After the two weeks, he was cleared to return to his regular 12 hour shifts, without any work restrictions.

7) On 9/13/2013, Respondent terminated Complainant's employment, with an effective date of 9/15/2013. Respondent's written reason for the termination was that it could not hold Complainant's Assistant Manager position open "as its vacancy is a hardship for the Mechanical Department."

8) Complainant was then advised to contact the VPMD, who told him that the company no longer wanted to carry him, and that they needed someone in his position right away. Complainant asked the VPMD if he could have an Assistant Manager position if one was still open by the time he was ready to return to work, and no one had yet filled the position. The VPMD said, "Yes."

9) On 10/3/2013, Complainant's doctor wrote a note releasing him to return to work without restrictions. Although Complainant returned to work at Respondent's Waterville facility on or about 10/18/2013, it was in the position of Machinist, not as an Assistant Manager, even though at that time the company had still not filled Complainant's former managerial position.

10) Complainant asked two times for the vacant Assistant Manager position but was denied both times. The Assistant Manager position remained open for at least two months[2] after Complainant returned to work.

11) Approximately two weeks after Complainant returned to work in the demoted position, it affected him so negatively that in early November 2013 he was forced to seek psychiatric care. On or about 2/28/2014, Complainant resigned[3] his position as a Machinist at Respondent, primarily because the company refused

[2] Respondent's records actually reflect that Complainant's replacement technically assumed the position on 11/1/2013.

[3] Since Complainant did not specifically allege that he was forced to resign, a constructive discharge, that claim will not be analyzed in this report.

to reinstate him to his former position as Assistant Manager.

12) Complainant believes Respondent's given reason for terminating his employment as Assistant Manager - that it would have been a hardship to grant more leave - was a pretext for discrimination, and retaliation for taking the reasonable accommodation of medical leave, and for requesting a few additional weeks of leave.

Respondent's Answer to Complainant's MHRC Complaint

13) As an Assistant Manager, Complainant was responsible for overseeing the shop and the shift employees for a 12-hour shift, four days per week. His duties also required, among other things, to be capable of problem solving as well as to explain observations, the ability to stay alert, and to provide written and oral instructions. Although it was a managerial position, as a Machinist, Complainant had become a member of the Union, and maintained his rights and membership therein after becoming an Assistant Manager.

14) Complainant was allegedly diagnosed with a medical condition that required him to undergo treatment. Upon his request in May 2013, Respondent granted him a leave of absence[4] until 9/16/201.

15) On or about 9/13/2013, Complainant advised the Superintendent (and Assistant Superintendent) of the Waterville facility that he would not be able to return to work for another three weeks. Additionally, Complainant stated that he would only be able to return to work for four-hour[5] shifts, rather than his regular 12-hour shifts, four days per week. No doctor's note was provided in support of these alleged restrictions

16) Due to the critical nature of the Assistant Manager position, this would have created an extreme hardship for the company. The position had already been unfilled for approximately four months and it had been expected that Complainant would return to work on 9/16/2013, as agreed. It was decided that Respondent needed to fill the position as soon as possible in order to keep Engine House operations running efficiently and productively and to lower operations costs. [Affidavits of the Superintendent and the Assistant Superintendent are attached hereto as, "Exhibit A," and "Exhibit B," respectively.]

17) Complainant had union rights and upon his return to work was able to exercise those rights to return to a Machinist position. He voluntarily resigned from that position on or about 2/28/2014, explaining that he had found a new job with day-shift hours, with more money, and wanted to spend time with his family.

18) Although Complainant alleges that he requested his former Assistant Manager position back, and that it remained vacant for two months after he returned as a Machinist, that was not the case. Complainant in fact never asked for his old job back, although he did ask whether he would be considered for a management job in the future if one arose upon his return to work. He was informed that he would indeed be considered.

19) Finally, the Assistant Manager position was in the process of being filled upon Complainant's return to work on 10/18/2013. The individual who filled the Assistant Manager position was then currently preparing to leave his present job and was being processed for the management position. That individual officially began in the Assistant Manager position on 11/1/2013.

20) Having the Assistant Manager's position vacant created an unreasonable hardship for Respondent. To

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[4] Complainant was ineligible for Family Medical Leave Act ("FMLA") leave having been employed for less than a year.

