



February 7, 2011

MAINE HUMAN RIGHTS COMMISSION
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Heather Hider (Portland)

v.

Total Property Services, Inc. (Portland)

I. COMPLAINANT'S CHARGE:

Complainant, Heather Hider, alleged that Respondent, Total Property Services, Inc., terminated her employment because of her sex, and specifically because she was pregnant.

II. RESPONDENT'S ANSWER:

Respondent, Total Property Services, Inc., denied the allegation of discrimination and said that Complainant was terminated for poor job performance.

III. JURISDICTIONAL DATA:

- 1) Date(s) of alleged discrimination: September 21, 2009.
- 2) Date complaint filed with the Maine Human Rights Commission: February 8, 2010.
- 3) Respondent employs approximately ten employees and is subject to the Maine Human Rights Act, as well as state employment regulations.
- 4) Neither Complainant nor Respondent are represented by counsel.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and a fact finding conference.

IV. DEVELOPMENT OF FACTS:

- 1) The parties and issues in this case are as follows:

- a) The Complainant, Heather Hider, is a female who worked for Respondent as an office cleaner from January 7, 2009 until September 21, 2009. Complainant was pregnant at the time she was terminated.
 - b) The Respondent, Total Property Services, Inc., operates a cleaning business at a location in Portland, Maine, and is owned by Marc Moschetto and Marci Booth.
 - c) Steve Booth is a former owner of Total Property Services, Inc., and was the individual who notified Complainant that she was terminated on September 21, 2009.
 - d) Complainant's employment was terminated on September 21, 2009.
 - e) Respondent alleged that Complainant was terminated for poor job performance. Complainant alleges that Respondent's stated reason is false and that she was actually terminated because she was pregnant.
- 2) Complainant provided the following concerning her employment with Respondent:
- a) Complainant was originally hired by Marc Moschetto on January 7, 2009. During her employment, she cleaned offices at three separate locations.
 - b) Complainant's supervisor at the first location at which she cleaned was Marc Moschetto. Her supervisor at the other two locations at which she cleaned, including the location where she worked when she was terminated, was Steve Booth.
 - c) When Complainant reported to clean on September 20, 2009, it appeared as though the cleaning had already been performed. Complainant unsuccessfully attempted to contact Marc Moschetto and Steve Booth by phone to inquire about the work already being completed, and eventually received a text message from Steve Booth instructing her to contact him the next day.
 - d) When Complainant contacted Steve Booth by phone on September 21, 2009, as instructed, she was informed that she had been replaced because of the anticipated delivery of her baby.
- 3) Respondent provides the following concerning the circumstances leading to Complainant's termination:
- a) Complainant was terminated for poor job performance.
 - b) Marc Moschetto was the principal responsible for all hiring and firing of employees of Total Property Services, Inc.
 - c) Steve Booth was not part of Total Property Services, Inc. as of June 2009, because he had resigned due to a conflict of interest. As of September 21, 2009, he did not have authority to make termination decisions on behalf of Total Property Services, Inc.

- d) Marc Moschetto attempted to contact Complainant by phone several times between September 17, 2009 and September 23, 2009, to inform her that she was terminated for poor job performance.
 - e) When Complainant did not return Mr. Moschetto's calls, he left her a voice mail message on September 23, 2009, informing her that she was terminated and asking her to return the keys to the office she was assigned to clean.
- 4) Complainant responds as follows:
- a) Complainant never received any complaints or warnings about her job performance during her employment with Total Property Services, Inc.
 - b) Two weeks prior to being terminated, Complainant was asked to train her replacement who was intended to fill in for Complainant during her maternity leave.
 - c) The first time Complainant learned of performance issues was when she requested her personnel file as part of her application for unemployment compensation.
- 5) Documents submitted by the parties reveal the following:
- a) A transcript and recording of a September 21, 2009, telephone conversation contains Steve Booth speaking to Complainant as follows: "... You've just got to understand from having to find a person to come in that can handle going into a place like you've been doing, handle alarms, not have to be, you know, looked over their shoulder. You know I've got to be able to find somebody I can trust and being able to find somebody. I know you're due within a month here so it's just the time I got to make it happen, be proactive rather than reactive, so that I know there's good transition and I don't have to worry about it when, you know, so it's just something I have to do to kind of make it happen sooner than later so that I know that they're happy and, you know, the account stays good and all that stuff. So ... ultimately, you know, no time is ever a good time, but um, you know, so that's the move I got to make ..."
 - b) Stock certificates provided by Respondent reveal that Steve Booth's shares were transferred as of January 1, 2009.
 - c) Payroll records provided by Respondent reveal that Steve Booth received weekly payroll checks from Total Property Services between January 1, 2009, and June 4, 2009, and was terminated as of June 4, 2009.
 - d) Respondent provided an e-mail dated August 25, 2009, from the customer at the location where Complainant regularly cleaned addressed to Steve Booth which reads: "Steve, Will you remind Heather to wipe down the front desk shelf in each waiting room nightly and the arms of the chairs also."

