94-348 MAINE HUMAN RIGHTS COMMISSION

Chapter 3: EMPLOYMENT REGULATIONS OF THE MAINE HUMAN RIGHTS COMMISSION

3.01 GENERALLY

A. Purpose

Pursuant to Title 5 M.R.S.A., §4566(7), the Maine Human Rights Commission has adopted the following regulations which are designed to inform employers, labor organizations, employment agencies, and other interested parties of the Commission's interpretation of the Maine Human Rights Act, Title 5 M.R.S.A., §4551, *et seq*., hereinafter referred to as "the Act".

B. Effect

These regulations shall be accorded the full force and effect of interpretative administrative regulations.

C. Construction

(1) Consistent with the public policy underlying the Act (as expressed in §4552), and with firmly established principles for the interpretation of such humanitarian legislation, the remedial provisions of the Act shall be given broad construction and its exceptions shall be construed narrowly.

(2) The provisions of these regulations are severable. If any provision or the application of any provision of these regulations to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

3.02 DEFINITIONS

A. Unlawful Discrimination

(1) As in the Maine Human Rights Act.

(2) The Commission interprets the term, "unlawful employment discrimination," as defined in the Act, to encompass three concepts:

a. Overt Discrimination - an intentional, purposeful act of discrimination;

b. Unequal or Disparate Treatment - treating members of a protected class in a different and less favorable manner than members of the similarly situated majority group. Proof of discriminatory motive is required;

c. Disparate Impact - conduct which, although applied equally to all, has an adverse effect on membership of a protected class as compared to the effect on members of the majority class; in other words, practices fair in form but discriminatory in operation. Intent or motive is of no consequence. See Griggs v. Duke Power Company, 401, U.S. 424, 91S. CT. 849, 3 FEP Cases 175 (1971).

(3) A prima facie case of discrimination exists if the complainant establishes that membership in a protected class, even though not the sole factor, was nonetheless a substantial factor motivating the employer's conduct. If the complainant would not have been rejected, discharged or otherwise treated differently, but for membership in the protected class, the existence of other reasonable grounds for the employer's action does not relieve the employer from liability. Wells v. Franklin Broadcasting Corp., 403 A 2d 771, 20 FEP Cases 548 (1979).

B. **Tests**

The word "test” means all employee selection procedures used to make employment decisions. Employee selection procedures include the evaluation of applicants, candidates or employees on the basis of stated minimum and preferred job qualifications, application forms, interviews, performance examinations, paper and pencil examinations, performance in training programs or probationary periods and any other procedures used to make an employment decision whether administered by an employer, employment agency, labor organization, licensing or certification board or apprenticeship committee.

Employment decisions include, but are not limited to hiring, promotion, demotion, membership in a labor organization, referral, retention, licensing, certification and membership in an apprenticeship program.

C. **Sexual Orientation**

(1) The term “sexual orientation” means a person’s actual or perceived heterosexuality, bisexuality, homosexuality, gender identity, or gender expression.

(2) The term “gender identity” means an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with that individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.

(3) The term “gender expression” means the manner in which an individual’s gender identity is expressed, including, but not limited to, through dress, appearance, manner, speech, or lifestyle, whether or not that expression is different from that traditionally associated with that individual’s assigned sex at birth.

3.03 PRESERVATION OF RECORDS

A. **Record Preservation Requirements**

Any personnel or employment record (including, but not limited to: employment application forms, applicant and employee rating sheets, tests, and other records having to do with job referral, hiring, promotion, demotion, transfer, lay-off, rates of pay or other terms of compensation, seniority, labor organization memberships or selection for training or apprenticeship) made or kept by an employer, employment agency or labor organization shall be preserved for a period of at least one (1) year from the date of the making of the record or the personnel action involved, whichever occurs later. When an employee has been involuntarily terminated, the personnel records of the individual terminated shall be kept for a period of one (1) year from the date of termination.

3.04 JOB ADVERTISING AND SOLICITATION

A. **Advertising and Solicitation**

(1) 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.

(2) The Commission will consider to be a violation of the Act the acceptance for publication, by any communications medium, of any notice or advertisement relating to employment preference, limitation, specification or discrimination based on 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. Placement of any notice or advertisement of job opportunities in newspaper columns headed "Male" or "Female", will be considered a violation of this Act.

(3) An employer, union, employment agency, newspaper or other publication may, and is encouraged to, make an inquiry of the Maine Human Rights Commission as to whether race or color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin or age is a bona fide occupational qualification for a particular job which they intend to publish, print or circulate or cause to be published, printed or circulated.

The Commission shall, as soon as possible, give informal opinions in response to such inquiries.

An informal opinion rendered orally or in writing by the Commission prior to the publication of any advertisement in response to such an inquiry shall be binding for the purpose of this Regulation, except in those instances in which the inquiry has not fully and accurately disclosed the relevant facts regarding the particular job in question.

The Commission shall maintain records as to each inquiry made pursuant to this Section, to include the name, title and address of the caller, a summary of the job and job duties, the bases for the exception claimed, the time, date and identification number of the inquiry and a record of the opinion given in response to the inquiry.

A newspaper or other publication shall not be in violation of this Regulation where it has accepted any specific advertisement in good faith and in reasonable reliance upon the representations of the person placing the advertisement that he/she has obtained from the Commission an opinion that there is a bona fide occupational qualification for the specific job advertised together with the identification number of that opinion.

