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March 16, 2011

Peter Freeman (Newport)

v.

Tamco Transportation, Inc. (Presque Isle)

I. Complainant's Charge:

Peter Freeman alleges that Tamco Transportation, Inc. discriminated against him on the basis of disability (bipolar disorder) by terminating his employment.

II. Respondent's Answer:

Tamco Transportation, Inc. ("Tamco") denies discrimination and alleges that Complainant was selected for layoff due to lack of work and the fact that he had the least seniority on staff, as well as for performance issues.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: March 11, 2009.
- 2) Date complaint filed with the Maine Human Rights Commission: July 9, 2009.
- 3) Respondent employs 12 people and is subject to the Maine Human Rights Act as well as state employment regulations.
- 4) Complainant is represented by Chad Hansen, Esq. Respondent is represented by Harold Stewart, Esq.
- 5) Investigative methods used: A thorough review of the written materials submitted by the parties, a Fact Finding Conference, follow up requests for information and documents.

IV. Development of Facts:

- 1) The parties and issues in this case are as follows:
 - a) Complainant alleges that he has bipolar disorder and was perceived by Respondent as having bipolar disorder. He worked as a truck driver at Tamco from 3/11/2008 to 3/11/2009, when he was laid off from his job.
 - b) Mr. M is the owner of Tamco and was Complainant's supervisor.
 - c) Mr. M alleges that Complainant was laid off due to lack of work, having the least seniority on staff, his involvement in an accident costing the company money, his failure to follow directions and the fact that he opened a sealed trailer without authorization. Complainant alleges that his reasons for layoff are pretextual and that he was selected for lay-off due to his bipolar disorder.
- 2) Relevant documents are as follows:
 - a) A roster of employees provided by Respondent of drivers employed from 1/1/2008 to present, shows two drivers were hired after Complainant. PD was hired on 1/28/2009 and DT was hired on 7/31/2008. The roster also shows that JR, although employed for a period prior to Complainant's date of hire, was hired back on 3/13/2009, two days following Complainant's lay-off.
 - b) The Bureau of Unemployment Compensation issued a report finding that Complainant was eligible for benefits. Under "Findings of Fact" the report states the following: *"The claimant was discharged from his employment on 3/13/09 because he failed to follow directives. He doesn't listen. You can't reason with him. He is hyperactive. He appears to be bipolar. He opened a sealed trailer without authorization. He has been warned regarding his failure to follow directives."*
- 3) Complainant provided the following:
 - a) He performed his job as a truck driver satisfactorily and believes that he was terminated because of his bipolar disorder. He told Mr. M in a conversation that he was bipolar, so it is clear Mr. M had knowledge of his condition. After he revealed this to Mr. M, Mr. M responded, "well that explains a lot." This shows Mr. M's negative attitude toward his bipolar disorder. Mr. M also made it clear in his interview with the Bureau of Unemployment Compensation that bipolar disorder was a factor in his termination (see above). This is direct evidence of discrimination.
 - b) Respondent has continually changed its reasoning for why he was laid off, showing evidence of pretext. He was originally told by Mr. M that he was being laid off due to lack of work, but when he applied for unemployment, performance

issues as well as his bipolar disorder were mentioned as reasons, including the fact that he opened a sealed trailer without permission (see relevant documents). He was never spoken to about any performance issues, and Respondent admitted at the Fact Finding Conference that opening a sealed trailer was not a factor in his termination. Respondent changed its story again in its first submission to the Commission, stating that he was laid off due to a reduction in force, because he had the least seniority of the drivers, that he caused damage to his truck costing the company money, and because he was driving the oldest truck in the fleet. At the fact finding conference, however, Respondent admitted that the damage to the truck was not his fault and that it was not a factor in his layoff.

- c) Respondent claims that he was laid off in part due to lack of work and the fact that he had the least seniority of all drivers at the company. He knows for a fact, however, that at least one driver was hired after he was. The fact that he was chosen for layoff instead of someone with less seniority shows that he was terminated because of his disability, as evidenced by the unemployment report, and not because of his lack of seniority.
- 4) Respondent (Mr. M) provided the following:
- a) (In first submission to Commission): Complainant was terminated due to a shortage of work. The company lost a large paper client because the client's volume was reduced. Tamco had to stop running two trucks as a result. Complainant was selected for layoff because he had the least seniority of all the drivers, was driving the oldest truck in the fleet which was costing the most to operate, because he cost the company over \$8,000 from an accident he was involved in, and because he failed and refused to follow directions daily.
 - b) Complainant mentioned bipolar disorder once in a conversation, when he confronted Complainant to discuss his argumentative nature and attitude. Complainant told him that he "thought" he was bipolar, and he responded that he had no problem with that, he just wanted Complainant to listen and follow daily instructions.
 - c) (At the Fact Finding Conference): Regarding performance issues, Complainant would often interrupt him when he tried to give him directions, and he was argumentative. He cannot blame Complainant for the accident he was involved in, as it could have happened to anyone. This was not a factor in the decision to lay him off. Complainant was the only one laid off, but he also had the least seniority of the drivers.
 - d) Complainant's bipolar disorder did not factor into the decision to end his employment. He regrets mentioning bipolar disorder to the Unemployment Bureau and should not have made this statement. He was angry at the time and wanted to challenge the unemployment request. The fact that Complainant

opened a sealed trailer was also not a factor in his lay-off. Complainant opened the trailer after his lay-off.

