

MAINE STATE LEGISLATURE

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129th MAINE LEGISLATURE

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No. 1701

H.P. 1216

House of Representatives, May 8, 2019

An Act To Clarify Various Provisions of the Maine Human Rights Act

Submitted by the Maine Human Rights Commission pursuant to Joint Rule 204.
Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "R B. Hunt".

ROBERT B. HUNT
Clerk

Presented by Representative BAILEY of Saco.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 5 MRSA §4553**, as amended by PL 2015, c. 457, §§1 and 2, is further
3 amended to read:

4 **§4553. Definitions**

5 As used in this Act, unless the context or subchapter otherwise indicates, the
6 following words have the following meanings.

7 **1. Commission.** "Commission" means the Maine Human Rights Commission
8 established by this Act.

9 **1-A. Commercial facilities.** "Commercial facilities" means facilities that are
10 intended for nonresidential use.

11 **1-B. Covered entity.** For purposes of subchapter ~~III~~ 3, "covered entity" means an
12 employer, employment agency, labor organization or joint labor-management committee.
13 For purposes of subchapter ~~V~~ 5, "covered entity" means any applicable private entity or
14 public entity.

15 **1-C. Direct threat.** For purposes of subchapter ~~III~~ 3, "direct threat" means a
16 significant risk to the health or safety of others that can not be eliminated by reasonable
17 accommodation.

18 **1-D. Aggrieved person.** "Aggrieved person" includes any person who claims to
19 have been subject to unlawful discrimination on the basis of protected class status,
20 including discrimination based on the person's known relationship or association with a
21 member of a protected class and discrimination on the basis of perceived protected class
22 status. "Aggrieved person" also includes any person who claims to have been injured by
23 unlawful housing discrimination.

24 **1-E. Complainant.** "Complainant" means a person who files a complaint under
25 section 4611 ~~or a civil action under section 4621.~~

26 **1-F. Conciliation.** "Conciliation" means the attempted resolution after a finding by
27 the commission that unlawful discrimination has occurred of issues raised by a complaint
28 filed under section 4611 or by an investigation of such a complaint through informal
29 negotiations involving the complainant, the respondent and the commission.

30 **1-G. Conciliation agreement.** "Conciliation agreement" means a written agreement
31 setting forth the resolution of the issues in conciliation.

32 **1-H. Assistance animal.** "Assistance animal" means, for the purposes of subchapter
33 4:

34 A. An animal that has been determined necessary for an individual with a physical or
35 mental disability to mitigate the effects of a physical or mental disability by a
36 physician, psychologist, physician assistant, nurse practitioner ~~or~~, licensed social

1 worker, licensed professional counselor or other licensed health professional with
2 knowledge of the disability-related need for an assistance animal; or

3 B. An animal individually trained to do work or perform tasks for the benefit of an
4 individual with a physical or mental disability, including, but not limited to, guiding
5 individuals with impaired vision, alerting individuals who are deaf or hard of hearing
6 to intruders or sounds, providing reasonable protection or rescue work, pulling a
7 wheelchair or retrieving dropped items.

8 **2. Discriminate.** "Discriminate" includes, without limitation, segregate ~~or~~, separate
9 or subject to harassment.

10 For purposes of subchapter III 3, "discriminate" also includes, ~~as it relates to individuals~~
11 ~~with physical or mental disability~~:

12 A. Limiting, segregating or classifying a job applicant or employee in a way that
13 adversely affects the opportunities or status of the applicant or employee because of
14 the disability protected class of the applicant or employee;

15 B. Participating in a contractual or other arrangement or relationship that has the
16 effect of subjecting a covered entity's qualified applicant or employee ~~with a~~
17 disability to the discrimination prohibited by this Act. A relationship includes a
18 relationship with an employment or referral agency, labor union, an organization
19 providing fringe benefits to an employee of the covered entity or an organization
20 providing training and apprenticeship programs;

21 C. Utilizing standards, criteria or methods of administration:

22 (1) That have the effect of discrimination on the basis of disability protected
23 class status; or

24 (2) That perpetuate ~~the~~ discrimination ~~of~~ on the basis of protected class status by
25 others who are subject to common administrative control;