(4) It is not unlawful for employers engaged in corrective employment programs, or employment or referral agencies, to print or cause to be printed any advertisement which encourages applications from persons who are members of classes protected by the Maine Human Rights Act. The term "corrective employment program" means any Affirmative Action or other remedial program designed to increase the number of protected class employees in any industry, occupation, or place of work in order to correct the effects of past limited employment opportunities for members of the protected class. All advertising may include positive statements such as "We hire people with disabilities" or "We are an Equal Employment Opportunity Employer."

B. **Referral Sources**

(1) Employers are required to use sources of recruitment which do not discriminate on the basis of race or color, sex, sexual orientation, physical or mental handicap, religion, ancestry, or national origin or age. The use of an employment agency, employment service, labor organization, training school or other employee referral source which does not refer available members of one of these classes is considered a violation of the Act if the employer knew or had reason to know of the discriminatory actions of the referral source.

(2) It is unlawful practice for any employer, employment agency or labor organization to handwrite, print or circulate any interoffice or interagency communication, job order, advertisement, brochure, or notice which expresses directly or indirectly a preference or specification on the basis of race or color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin, or age unless the expression is based on a bona fide occupational qualification or made in accordance with a corrective employment program such as an affirmative action plan.

3.05 PRE-EMPLOYMENT PROCESS SELECTION (TESTS AND REQUIREMENTS)

After an applicant for employment, candidate for membership in a labor organization or employee has established that a test, used by an employer, employment agency, labor organization, licensing certification board or apprenticeship committee for the purpose of making an employment decision, disproportionately excludes members of a protected class, the burden is on the person or organization requiring the test to show that the test standard is manifestly related to the job. In other words, it must be shown that performance on the test is predictive of how well the examinee will perform the job and that the test is Justified by "business necessity." See Griggs v. Duke Power Company, 401 U.S. 424, 91S. Ct. 849, (1971), and Robinson v. P. Lorrilard, 444F. 2d 791, (1971).

This section applies to employers having any number of employees. When evidence of test validity is presented to the Commission by an entity which is subject to the federal Uniform Guidelines on Employee Selection, the Commission will consider the applicable standards set forth in the Uniform Guidelines and will look favorably upon evidence presented which meets those standards.

3.06 SEX DISCRIMINATION

A. **Bona Fide Occupational Qualification**

(1) Section 4572(l)(A) of the Act provides an exception to the prohibition of discrimination in employment on account of sex when such discrimination in 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.

(2) The following are examples of cases which do not warrant application of the BFOQ qualification exception, and will be considered unlawful employment practices.

a) Refusal to select an individual for a position based on assumptions about comparative employment characteristics between sexes, such as an assumption that the turnover rate among women is higher than among men or that men are less capable of assembling intricate equipment, or that women are incapable of aggressive sales techniques. Selection must be based upon the individual's capacities, not on stereotyped characterizations.

b) Refusal to select an individual because of the preferences of co-workers, the employer, clients or customers. An example is the assertion that passengers prefer female airline stewardesses to male flight cabin attendants.

c) The fact that an employer may have to provide separate sanitary facilities for employees of each sex will not justify discrimination, nor will the fact that members of one sex have traditionally been hired for particular Jobs. Past discrimination and usage may have created limitations on an

employer's facilities, so the failure to hire individuals because of such limitations will not justify continuing such discrimination in violation of the Act.

d) Refusal to hire a woman for a position based on the fear that pregnancy may in the future render her unable to work, or the belief that women with children should not work or are less reliable employees.

(3) The following situations are recognized as those in which a distinction based on sex is a bona fide occupational qualification.

a) Where it is necessary for the purpose of authenticity or genuineness, e.g., an actor or actress.

b) Where the biological functions of a particular sex are crucial to the successful performance of the job, e.g., a wetnurse or sperm donor.

B. **Pre-employment Inquiries**

(1) Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to sex shall be unlawful unless based on a bona fide occupational qualification.

(2) The term "pre-employment inquiry" includes questions asked on application forms, questions asked in employee interviews, questions asked of references or former employers, requests for photographs, or any other kind of inquiry used before selection.

(3) Pre-employment inquiries which are made in conformance with the instructions from, or requirements of, an agency or agencies of the local, state or federal government in connection with the administration of fair employment practices programs will not constitute evidence of unlawful employment discrimination under the Maine Human Rights Act.

(4) It is NOT an unlawful employment practice to record any data required by law, or by the rules and regulations of any state or federal agency, provided such records are kept in good faith for the purpose of complying with law, and are not used for the purpose of discrimination in violation of this Act.

(5) Subsequent to employment, it is NOT unlawful employment practice to make a record of such information or features concerning an individual as are needed in good faith for the purpose of identifying that individual, provided these records are intended for and used in good faith solely for such identification, and not for the purpose of unlawful discrimination in violation of this Act.

(6) An employer cannot request information from a member of one sex which would not be requested from a member of the other sex, e.g., one cannot ask a female questions concerning the care of her children during employment unless the same questions are asked of males.

(7) No person shall be denied equal consideration for employment, promotion, or any other term, condition, or privilege of employment because that person refused to answer a pre-employment inquiry, if that pre-employment inquiry is prohibited by these rules and the Maine Human Rights Act.

C. **Separate Lines of Progression and Seniority Systems**

(1) It is an unlawful employment practice to classify any job according to sex or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job.