- e) (After Fact Finding Conference): Tamco has provided sufficient evidence to support the fact that Complainant's layoff was driven by economic reasons and the need to reduce staff. Tamco's 2008 and 2009 tax returns show a 22% decline in gross revenue. Tamco also provided evidence showing that three trucks were taken out of service in March of 2009 as a result of the lack of work.

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 that it is unlawful to terminate an employee because of physical or mental disability. 5 M.R.S.A. § 4572(1)(A).
- 3) The Maine Human Rights Act defines bipolar disorder, and being regarded as having bipolar disorder, as a disability. 5 M.R.S.A. § 4553-A(1)(B, D).
- 4) The analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). See *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).
- 5) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) he belonged to a protected class, (2) he performed his job satisfactorily, (3) his employer took an adverse employment decision against him, and (4) his employer continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261.
- 6) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. See *Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. See *id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. See *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d

at 1262, 1267-68. Thus, Complainant can meet her overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.

- 7) In order to prevail, Complainant must show that he would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.
- 8) Here, Complainant establishes a prima-facie case of discrimination by showing that he was perceived as having bipolar disorder by his employer. (While Complainant most likely has bipolar disorder, medical documents were not obtained to verify this. Respondent, however, admits Complainant mentioned his bipolar disorder on one occasion, and it is clear from the unemployment report that Respondent regarded Complainant as having bipolar disorder.) Complainant also showed that he performed his job satisfactorily, that he was laid off, and that there was a continued need for his work to be performed.
- 9) Respondent provided legitimate, nondiscriminatory reasons for selecting Complainant for lay-off, namely the need to cut staff due to lack of work, Complainant having the least seniority of the drivers on staff, Complainant's involvement in an accident costing the company money, Complainant's failure to follow directions and the fact that he opened a sealed trailer without authorization.
- 10) Complainant was able to show that Respondent's nondiscriminatory reasons were pretextual and that his bipolar disorder likely played, in part, a role in his layoff. Reasoning is as follows:
 - a) Respondent showed evidence of pretext by its shifting reasons for terminating Complainant. Pretext can be shown with "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons such that a fact finder could infer that the employer did not act for the asserted non-discriminatory reasons." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000). Over the course of the investigation, Respondent presented different reasons for ending Complainant's employment. The unemployment paperwork indicates that Complainant was laid off for failure to follow directives, opening a sealed trailer without authorization, the fact that he "appears to be bipolar" and does not listen. In the initial response to the Charge of discrimination, Respondent claimed that Complainant was laid off due to lack of work, the fact that he had the least seniority of the drivers at the company, failure to follow directions, and because he had been involved in an accident that cost the company over \$8,000. At the Fact Finding Conference, Respondent (Mr. M) admitted that the accident was not Complainant's fault and that it was not a factor in his layoff. Mr. M also alleged at the Conference that opening the sealed trailer was not a factor in his termination. Following the Fact

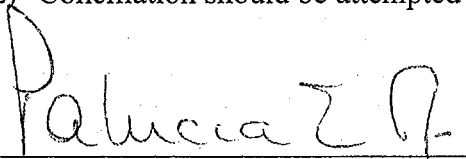
Finding Conference, Respondent reiterated that Complainant was laid off for economic reasons and the need to reduce staff.

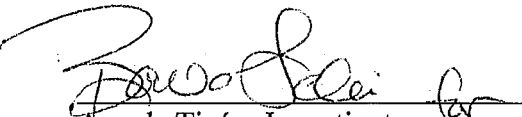
- b) The report issued by the Bureau of Unemployment Compensation also shows evidence of pretext. The report clearly indicates that Respondent mentioned Complainant's bipolar disorder which was understood by the Bureau to be a reason for his layoff. Mr. M acknowledged making a comment about his bipolar disorder to the Bureau but claimed at the Fact Finding Conference that although he regretted making the statement and should not have made it, it was not a factor in Complainant's termination. Mr. M's explanation, however, is not credited given his continually shifting reasons for ending Complainant's employment, as described in the paragraph above.
- c) Furthermore, the roster of employees provided by Respondent shows that two drivers had less seniority than Complainant, DT who began on 7/31/2008 (four months after Complainant's date of hire), and PD who began on 1/28/2009, approximately a month before Complainant was laid off. Therefore, Complainant did not have the least seniority on the roster as alleged by Respondent. Also, JR was hired prior to Complainant, but left on 6/20/2008. He was hired back on 3/13/2009, only a few days following Complainant's lay-off. This does not support Respondent's reasoning that Complainant was laid off due to lack of work. If this were true, JR would not have been hired directly after Complainant was laid off.

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 Tamco Transportation, Inc. discriminated against Peter Freeman on the basis of disability by terminating his employment.
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).


Patricia E. Ryan, Executive Director


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