[5] A 9/13/2013 email submitted by Respondent confirms that Complainant's requested accommodation was to work "only eight hours/day for the first two weeks," not to work "four-hour shifts," as Respondent mistakenly alleges here.

temporarily fill the position during Complainant's leave of absence, a craft employee had to be taken off the floor and placed in the position. This leaves a shortage of personnel to work on locomotives that are inoperative or in need of routine maintenance, and which are not moving freight. This in turn means that either a craft worker must be paid overtime to fill the shortage of personnel on the Engine Room floor, or the carrier has to perform with a shortage of personnel, resulting in a shortage of locomotives on the system to serve the railroad's (and customers') needs, which would ultimately affect interstate commerce.

21) Although Respondent endured that burden while Complainant was on medical leave, it was never made meaningfully certain when, or even if, Complainant was going to return to a normal, full-time work schedule. It is notable that Complainant was absent 16 days in the four months from when he returned to work on 10/18/2013, and his resignation in February 2014.

Complainant's Reply to Respondent's Answers

22) Throughout Complainant's medical leave, he kept Respondent's managers appraised of his condition and anticipated return date. On 9/13/2013, he spoke in person to the Superintendent and the Assistant Superintendent and explained to them that his doctor had advised he needed additional accommodations in order to successfully transition back to work after months of chemo radiation treatments. Specifically, Complainant requested three more weeks of leave, and then two weeks of a temporarily reduced work schedule of 8 hour shifts, instead of 12.

23) At the conclusion of the 9/13 meeting, Complainant was told they were glad he would be back to work, that they had to make some phone calls, and that they would call him later that day. Superintendent then emailed Complainant's request for reasonable accommodation to Respondent's Human Resources department, with a copy to the Director of Personnel Administration, who approved the termination of Complainant's employment that same day, 9/13/2013.

24) After Complainant did not receive a follow-up call, he contacted the Assistant Superintendent on 9/14/2013, who advised Complainant to speak with the VPMD. The VPMD told Complainant, "I have good news and bad news. The bad news is the company is no longer able to carry you so they will be terminating you position as Assistant Manager. The good news is you can go back to work as a Machinist." Complainant then asked if he could have his Assistant Manager position back if it was still open at the time he was able to return to work, and the VPMD told him, "Absolutely, I don't see any problem with that."

25) However, when Complainant returned to work on 10/18/2013 and spoke to the VPMD about the job still being open, Complainant was told that it was a Personnel department decision, and that the decision had been made not to give him his Assistant Manager position back.

26) Respondent appears to argue that Complainant never asked for his old job back, but rather that he only asked for consideration for any position that might open up in the future. However, his request obviously included consideration for his own former position as well. Respondent was well aware of his desire for his job back.

27) No one ever contacted Complainant during his medical leave to indicate that his absence caused the company any hardship, or that he was in jeopardy of losing his job if he was unable to return to work by 9/16/2013. On the contrary, the Superintendent had informed Complainant that they had plenty of "extra" managers to fill in for him while he was out on medical leave.

28) Less than three weeks after Complainant's termination (on 9/13/2013), he was cleared by his doctor to return to work without any work restrictions on 10/3/2013, when his Assistant Manager position was still open. Although Respondent vaguely asserts that at the time Complainant returned to work as a Machinist (on 10/18/2013), his Assistant Manager position was "in the process of being filled," Respondent's personnel documents reflect that the

individual who replaced Complainant did not begin until 11/1/2013, nearly a full month after Complainant had been cleared to return to work without restrictions. Further, since his replacement had just been promoted from a mechanic's position to a management position, it is fair to assume that he would have required appropriate managerial training,[6] while Complainant could have resumed his role as Assistant Manager without delay.

29) Complainant eventually resigned from his Machinist position in February 2013 once it became clear that Respondent would not return him to his Assistant Manager position, and because he found replacement employment.

30) Despite Respondent's argument to the contrary, at no time did Complainant request indefinite leave. He specifically requested an additional three weeks of leave, and then two weeks of reduced shifts, before returning to work without restrictions. Respondent has submitted no evidence that providing Complainant with three additional weeks of leave, or two weeks of reduced shifts, would have resulted in an undue hardship, especially since they had already covered his position so for approximately four months without experiencing any undue hardship.