(2) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of both sexes are capable of performing.

D. **Fringe Benefits**

(1) "Fringe benefits," as used herein includes medical, hospital, accident, disability, life insurance and retirement benefits; profit-sharing and bonus plans; leave; "overtime/compensatory time" benefits; and other terms, conditions; and privileges of employment.

(2) It is an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(3) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found to be a prima facie violation of the prohibitions against sex discrimination contained in the Maine Human Rights Act.

(4) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(5) It shall not be a defense under the Maine Human Rights Act to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(6) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex.

(7) The Act does not require any employer to grant paid or unpaid child care leave of absence. Any employer providing such leaves, however, must do so without regard to the sex of the person applying for such leave.

E. **Discrimination Against Married Women**

It is unlawful employment practice to forbid or restrict the employment of married women when such a prohibition or restriction is not applicable to married men.

F. **Employment Policies Relating to Childbirth and Pregnancy**

(1) Any written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is a prima facie violation of the Act.

(2) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, or related medical conditions, and recovery therefrom, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment.

(3) Any written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other disabilities.

(4) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified as a business necessity.

G. **Employment Agencies**

Section 4572(I)(B) of the Maine Human Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex.

An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer,

the description of the job and the basis for the employer's claim of bona fide occupational qualification.

H. **Sex-Specific Job Titles**

It is unlawful for an employer to use a sex-specific job title in any help wanted advertisement, job or position description, job announcement, or any other notice, statement, or publication, if the use of such sex-specific job title operates to discourage members of one sex from applying for a job for which they are qualified, unless membership in one sex is a bona fide occupational qualification for the job. See: Job Title Revisions to Eliminate Sex-and-Age-Referent Language from the Dictionary of Occupational Titles, Third Edition, U.S. Department of Labor, Manpower Administration (1975).

I. **Sexual Harassment**

(1) Harassment on the basis of sex is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when:

a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(2) An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment. When the supervisor’s harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor’s harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(3) With respect to persons other than those mentioned in paragraph 2 of this section, an employer is responsible for acts of sexual harassment in the workplace where

the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

3.07 AGE DISCRIMINATION

A. Bona Fide Occupational Qualification

(1) Section 4572(l)(A) of the Act provides an exception to the prohibition of discrimination in employment on account of age 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 age group or all or substantially all persons above or below a certain age would be unable to perform the normal duties of the job involved.

(2) The following are examples of cases which do not warrant application of the bona fide occupational qualification exception, and will be considered unlawful employment practices.

a) Refusal to select an individual for a position based on assumptions about comparative employment characteristics among individuals of different ages such as an assumption that people over 40 years of age are too hard to retrain.

b) Refusal to select an individual because of the preferences of co-workers, the employer, clients or customers.

B. Pre-employment Inquiries

(1) Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to age, shall be unlawful unless based on a bona fide occupational qualification.

(2) The term “pre-employment inquiry" includes questions asked on application forms, questions asked in employee interviews, questions asked of references or former employers, requests for photographs, or any other kind of inquiry used before selection.

(3) Pre-employment inquiries which are made in conformance with the instructions from, or requirements of, an agency or agencies of the local, state of federal government in connection with the administration of fair employment practices programs will not constitute evidence of unlawful employment discrimination under the Maine Human Rights Act.

(4) It is NOT unlawful employment practice to record any data required by law, or by the rules and regulations of any state or federal agency, provided such records are kept in good faith for the purpose of complying with law, and are not used for the purpose of discrimination in violation of this Act.

(5) Subsequent to employment, it is NOT unlawful employment practice to make a record of such information or features concerning an individual as are needed in good faith for the purpose of identifying that Individual, provided these records are intended for and used in good faith solely for such identification, and not for the purpose of unlawful discrimination in violation of the Act.

(6) An employer, employment agency, or labor organization cannot request information from a member of one age group which would not be requested from a member of another age group. For example, an employer cannot ask older applicants questions concerning their health if the employer does not ask the same questions of younger applicants.

(7) No person shall be denied equal consideration for employment, promotion, or any other term, condition, or privilege of employment because that person refused to answer a pre-employment inquiry concerning age, if that pre-employment inquiry is prohibited by these regulations and the Maine Human Rights Act.

C. **Separate Lines of Progression and Seniority Systems**

(1) It is an unlawful employment practice to classify any job according to age or to maintain separate lines of progression or separate seniority lists based on age where this would adversely affect any employee unless age is a bona fide occupational qualification for that job.

(2) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a form of classification by age, or creates unreasonable obstacles to the advancement by persons of a particular age into jobs which persons of that age are capable of performing.

(3) It is not unlawful for labor organizations and employers to adopt a maximum age limitation in apprenticeship programs.

D. **Fringe Benefits**

(1) "Fringe benefits," as used in this section include, but are not limited to: medical, hospital, accident, disability and life insurance and retirement benefits; profit sharing and bonus plans; overtime and compensatory time benefits; and leave.

(2) It is unlawful employment practice to discriminate on the basis of age, with regard to fringe benefits.

(3) It is not unlawful employment practice, however, on account of age, to observe the terms of any bona fide employee benefit plan such as a retirement, pension or insurance plan which does not evade or circumvent the purpose of the Maine Human Rights Act and which complies with the Federal Age Discrimination in Employment Act, United States Code, Title 29, Section 621, as amended, and federal administrative interpretations thereof, provided that the benefit does not require or permit any employer to refuse or fail to hire an applicant because of the age of the individual; and provided that the benefit plan does not require or

permit the termination of any individual because of the age of the individual or after completion of a specified number of years of service.