26 D. Excluding or otherwise denying equal jobs or benefits to a qualified individual
27 because of the known disability protected class status of an individual with whom the
28 qualified individual is known to have a relationship or association;

29 E. Not making reasonable accommodations to the known physical or mental
30 limitations of an otherwise qualified individual with a disability who is an applicant
31 or employee, unless the covered entity can demonstrate that the accommodation
32 would impose an undue hardship on the operation of the business of the covered
33 entity;

34 F. Denying employment opportunities to a job applicant or employee who is an
35 otherwise qualified individual with a disability, if the denial is based on the need of
36 the covered entity to make reasonable accommodation to the physical or mental
37 impairments of the employee or applicant;

38 G. Using qualification standards, employment tests or other selection criteria that
39 screen out or tend to screen out an individual ~~with a disability~~ or a class of
40 individuals with disabilities based on their protected class status unless the standard,
41 test or other selection criteria, as used by the covered entity, is shown to be job-
42 related for the position in question and is consistent with business necessity; and

1 H. Failing to select and administer tests concerning employment in the most
2 effective manner to ensure that, when the test is administered to a job applicant or
3 employee who has a disability that impairs sensory, manual or speaking skills, the
4 test results accurately reflect the skills, aptitude or any other factor of the applicant or
5 employee that the test purports to measure, rather than reflecting the impaired
6 sensory, manual or speaking skills of the employee or applicant, except when the
7 skills are the factors that the test purports to measure.

8 **2-A. Educational institution.** "Educational institution" means any public school or
9 educational program, any public post-secondary institution, any private school or
10 educational program approved for tuition purposes if both male and female students are
11 admitted and the governing body of each such school or program. For purposes related to
12 disability-related discrimination, "educational institution" also means any private school
13 or educational program approved for tuition purposes.

14 **3. Employee.** "Employee" means an individual employed by an employer.
15 "Employee" does not include any individual employed by that individual's parents,
16 spouse or child, except for purposes of disability-related discrimination, in which case the
17 individual is considered to be an employee.

18 **4. Employer.** "Employer" includes any person in this State employing any number
19 of employees, whatever the place of employment of the employees, and any person
20 outside this State employing any number of employees whose usual place of employment
21 is in this State; any person acting in the interest of any employer, directly or indirectly,
22 such that the person's actions are considered the actions of the employer for purposes of
23 liability; and labor organizations, whether or not organized on a religious, fraternal or
24 sectarian basis, with respect to their employment of employees. "Employer" does not
25 include a religious or fraternal corporation or association, not organized for private profit
26 and in fact not conducted for private profit, with respect to employment of its members of
27 the same religion, sect or fraternity, except for purposes of disability-related
28 discrimination, in which case the corporation or association is considered to be an
29 employer.

30 **5. Employment agency.** "Employment agency" includes any person undertaking
31 with or without compensation to procure opportunities to work, or to procure, recruit,
32 refer or place employees; it includes, without limitation, placement services, training
33 schools and centers, and labor organizations, to the extent that they act as employee
34 referral sources; and it includes any agent of such person acting in the interest of the
35 person such that the agent's actions are considered the actions of the employment agency
36 for purposes of liability.

37 **5-A. Familial status.** "Familial status" means that a family unit may contain one or
38 more individuals who have not attained ~~the age of~~ 18 years of age and are living with:

39 A. A parent or another person having legal custody of the individual or individuals;
40 or

41 B. The designee of the parent or other person having custody, with the written
42 permission of the parent or other person.

1 The protections afforded against discrimination on the basis of familial status shall apply
2 to any person who is pregnant or who is in the process of securing legal custody of any
3 individual who has not attained ~~the age of~~ 18 years of age.

4 **5-B. Family.** "Family" includes, but is not limited to, a single individual.

5 **5-C. Gender identity.** "Gender identity" means the gender-related identity,
6 appearance, mannerisms or other gender-related characteristics of an individual,
7 regardless of the individual's assigned sex at birth.