31) If Respondent's claim of hardship was based upon the need to have an Assistant Manager in place as soon as possible after Complainant's leave expired on 9/16/2013, it was patently unreasonable for them to prevent him from resuming his role as Assistant Manager on 10/3/2013 (when he was cleared to return to work without restrictions), and instead hold the position open for another month or more while a non-disabled co-worker trained for it.

32) Respondent also failed to accommodate Complainant's requested accommodation for temporarily reduced hours, again based upon the asserted need to keep operations running efficiently and effectively, it still made more sense to return Complainant to the position at a two-week temporarily reduced work schedule as of 10/3/2013, rather than keep the position open any longer.

33) Lastly, regarding Complainant's claim of retaliation, instead of fairly considering the reasonableness of Complainant's request for accommodation, Respondent immediately terminated his employment. The timing of this adverse employment action, in and of itself, evidences Respondent's retaliatory animus.

V. Analysis and Conclusions

1) The MHRA requires the Commission in this investigation 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) In this case, Complainant alleges that Respondent unlawfully discriminated against him because of his cancer by refusing to grant reasonable accommodations of three additional weeks of medical leave, and a two-week reduced shift schedule. He further also alleged that he was subjected to unlawful retaliation (termination of employment) for requesting medical leave and/or additional medical leave. Respondent denies that it engaged in discrimination or retaliation and states Complainant's requested accommodation of additional medical leave was denied because granting it would have posed an undue hardship.

3) 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).

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[6] Complainant asserts, based upon personal knowledge, that his replacement trained for the Assistant Manager position during November and most of December before effectively filling the position in later December 2013. Complainant further asserts that the same co-worker who covered his Assistant Manager position while he was out on leave also covered the position while Complainant's replacement was training.

4) Complainant has a cancer, which is a "disability" *per se* (without regard to severity) under the MHRA. 5 M.R.S. § 4553-A(1)(B).

Disability Discrimination –Denial of Reasonable Accommodation

5) 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).

6) 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.*

7) 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, [and] the provision of qualified readers or interpreters. . . ." 5 M.R.S. § 4553(9-A).

8) To prove an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable [his] 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). In order 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.

9) Complainant requested the reasonable accommodation of three additional weeks of medical leave, and a two-week reduced shift schedule. Respondent took the position that the requests were not reasonable, because granting the accommodations would have posed an undue operational/financial hardship to the company, and terminated Complainant's employment as Assistant Manager.

10) The requested accommodation is found to be reasonable, and not an undue burden on Respondent, with reasoning as follows:

    a) Respondent has offered little if any evidence that, after having covered Complainant's Assistant Manager position for the four months while he was on medical leave, it would have been an undue hardship to continue to do so for the relatively short additional three weeks he requested, or by granting his other requested reasonable accommodation of allowing him to work a slight reduced work shift for the first two weeks after his return to work. Respondent provided statements (but no actual evidence) that it had to pull staff to cover the vacant Assistant Manager position and this was a financial burden. Even if this was true, terminating Complainant from the position as of 9/15/2013 makes no sense when considering the evidence that the position actually did remain vacant for the three extra weeks Complainant would have been out on extended leave, as well as the two weeks during which Complainant would have been on

"limited" duty (eight-hour days rather than 12).

b) If time truly was of the essence in filling the position, due to alleged operational and/or financial considerations, Complainant - who was ready, willing, and able to return to his former position in early October - was clearly the logical candidate. Respondent has presented absolutely no evidence that it made more operational sense to wait a full month to elevate Complainant's replacement (11/1/2013), and then take (according to Complainant) at least another month or two to train his replacement as a manager instead of just reinstating Complainant to his still open former Assistant Manager position when he was cleared to return to work, on 10/3/2013. Respondent's argument that the VPMD assured Complainant he would be considered for an open *future* position, versus his *former* position, is not persuasive.