E. **Employment Agencies**

Section 4572(I)(B) of the Maine Human Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of age.

An employment agency that receives a job order containing an unlawful age specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the age specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

F. **Harassment on the Basis of Age**

(1) Harassment on the basis of age is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct related to age constitute harassment on the basis of age when:

a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c) such conduct has the purpose or effect of substantially interfering with an Individual's work performance or creating an intimidating, hostile, or offensive working environment.

(2) An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to harassment based on age. When the supervisor’s harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor’s harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on age, and

b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(3) With respect to persons other than those mentioned in paragraph 2 of this section, an employer is responsible for acts of age harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

3.08 PHYSICAL AND MENTAL DISABILITY DISCRIMINATION

A. Unlawful Discrimination

(1) It is an unlawful employment practice for any person to fail or refuse to hire, fail or refuse to refer, refuse membership in a labor organization or otherwise discriminate against any employee or applicant for employment or membership because that individual has a physical or mental disability. Each individual's ability to perform a particular job must be assessed on an individual basis.

B. Bona Fide Occupational Qualification

(1) Section 4572(l)(A) of the Act provides an exception to the prohibition of discrimination in employment on account of physical or mental disabilities 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 persons with a particular disability would be unable to perform the normal duties of the job involved.

(2) The following are examples of cases which do not warrant application of the BFOQ exception, and are considered unlawful employment practices.

a) Refusal to select an individual for a position based on assumptions about comparative employment characteristics between persons with physical or mental disabilities and persons without such disabilities. Selection must be based upon the individual's capacities, not on stereotyped characterizations.

b) Refusal to select an individual because of the preferences of co-workers, the employer, clients or customers.

C. Individual's Inability to Do the Job

(1) According to Section 4573(4) of the Act, an employer may refuse to hire or may discharge a physically or mentally disabled applicant for employment or an employee whose physical or mental disability prevents the applicant or employee from performing the duties of the job or from performing those duties in a manner consistent with the maintenance of his/her health and safety and that of others.

In deciding whether to hire, discharge or otherwise change the status or job description of a physically or mentally disabled applicant or employee, the employer shall use an objective standard. The employer shall not make the decision based upon general assumptions or stereotypes as to whether a particular physical or mental disability would interfere with the applicant or employees ability to safely perform the duties of the job.

D **Reasonable Accommodation with Regard to Disability**

(1) It is an unlawful employment practice for an employer to fail or refuse to make reasonable accommodations to the physical or mental limitations of otherwise qualified employees or applicants for employment, unless the employer can demonstrate that a reasonable accommodation does not exist or that an accommodation would impose an undue hardship on the conduct of the employer's business.

E. **Pre-employment Inquiries**

(1) Except as provided in paragraphs (2) and (3) of this sub-section, an employer may not conduct a pre-employment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is an individual with a physical or mental disability or as to the nature or severity of a physical or mental disability. An employer may, however, make pre-employment inquiry into an applicant's ability to perform job-related functions.

(2) When an employer is taking remedial action to correct the effects of past discrimination, when an employer is taking voluntary action to overcome the effects of conditions that, in the past, resulted in limited employment opportunities for individuals with physical or mental disabilities or when an employer is taking other affirmative action, the employer may ask applicants to what extent they have a physical or mental disability, provided that:

a) The employer states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

b) The employer states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (4) of this sub-section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(3) Nothing in this sub-section shall prohibit an employer from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that:

a) All entering employees are subjected to such an examination regardless of physical or mental disability, and

b) the results of such an examination are used in accordance with the requirements of the Maine Human Rights Act.

(4) Information obtained in accordance with this sub-section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

a) Supervisors and managers may be informed regarding restrictions on the work or duties of individuals with physical or mental disabilities and regarding necessary accommodations; and

b) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment.

(5) No person shall be denied equal consideration for employment, employment promotion, or any other term, condition, or privilege of employment because that person refused to answer a pre-employment inquiry, if that pre-employment inquiry is prohibited by these regulations and the Maine Human Rights Act.

F. **Separate Lines of Progression and Seniority Systems**

(1) It is an unlawful employment practice to classify any job according to the presence or absence of physical or mental disability or to maintain separate lines of progression or separate seniority lists based on the presence or absence of such disability unless the absence of such disability is a bona fide occupational qualification for that job.

(2) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a form of classification based on the presence or absence of physical or mental disability or creates unreasonable obstacles to the advancement of individuals with physical or mental disabilities into jobs which such individuals with disabilities are capable of performing.

G. **Fringe Benefits**

(1) "Fringe benefits," as used herein includes medical, hospital, accident, disability, life insurance and retirement benefits; profit-sharing and bonus plans; leave; "overtime/compensatory time" benefits and other terms, conditions, and privileges of employment.

(2) It is an unlawful employment practice for an employer to discriminate on the basis of physical or mental disability with regard to fringe benefits.

H. **Employment Agencies**

Section 4572(I)(B) of the Maine Human Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of physical or mental disability.