8 **5-D. Harassment.** "Harassment" includes verbal or physical conduct related to a
9 protected class or directed at an individual because of protected class status when:

10 A. Submission to such conduct is made either explicitly or implicitly a term or
11 condition of the individual's access to employment, housing, public accommodation,
12 educational opportunity or extension of credit;

13 B. Submission to or rejection of such conduct by an individual is used as the basis
14 for the individual's access to employment, housing, public accommodation,
15 educational opportunity or extension of credit;

16 C. Such conduct has the purpose or effect of unreasonably interfering with the
17 individual's access to employment, housing, public accommodation, educational
18 opportunity or extension of credit or creating an intimidating, hostile or offensive
19 environment in those settings; or

20 D. Such conduct constitutes an assault, as defined by Title 17-A, section 207.

21 **6. Housing accommodation.** "Housing accommodation" includes any building or
22 structure or portion thereof, or any parcel of land, developed or undeveloped, that is
23 occupied, or is intended to be occupied or to be developed for occupancy, for residential
24 purposes.

25 **6-A. Normal retirement age.** "Normal retirement age" means the specified age, the
26 years of service requirement or any age and years of service combination at which a
27 member may become eligible for retirement benefits. This subsection may not be
28 construed to require the mandatory retirement of a member or to deny employment to any
29 person based solely on that person's normal retirement age.

30 **7. Person.** "Person" includes one or more individuals, partnerships, associations,
31 organizations, corporations, municipal corporations, legal representatives, trustees,
32 trustees in bankruptcy, receivers and other legal representatives, labor organizations,
33 mutual companies, joint-stock companies and unincorporated organizations and includes
34 the State and all agencies thereof.

35 **7-A. Physical or mental disability.** "Physical or mental disability" has the meaning
36 set forth in section 4553-A.

37 **8. Place of public accommodation.** "Place of public accommodation" means a
38 facility, operated by a public entity or private entity, whose operations fall within at least
39 one of the following categories:

- 1 A. An inn, hotel, motel or other place of lodging, whether conducted for the
2 entertainment or accommodation of transient guests or those seeking health,
3 recreation or rest;
- 4 B. A restaurant, eating house, bar, tavern, buffet, saloon, soda fountain, ice cream
5 parlor or other establishment serving or selling food or drink;
- 6 C. A motion picture house, theater, concert hall, stadium, roof garden, airdrome or
7 other place of exhibition or entertainment;
- 8 D. An auditorium, convention center, lecture hall or other place of public gathering;
- 9 E. A bakery, grocery store, clothing store, hardware store, shopping center, garage,
10 gasoline station or other sales or rental establishment;
- 11 F. A laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe
12 repair service, funeral parlor, gas station, office of an accountant or lawyer,
13 pharmacy, insurance office, professional office of a health care provider, hospital,
14 dispensary, clinic, bathhouse or other service establishment;
- 15 G. All public conveyances operated on land or water or in the air as well as a
16 terminal, depot or other station used for specified public transportation;
- 17 H. A museum, library, gallery or other place of public display or collection;
- 18 I. A park, zoo, amusement park, race course, skating rink, fair, bowling alley, golf
19 course, golf club, country club, gymnasium, health spa, shooting gallery, billiard or
20 pool parlor, swimming pool, seashore accommodation or boardwalk or other place of
21 recreation, exercise or health;
- 22 J. A nursery, elementary, secondary, undergraduate or postgraduate school or other
23 place of education;
- 24 K. A ~~day-care~~ day care center, senior citizen center, homeless shelter, food bank,
25 adoption agency or other social service center establishment;
- 26 L. Public elevators of buildings occupied by 2 or more tenants or by the owner and
27 one or more tenants;
- 28 M. A municipal building, courthouse, town hall or other establishment of the State or
29 a local government; and
- 30 N. Any establishment that in fact caters to, or offers its goods, facilities or services
31 to, or solicits or accepts patronage from, the general public.

32 When a place of public accommodation is located in a private residence, the portion of
33 the residence used exclusively as a residence is not covered by this subchapter, but that
34 portion used exclusively in the operation of the place of public accommodation or that
35 portion used both for the place of public accommodation and for the residential purposes
36 is covered by this subchapter. The covered portion of the residence extends to those
37 elements used to enter the place of public accommodation, and those exterior and interior
38 portions of the residence available to or used by customers or clients, including rest
39 rooms.

40 **8-A. Private entity.** "Private entity" means any entity other than a public entity.