c) Complainant has also asserted that at no time while he was out on medical leave did any manager ever express that covering his position while he was out posed an undue hardship. Rather, Complainant asserts that the Superintendent reassured him that the company had "extra" managers who could cover his position while he was out. Respondent has not refuted this assertion despite being provided with the opportunity to do so.

d) Lastly, while Respondent has also attempted to justify its termination decision by suggesting that Complainant was requesting indefinite leave on 9/13/2013, its own documentation confirms that the requested accommodations was precise and finite – three weeks more of additional leave (with no work), and then two more weeks of a return to work at reduced shifts, before returning to full duty, without work restrictions. While it is somewhat understandable that Respondent may have "circled" Complainant's return to work date as the likely point where he would resume his position, and planned accordingly, the fact that he was unable to return at full capacity at that exact point in time does not in and of itself justify termination from a position in which all agree that Complainant performed well, and without any discipline history.

11) Disability discrimination in employment (failure to grant reasonable accommodations) is found in this case.

Disability Discrimination – Termination

12) 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).

13) 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 her, 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.

14) 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.

15) 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. 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

16) Here, Complainant established a prima-facie case of disability discrimination leading to the termination of his employment. He was in a protected class due to his cancer, he performed his job well, he was terminated from employment, and Respondent still needed his work completed.

17) Respondent provided a legitimate, non-discriminatory reason for the termination: Complainant was not available to work due to his medical leave.

18) In the final analysis, Complainant established that he would not have been terminated from his Assistant Manager position but for his disability. The only reason Complainant was unavailable for his work was because of his disability, which required him to take medical leave for treatment. Complainant had identified his return to work date, and limited restrictions that would last only a few weeks. As noted above, Respondent's refusal to grant those accommodations was not reasonable.

19) Disability discrimination in the termination of Complainant's employment is found.

MHRA Retaliation

20) Complainant has also alleged that he was subjected to unlawful retaliation because of his asserting rights under the MHRA (taking leave to address his disability and requesting further leave).

21) The MHRA also makes it unlawful for "an employer . . . to discriminate in any manner against individuals because they have opposed a practice that would be a violation of [the Act] or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S. § 4572(1)(E). The MHRA further defines unlawful discrimination to include "punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act...." 5 M.R.S. § 4553(10)(D)

22) In order to establish a prima-facie case of MHRA retaliation, Complainant must show that he engaged in statutorily protected activity, he was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56; *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006). The term "materially adverse action" covers only those employer actions "that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 126 S. Ct. 2405. One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *See DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.

23) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in MHRA-protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. *See also Doyle*, 2003 ME 61, ¶ 20,

824 A.2d at 56. If Respondent makes that showing, the Complainant must carry his overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse action." *Id.* Complainant must show that he would not have suffered the adverse action but for his protected activity, although the protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).

24) In this case, Complainant sought to exercise rights declared under the MHRA on two occasions –when he requested and received a medical leave from May 2013 through 9/16/2013, and when he requested additional accommodations (three more weeks of leave, and two weeks of reduced shifts) on 9/13/2013.

25) Although one could argue that no likely retaliation occurred as a result of the first request since it was summarily approved, Respondent clearly took this prior leave time into account when it considered whether to grant Complainant's additional requests for accommodation in September. The fact that Complainant's employment was in fact terminated the same day that he requested additional accommodations provides strong evidence that this request was almost certainly a motivating factor in that decision, especially since it is likely that Respondent would have returned Complainant to his former position had he been able to return to work as scheduled on 9/16/2013.

26) Retaliation for asserting rights protected under the MHRA is found in this case.

VI. Recommendations

Based upon the information contained herein, the following recommendation is made to the MHRC:

1. There are **REASONABLE GROUNDS** to believe that Complainant [redacted] was subjected to unlawful disability discrimination by Respondent [redacted] Inc. when it refused his request for reasonable accommodations in employment;

2. There are **REASONABLE GROUNDS** to believe that Complainant [redacted] was subjected to unlawful disability discrimination when Respondent [redacted] Inc. terminated his employment;

3. There are **REASONABLE GROUNDS** to believe that Respondent [redacted] Inc. subjected Complainant [redacted] to unlawful retaliation for exercising rights under the MHRA; and

4. That conciliation should be attempted in keeping with 5 M.R.S. § 4612(3).

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