An employment agency that receives a job order containing an unlawful request for individuals without disabilities will share responsibility with the employer placing the job order if the agency fills the order knowing that the request is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

I. **Harassment on the Basis of Physical or Mental Disability**

(1) Harassment on the basis of physical or mental disability is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct related to physical or mental disability constitute harassment on the basis of physical or mental disability when:

a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(2) An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to physical or mental disability harassment. When the supervisor’s harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor’s harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on physical or mental disability, and

b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(3) With respect to persons other than those mentioned in paragraph 2 of this section, an employer is responsible for acts of physical or mental disability harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent

liability for such acts by showing that it took immediate and appropriate corrective action.

3.09 RACE OR COLOR DISCRIMINATION

A. **Bona Fide Occupational Qualification**

(1) Section 4572(l)(A) of the Act provides an exception to the prohibition of discrimination in employment on account of race or color 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 race or color would be unable to perform the normal duties of the job involved.

(2) The following are examples of cases which do not warrant application of the BFOQ exception, and will be considered unlawful employment practices.

a) Refusal to select an individual for a position based on assumptions about comparative employment characteristics among different races. Selection must be based upon the individual's capacities, not on stereotyped characterizations.

b) Refusal to select an individual because of the preferences of co-workers, the employer, clients or customers.

B. **Pre-employment Inquiries**

(1) Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to race or color shall be unlawful unless based on a BFOQ.

(2) The term "pre-employment inquiry," includes questions asked on application forms, questions asked in employee interviews, questions asked of references or former employers, requests for photographs or any other kind of inquiry used before selection.

(3) Pre-employment inquiries which are made in conformance with the instructions from, or requirements of, an agency or agencies of the local, State or Federal Government in connection with the administration of fair employment practices programs will not constitute evidence of unlawful employment discrimination under the Maine Human Rights Act.

(4) It is NOT an unlawful employment practice to record any data required by law, or by the rules and regulations of any state or federal agency, provided such records are kept in good faith for the purpose of complying with law, and are not used for the purpose of discrimination in violation of this Act.

(5) Subsequent to employment, it is NOT unlawful employment practice to make a record of such information or features concerning an individual as are needed in good faith for the purpose of identifying that individual, provided these records

are intended for and used in good faith solely for such identification, and not for the purpose of unlawful discrimination in violation of the Act.

(6) No person shall be denied equal consideration for employment, employment promotion, or any other term, condition, or privilege of employment because that person refused to answer a pre-employment inquiry, if that pre-employment inquiry is prohibited by these rules and the Maine Human Rights Act.

C. **Separate Lines of Progression and Seniority Systems**

(1) It is an unlawful employment practice to classify any job according to race or color or to maintain separate lines of progression or separate seniority lists based on race or color unless race or color is a bona fide occupational qualification for that job.

(2) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a form of classification by race or color or creates unreasonable obstacles to the advancement by members of a racial group into jobs which members of that racial group are .capable of performing.

D. **Fringe Benefits**

(1) "Fringe benefits," as used herein includes medical, hospital, life and disability insurance and retirement benefits; profit-sharing and bonus plans; leave; "overtime/compensatory time" benefits, and other terms, conditions, and privileges of employment.

(2) It is an unlawful employment practice for an employer to discriminate among members of different races with regard to fringe benefits.

E. **Employment Agencies**

Section 4572(I)(B) of the Maine Human Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of race or color.

An employment agency that receives a job order containing an unlawful race or color specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the race or color specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

F. **Harassment Based on Race or Color**

(1) Harassment on the basis of race or color is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct of a racial nature constitute racial harassment when:

a) submission to such conduct is made either explicitly or implicitly term or condition of an individual's employment;

b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(2) An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to racial harassment. When the supervisor’s harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor’s harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on race or color, and

b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(3) With respect to persons other than those mentioned in paragraph 2 of this section, an employer is responsible for acts of racial harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

3.10 RELIGIOUS DISCRIMINATION

A. **Bona Fide Occupational Qualification**

(1) Section 4572(l)(A) of the Act provides an exception to the prohibition of discrimination in employment on account of religion 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 a religion would be unable to perform the normal duties of the job involved.

(2) The following are examples of cases which do not warrant application of the bona fide occupational qualification exception, and will be considered unlawful employment practices.

a) Refusal to select an individual for a position based on assumptions about comparative employment characteristics among members of different religions. Selection must be based upon the individual's capacities, not on stereotyped characterizations.

b) Refusal to select an individual because of the preferences of co-workers, the employer, clients or customers.

(3) The Commission recognizes as a bona fide occupational qualification the requirement by a religious corporation or association, not organized for private profit and in fact not conducted for private profit, that certain of its employees be members of that religious faith. For example, a requirement that a Rabbi be Jewish or that a member of a Roman Catholic religious order be a Roman Catholic is valid.

B. **Pre-employment Inquiries**

(1) It is an unlawful employment practice for any person to elicit or attempt to elicit any information directly or indirectly pertaining to the religion of applicants for employment. Examples of such a practice include the use of the following inquiries:

a) NAME. Where original name of applicant has been changed by court order, inquiries which could indicate or suggest religious group by requesting any former names, including maiden names, ever used by applicant.

b) BIRTHPLACE. Requirement that applicant submit birth certificate or baptismal record, which could indicate religious denomination.

c) RELIGION. Applicant's religious denomination, affiliation, church, parish, pastor, or religious holidays observed; representing to applicants that employer is of a predominant or particular religious orientation.

d) EDUCATION. Inquiry asking specifically for the religious affiliation of applicant's school.

e) REFERENCES. Requirement of submission of a religious reference.

f) WORK SCHEME. Any Inquiry into willingness to work any particular religious holiday.

g) ORGANIZATIONS. Request a list of all clubs, social fraternities, societies, lodges, or organizations to which the applicant belongs, other than trade, professional or service organizations.