- e) Respondent provided a series of handwritten notes by Marc Moschetto concerning deficiencies in the work being performed by Complainant.
 - f) Respondent provided a series of customer e-mails addressed to Steve Booth concerning deficiencies in cleaning at Complainant's location between March 10, 2009 and August 25, 2009 containing handwritten notations by Marc Moschetto that the problems were discussed with Complainant.
 - g) Respondents provided a handwritten chronology concerning Complainant's employment referencing several instances where Complainant was notified of deficiencies in her performance. This chronology also reflects that Complainant's replacement was "brought in" on September 18, 2009.
- 6) Testimony at the fact-finding conference revealed the following:
- a) The first time Complainant learned that Steve Booth was no longer affiliated with Total Property Services was upon receipt of Respondent's response to her Charge of Discrimination.
 - b) During the months Complainant cleaned at the location she worked at when terminated, all contact with her employer was with Steve Booth. She estimates that she talked with Steve Booth approximately twice a month during those months.
 - c) Steve Booth became employed by a commercial cleaning supply company creating a conflict of interest with his continued interests in Total Property Services, Inc.
 - d) Complainant received no written warnings concerning her performance. Marc Moschetto indicated that he would leave messages on Complainant's cell phone of complaints of work not being performed properly.
 - e) When asked what steps were taken to notify employees that Steve Booth was no longer affiliated with Total Property Services, Marc Moschetto responded that no steps were taken because it was "none of their business" and that he was the individual responsible for hiring and firing employees.
 - f) When asked what steps were taken to notify customers that Steve Booth was no longer affiliated with Total Property Services, Marc Moschetto responded that customers were not notified because Steve Booth was still dealing with the same customers as a supplier of cleaning products, and would simply forward any issues concerning Total Property Services, Inc. to Marc Moschetto.

V. ANALYSIS:

- 1) The Maine Human Rights Act requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. §

4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

2) The Maine Human Rights Act provides, in part, as follows:

It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of . . . sex . . . discharge an employee or discriminate with respect to . . . terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S.A. § 4572(1)(A).

The word "sex" includes pregnancy and medical conditions which result from pregnancy. 5 M.R.S.A. § 4572-A(1).

- 3) Here, Complainant, Heather Hider, alleges that she was terminated on the basis of sexual discrimination because she was pregnant.
- 4) Respondent, Total Property Services, Inc, denies the allegation of discrimination and states that Complainant was terminated because of poor job performance.¹
- 5) A mixed-motive analysis applies in cases involving "direct evidence" of unlawful discrimination. *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination. . . ." *Id.* Where this evidence exists, Complainant "need prove only that the discriminatory action was a motivating factor in an adverse employment decision." *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Doyle*, 2003 ME 61, ¶ 14, n.6, 824 A.2d at 54, n.6. Upon such a showing, in order to avoid liability, Respondent must prove "that it would have taken the same action in the absence of the impermissible motivating factor." *Id.*; *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 276-77, 109 S. Ct. 1775, 1804 (1989) (O'Connor, J., concurring).²
- 6) Alternatively, a court may 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).

¹ Respondent's argument that Steve Booth did not have the authority to terminate Complainant's employment is rejected. Although Steve Booth had resigned from the company prior to Complainant's termination, no effort was made to notify employees that he was no longer affiliated with the company. During her employment at the location Complainant worked at when terminated, all dealings with her employer were conducted with Steve Booth. Despite Steve Booth's resignation on January 1, 2009, he continued to receive a salary from Respondent until June, and continued to correspond regularly with customers as late as August 25, 2009. Complainant was justified in relying on Steve Booth's apparent authority in making the decision to terminate her employment. *See* Restatement 3rd Agency § 2.03.

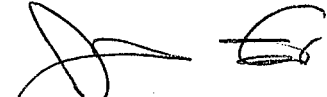
² The continued application of the mixed-motive analysis has been called into question as a result of the U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2348 (2009), in which the Court held that the burden of persuasion does not shift to defendant even with "direct evidence" of unlawful discrimination in a federal Age Discrimination in Employment Act case. That decision did not interpret the Maine Human Rights Act, however, and the guidance from the Maine Supreme Court in *Doyle* will continue to be followed.

- 7) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) she belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her 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); *Cumpiãno v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261.
- 8) 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.
- 9) After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. *See id.* Complainant's burden may be met either with affirmative evidence of pretext or by the strength of Complainant's evidence of unlawful discriminatory motive. *See City of Auburn*, 408 A.2d at 1262, 1267-68.
- 10) In order to prevail, Complainant must show that she 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.
- 11) Here, Complainant has demonstrated direct evidence of unlawful discrimination because the recorded telephone conversation with Steve Booth on September 21, 2009, clearly indicates that Complainant was being replaced in anticipation of the delivery of her baby.
- 12) Alternatively, Complainant has established a prima-facie case under *McDonnell Douglas* by showing that (1) she is a female who was pregnant at the time of the adverse job action, (2) she performed her job satisfactorily, (3) her employment was terminated, and (4) Respondent had a continuing need for her cleaning work to be performed.
- 13) Respondent has articulated a legitimate, nondiscriminatory reason for Complainant's termination, namely, that she demonstrated poor job performance.
- 14) At the final stage of the analysis, Complainant has sufficiently demonstrated that Respondent's reason was false or irrelevant and that unlawful discrimination brought about her termination, with reasoning as follows:
 - a) There were no direct complaints from the customer concerning Complainant's job performance during the month preceding her termination. The most recent correspondence from the customer prior to Complainant's termination was dated August 25, 2009, and merely asked Steve Booth to remind Complainant to dust shelves and chairs.


VI. RECOMMENDATION:

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

- 1) There are **Reasonable Grounds** to believe that the Respondent, Total Property Services, Inc., terminated Complainant, Heather Hider's, employment on the basis of her sex (pregnancy); and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



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