1 **8-B. Public accommodation.** "Public accommodation" means a public entity or
2 private entity that owns, leases, leases to or operates a place of public accommodation.

3 **8-C. Public entity.** "Public entity" means:

4 A. The State or any local government;

5 B. Any department, agency, special purpose district or other instrumentality of the
6 State, 2 or more states or a local government; and

7 C. A state, local or private commuter authority as defined in the federal Rail
8 Passenger Service Act, ~~Section 103 (8).~~

9 **8-D. Qualified individual with a disability.** "Qualified individual with a disability"
10 applies to only:

11 A. Subchapter ~~HH~~ 3 (employment); and

12 B. Subchapter ~~V~~ 5 (public accommodations) with regard to public entities only.

13 For purposes of subchapter ~~HH~~ 3, "qualified individual with a disability" means an
14 individual with a physical or mental disability who, with or without reasonable
15 accommodation, can perform the essential functions of the employment position that the
16 individual holds or desires.

17 For purposes of subchapter ~~V~~ 5, "qualified individual with a disability" means an
18 individual with a disability who, with or without reasonable modification to rules,
19 policies or practices, the removal of architectural, communication or transportation
20 barriers or the provision of auxiliary aids and services, meets the essential eligibility
21 requirements for the receipt of services or the participation in programs or activities
22 provided by a public entity.

23 **8-E. Protected class.** "Protected class" means a class of individuals protected from
24 unlawful discrimination under this Act.

25 **9. Real estate broker and sales agent.** "Real estate broker" and "real estate
26 salesman sales agent" have the same definitions meanings as are ~~given respectively~~ in
27 Title 32, ~~section 4001, subsections 2 and 3~~ sections 13198 and 13200 respectively; but
28 include all persons meeting those definitions, whether ~~or not~~ they are licensed or required
29 to be licensed.

30 **9-A. Reasonable accommodation.** For purposes of subchapter ~~HH~~ 3, "reasonable
31 accommodation" may include, but is not limited to:

32 A. Making existing facilities used by employees readily accessible to and usable by
33 individuals with disabilities; and

34 B. Job restructuring, part-time or modified work schedules, reassignment to a vacant
35 position, leaves of absence, acquisition or modification of equipment or devices,
36 appropriate adjustment or modifications of examinations, training materials or
37 policies, the provision of qualified readers or interpreters and other similar
38 accommodations for individuals with disabilities.

1 **9-B. Undue hardship; undue burden.** "Undue hardship" or "undue burden" ~~mean~~
2 means an action requiring undue financial or administrative hardship. In determining
3 whether an action would result in an undue hardship, factors to be considered include:

- 4 A. The nature and cost of the accommodation needed under this Act;
- 5 B. The overall financial resources of the facility or facilities involved in the action,
6 the number of persons employed at the facility, the effect on expenses and resources
7 or the impact otherwise of the action upon the operation of the facility;
- 8 C. The overall financial resources of the covered entity, the overall size of the
9 business of a covered entity with respect to the number of its employees and the
10 number, type and location of its facilities;
- 11 D. The type of operation or operations of the covered entity, including the
12 composition, structure and functions of the work force of the entity, the geographic
13 separateness, administrative or fiscal relationship of the facility or facilities in
14 question to the covered entity;
- 15 E. All the resources available to meet the costs of the accommodation, including any
16 government funding or other grants available for making public accommodations and
17 places of employment accessible;
- 18 F. The extent to which current costs of accommodations have been minimized by
19 past efforts to provide equal access to persons with disabilities;
- 20 G. The extent to which resources spent on improving inaccessible equipment or
21 service could have been spent on making an accommodation so that service or
22 equipment is accessible to individuals with disabilities, as well as to individuals
23 without disabilities;
- 24 H. Documented good faith efforts to explore less restrictive or less expensive
25 alternatives;
- 26 I. The availability of equipment and technology for the accommodation;
- 27 J. Whether an accommodation would result in a fundamental change in the nature of
28 the public accommodation;
- 29 K. Efforts to minimize costs by spreading costs over time; and
- 30 L. The extent to which resources saved by failing to make an accommodation for
31 persons who have disabilities could have been saved by cutting costs in equipment or
32 services for the general public.