(2) Nothing in this regulation prohibits an applicant from voluntarily providing a potential employer with information which would aid in the employer's compliance with any statute, state or federal, or affirmative action plan, and not for the purpose of unlawful discrimination.

(3) Pre-employment inquiries which are made in conformance with the instructions from, or the requirements of, an agency or agencies of the local, State or Federal Government in connection with the administration of a fair employment practices program will not constitute evidence of unlawful employment discrimination under the Maine Human Rights Act.

(4) No person shall be denied equal consideration for employment, employment promotion, or any other term, condition, or privilege of employment because that person refused to answer a pre-employment inquiry, if that pre-employment inquiry is prohibited by these Regulations and the Maine Human Rights Act.

C. **Obligation to Make Reasonable Accommodations**

(1) The duty not to discriminate on religious grounds includes an obligation on the part of the employer and/or labor organization to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship to the conduct of the employer's business. Because of the particularly sensitive nature of refusing to hire or discharging an individual on account of his/her religious beliefs, the burden of proof that the accommodations required by the individual's religious needs impose an undue hardship to the conduct of the employer's business, is on the employer. Resolution of such cases depends on specific factual circumstances and involves a delicate balancing of an applicant or employee's religious needs with the degree of disruption imposed on the employer's business operation.

(2) It is an unlawful employment practice for an employer to refuse to hire an applicant for employment or to discharge an employee who regularly observes Friday evening and Saturday, or some other day of the week, as the Sabbath or who observes certain special religious holidays during the year and, as a consequence, does not work on such days, unless the employer can prove that there exists no reasonable accommodation of such religious needs or that such accommodations can only be made at the price of undue hardship.

D. **Separate Lines of Progression and Seniority Systems**

(1) It is an unlawful employment practice to classify any job according to religion or to maintain separate lines of progression or separate seniority lists based on religion unless religion is a bona fide occupational qualification for that job.

E. **Fringe Benefits**

(1) "Fringe Benefits," as used herein includes medical, hospital, accident, disability and life Insurance and retirement benefits; profit-sharing and bonus plans; leave; "overtime compensatory time" benefits; and other terms, conditions, and privileges of employment.

(2) It is an unlawful employment practice for an employer to discriminate on the basis of religion with regard to fringe benefits.

F. **Employment Agencies**

Section 4572(l)(B) of the Maine Hunan Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of religion.

An employment agency that receives a job order containing an unlawful request based on religion will share responsibility with the employer placing the job order if the agency fills the order knowing that the religion specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

G. **Religious Harassment**

(1) Harassment on the basis of religion is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct of a religious nature constitute religious harassment when:

a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(2) An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to religious harassment. When the supervisor’s harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor’s harassment does not culminate in a tangible

employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on religion, and

b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(3) With respect to persons other than those mentioned in paragraph 2 of this section, an employer is responsible for acts of religious harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

3.11 ANCESTRAL AND NATIONAL ORIGIN DISCRIMINATION

A. Country of National Origin

It is an unlawful employment practice for an employer, labor organization, or employment agency to deny any individual any equal employment opportunity for reasons grounded, in whole or part, in national origin considerations. "Country of national origin" includes not only an individual's place of birth, but also the place of birth of the individual's parents and more remote ancestors. The Act protects all individuals of a particular country of national origin, such as Spanish-surnamed or Franco Americans. The Act further prohibits discrimination against naturalized citizens, resident aliens and other lawfully immigrated individuals.

B. Examples of Unlawful Employment Practices

(1) Use of English language tests to screen out persons whose mother tongue or first language is not English is unlawful where verbal skill in the English language is not a necessary requirement of the work to be performed.

(2) Use of height and weight requirements which are beyond the national norms of particular groups is unlawful if they have the effect of screening out persons of a certain ancestral origin and have not been shown to be necessary for successful performance of the job involved.

(3) A requirement that employees be U.S. citizens is unlawful where it is not imposed in the interests of national security pursuant to a statute of the United States or an Executive Order of the President with respect to the particular occupation or place of work involved.

C. Bona Fide Occupational Qualification

(1) Section 4572(l)(A) of the Act provides an exception to the prohibition of discrimination in employment on account of ancestry or national origin 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 national origin would be unable to perform the normal duties of the job involved.

(2) The following are examples of cases which do not warrant application of the BFOQ exception, and will be considered unlawful employment practices.

a) Refusal to select an individual for a position based on assumptions about comparative employment characteristics among individuals of different national origins. Selection must be based upon the individual's capacities, not on stereotyped characterizations.

b) Refusal to select an individual because of the preferences of co-workers, the employer, clients or customers.

(3) The Commission recognizes as a BFOQ the requirement by an employer, subject to a statute of the United States, an Executive Order of the President, or a valid regulation of a department of the Executive Branch of the Federal Government, imposed in the interests of national security, that its employees be citizens of the United States.

D. **Pre-employment Inquiries**

(1) It is an unlawful employment practice to elicit or attempt to elicit any information directly or indirectly pertaining to the country of ancestral origin of applicants for employment. Examples of such a practice include the use of the following inquiries:

a) NAME. Where original name of applicant has been changed by court order, inquiries which could indicate national origin or ancestry by requesting any former names, including maiden names, previously used by the applicant; names or former names of spouse, parents or other relatives.

b) BIRTHPLACE. Inquiries into the place of birth of applicant, spouse, parents, or other relatives; request for birth certificate.

c) CITIZENSHIP. Whether applicant is native born or naturalized citizen; country of former citizenship or date of naturalization; citizenship of spouse, parents or other relatives. Nothing in this regulation, however, precludes an employer from inquiring whether an applicant for employment is a citizen of the United States or whether the applicant, if not a citizen, has the legal right to remain permanently in the United States.

d) NATIONAL ORIGIN OR ANCESTRY. Nationality, lineage ancestry or descent of applicant, spouse, parents or other relatives; language commonly used by applicant, or how applicant acquired ability to read, write or speak a foreign language.

e) MILITARY SERVICE. Applicant's military experience in armed forces, other than U.S., draft classification or other military eligibility.

f) ORGANIZATIONS. Requirement that applicant list all clubs, social fraternities, societies, lodges or organizations to which the applicant belongs or has belonged, other than trade, professional or service groups.

(2) Nothing in this regulation prohibits an applicant from voluntarily providing a potential employer with information which would aid in the employer's compliance with any statute, state or federal, or affirmative action plan, and not for the purpose of unlawful discrimination. Nor does this regulation preclude pre-employment inquiries made in conformance with the instructions from, or the requirements of, an agency or agencies of the local, State or Federal Government in connection with the administration of a fair employment practices program. Such inquiries will not constitute evidence of unlawful employment discrimination under the Maine Human Rights Act.

No person shall be denied equal consideration for employment, employment, promotion, or any other term, condition, or privilege of employment because that person refused to answer a pre-employment inquiry, if that pre-employment inquiry is prohibited by these rules and the Maine Human Rights Act.

E. **Separate Lines of Progression and Seniority Systems**

(1) It is an unlawful employment practice to classify any job according to ancestry or national origin or to maintain separate lines of progression or separate seniority lists based on ancestry or national origin unless ancestry or national origin is a bona fide occupational qualification for the job.

(2) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes unlawful employment practice if it operates as a form of classification by ancestry or national origin or creates unreasonable obstacles to the advancement by members of a particular national origin or ancestry into jobs which members of that group are capable of performing.

F. **Fringe Benefits**

(1) "Fringe benefits," as used herein includes medical, hospital, accident, disability and life insurance and retirement benefits; profit-sharing and bonus plans; leave; "overtime/compensatory time" benefits; and other terms, conditions, and privileges of employment.

(2) It is an unlawful employment practice for an employer to discriminate among persons of different national origin or ancestry with regard to fringe benefits.

G. **Employment Agencies**

Section 4572(I)(B) of the Maine Human Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of ancestry or national origin.

An employment agency that receives a job order containing an unlawful ancestral or national origin specification will share responsibility with the employer placing the job

order if the agency fills the order knowing that the specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

H. **Harassment**

(1) Harassment on the basis of ancestry or national origin is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes acts and other verbal or physical conduct based on a persons ancestry or national origin constitute unlawful harassment when:

a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(2) An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of ancestry or national origin. When the supervisor’s harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor’s harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on ancestry or national origin, and

b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(3) With respect to persons other than those mentioned in paragraph 2 of this section, an employer is responsible for acts of harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

3.12 SEXUAL ORIENTATION DISCRIMINATION

A. Bona Fide Occupational Qualification

(1) Section 4572(l) of the Act provides an exception to the prohibition of discrimination in employment on account of sexual orientation when such discrimination is based on a bona fide occupational qualification (BFOQ). The BFOQ exception is construed very narrowly, and the employer, employment agency, or labor organization must prove by a preponderance of the evidence that (1) the essence of the business operation requires the discriminatory practice and (2) it had a factual basis to believe that all or substantially all persons in the excluded category would be unable to safely or efficiently perform the duties of the job involved.

(2) The following are examples of cases that do not warrant application of the BFOQ qualification exception and are considered unlawful employment practices:

a) Refusal to select an individual for a position based on assumptions about comparative employment characteristics based on sexual orientation rather than actual capabilities.

b) Refusal to select an individual because of the preferences or prejudices of others, including, but not limited to, coworkers, clients, business associates, or customers.

B. Religious Entity Exclusion

(1) Subject to the following paragraph, the Act and these regulations do not prohibit a religious corporation, religious association, religious educational institution, or religious society, that does not receive public funds, from giving preference in employment to individuals of its same religion to perform work connected with the carrying on by the corporation, association, educational institution, or society of its activities. Under the Act and these regulations, such a religious organization may require that all applicants and employees conform to the religious tenets of that organization.

(2) The exemptions in the preceding paragraph do not apply to any for-profit organization owned, controlled, or operated by a religious association or corporation and subject to the provisions of the Internal Revenue Code, 26 United States Code, Section 511(a).

C. Pre-employment Inquiries

(1) Any pre-employment inquiry in connection with prospective employment that expresses directly or indirectly any limitation, specification, or discrimination as to sexual orientation shall be unlawful unless based on a bona fide occupational qualification.

(2) The term "pre-employment inquiry" includes questions asked on application forms, questions asked in employee interviews, questions asked of references or

former employers, requests for photographs, or any other kind of inquiry used before selection.

(3) Pre-employment inquiries which are made in conformance with the instructions from, or requirements of, an agency or agencies of the local, state or federal government in connection with the administration of fair employment practices programs will not constitute evidence of unlawful employment discrimination under the Act.

(4) It is not an unlawful employment practice to record any data required by law, or by the rules and regulations of any state or federal agency, provided such records are kept in good faith for the purpose of complying with law, and are not used for the purpose of discrimination in violation of this Act.

(5) Subsequent to employment, it is not an unlawful employment practice to make a record of such information or features concerning an individual as are needed in good faith for the purpose of identifying that individual, provided these records are intended for and used in good faith solely for such identification, and not for the purpose of unlawful discrimination in violation of this Act.

(6) No person shall be denied equal consideration for employment, promotion, or any other term, condition, or privilege of employment because that person refused to answer a pre-employment inquiry, if that pre-employment inquiry is prohibited by these rules and the Act.

D. **Separate Lines of Progression and Seniority Systems**

(1) It is an unlawful employment practice to classify any job according to sexual orientation or to maintain separate lines of progression or separate seniority lists based on sexual orientation where this would adversely affect any employee unless sexual orientation is a bona fide occupational qualification for that job.

E. **Fringe Benefits**

(1) "Fringe benefits" as used herein includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; "overtime/compensatory time" benefits; and other terms, conditions, and privileges of employment.

(2) It is an unlawful employment practice for an employer, employment agency, or labor organization to discriminate on the basis of sexual orientation with regard to fringe benefits.

F. **Obligation to Make Reasonable Accommodations**

(1) It is an unlawful employment practice for an employer, employment agency, or labor organization to fail or refuse to make reasonable accommodations in rules, policies, practices, or services that apply directly or indirectly to gender identity or gender expression, unless the covered entity can demonstrate that the accommodations would impose an undue hardship on the conduct of the business of the covered entity.

(2) It is an unlawful employment practice for an employer, employment agency, or labor organization to deny employment or labor organization membership opportunities to an applicant, employee, or labor organization member if the denial is based on the need of the covered entity to make reasonable accommodations in rules, policies, practices, or services that apply directly or indirectly to gender identity or gender expression, unless the covered entity can demonstrate that the accommodations would impose an undue hardship on the operation of the business of the covered entity.

(3) With respect to the two preceding paragraphs, the burden of proof on the issue of whether the accommodations would impose an undue hardship is on the employer, employment agency, or labor organization. Resolution of such cases depends on the specific factual circumstances and involves a balancing of the needs of the applicant, employee, or labor organization member with the degree of hardship imposed on the covered entity’s business operation.

G. **Employment Agencies**

Section 4572(1)(B) of the Act states that it shall be unlawful for an employment agency to discriminate against any individual because of sexual orientation.

An employment agency that receives a job order containing an unlawful sexual orientation specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sexual orientation specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job, and the basis for the employer's claim of bona fide occupational qualification.

H. **Sexual Orientation Harassment**

(1) Harassment on the basis of sexual orientation is a violation of Section 4572 of the Act. Unwelcome comments, jokes, acts, and other verbal or physical conduct on the basis of sexual orientation constitute sexual orientation harassment when:

a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or union membership;

b) submission to or rejection of such conduct by an individual is used as the basis for employment or union decisions affecting such individual; or

c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working or union environment.

(2) An employer, employment agency, or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and

supervisory employees with respect to sexual orientation harassment. When the supervisor's harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

(a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on sexual orientation, and

(b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(3) With respect to persons other than those mentioned in paragraph 2 above, an employer is responsible for acts of sexual orientation harassment in the workplace where the employer, or its agents or supervisory employees, knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

3.13 RETALIATION

No employer, employment agency or labor organization shall discharge or otherwise discriminate against any employee or applicant because of any action taken by such employee or applicant to exercise their rights under the Maine Human Rights Act or because they assisted in the enforcement of the Act. Such action or assistance includes, but is not limited to: filing a complaint, stating an intent to contact the Commission or to file a complaint, supporting employees who are involved in the complaint process, cooperating with representatives of the Commission during the investigative process, and educating others concerning the coverage of the Maine Human Rights Act.

STATUTORY AUTHORITY: 5 M.R.S.A. §4566 (7)

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December 5, 1979

AMENDED:
October 1, 1980
April 8, 1985 - Sections 1, 2 & 3

EFFECTIVE DATE (ELECTRONIC CONVERSION):
May 12, 1996

NON-SUBSTANTIVE CORRECTIONS:
October 2 and 29, 1996 - minor spelling.
April 8, 1997 - Section 3.10(B)(4) - “to prohibited” changed to “is prohibited”

AMENDED:
June 14, 1997 - Section 3.06(F)(2)

REPEALED AND REPLACED:
July 17, 1999

NON-SUBSTANTIVE CORRECTION:
March 13, 2000 - removed an underline fragment

AMENDED:
July 20, 2005 – filing 2005-293 adding 3.02(C)(3)
March 21, 2007 – 3.02, 3.04(B)(2), 3.08(E), 3.08(F)(1), 3.08(I), filing 2007-104
September 15, 2007 – filing 2007-385
April 14, 2008 – repeal of 3.02(C), renumbering, filing 2008-161