33 "Undue hardship" or "undue burden" is a higher standard than "readily achievable" and
34 requires a greater level of effort on the part of the public accommodation.

35 **9-C. Sexual orientation.** "Sexual orientation" means a person's actual or perceived
36 heterosexuality, bisexuality, homosexuality or gender identity or expression.

37 **9-E. Service animal.** "Service animal" means:

- 38 B. For the purposes of subchapter 5, a dog that is individually trained to do work or
39 perform tasks for the benefit of an individual with a disability, including a physical,

1 sensory, psychiatric, intellectual or other mental disability. Other species of animals,
2 whether wild or domestic, trained or untrained, are not service animals for the
3 purposes of this definition. The work or tasks performed by a service animal must be
4 directly related to the individual's disability. Examples of such work or tasks include,
5 but are not limited to, assisting an individual who is totally or partially blind with
6 navigation and other tasks, alerting an individual who is deaf or hard of hearing to the
7 presence of people or sounds, providing nonviolent protection or rescue work, pulling
8 a wheelchair, assisting an individual during a seizure, alerting an individual to the
9 presence of allergens, retrieving items such as medicine or a telephone, providing
10 physical support and assistance with balance and stability to an individual with a
11 mobility disability and helping a person with a psychiatric or neurological disability
12 by preventing or interrupting impulsive or destructive behaviors. The crime deterrent
13 effects of an animal's presence and the provision of emotional support, well-being,
14 comfort or companionship do not constitute work or tasks for the purposes of this
15 definition.

16 **9-F. Rent.** "Rent" includes to lease, to sublease, to let or otherwise to grant for a
17 consideration the right to occupy premises not owned by the occupant.

18 **9-G. Respondent.** "Respondent" means a person accused of unlawful
19 discrimination in a complaint filed under section 4611 ~~or a civil action filed under section~~
20 ~~4621.~~

21 **10. Unlawful discrimination.** "Unlawful discrimination" includes:

22 A. Unlawful employment discrimination as defined and limited by subchapter III 3;

23 B. Unlawful housing discrimination as defined and limited by subchapter IV 4;

24 C. Unlawful public accommodations discrimination as defined by subchapter V 5;

25 D. Aiding, abetting, inciting, compelling or coercing another to do any of such types
26 of unlawful discrimination; obstructing or preventing any person from complying
27 with this Act or any order issued in this subsection; attempting to do any act of
28 unlawful discrimination; and punishing or penalizing, or attempting to punish or
29 penalize, any person for seeking to exercise any of the civil rights declared by this
30 Act or for complaining of a violation of this Act or for testifying in any proceeding
31 brought in this subsection;

32 E. In determining whether a person is acting as an agent or employee of another
33 person so as to make such other person responsible for that person's acts, the question
34 of whether the specific acts performed were actually authorized or subsequently
35 ratified is not controlling;

36 F. Unlawful educational discrimination as defined and limited by subchapter 5-B;
37 ~~and~~

38 G. Discrimination in employment, housing, public accommodation, credit and
39 educational opportunity on the basis of sexual orientation or gender identity, except
40 that a bona fide nonprofit religious corporation, association or organization that does
41 not receive public funds is exempt from this provision with respect to:

1 (1) Employment, as is more fully set forth in section 4553, subsection 4 and
2 section 4573-A;

3 (2) Housing; and

4 (3) Educational opportunity, as is more fully set forth in section 4602, subsection
5 4.

6 Any for-profit organization owned, controlled or operated by a religious association
7 or corporation and subject to the provisions of the Internal Revenue Code, 26 United
8 States Code, Section 511(a) is not covered by the exemptions set forth in this
9 paragraph; and

10 H. Harassment.

11 **Sec. 2. 5 MRSA §4555**, as enacted by PL 1995, c. 393, §10, is repealed.

12 **Sec. 3. 5 MRSA §4573-A, sub-§1**, as enacted by PL 1995, c. 393, §21, is
13 amended to read:

14 **1. General provisions.** It is a defense to a charge of discrimination under this
15 subchapter that an alleged application of qualification standards, tests or selection criteria
16 that screen out or tend to screen out or otherwise deny a job or benefit to an individual
17 ~~with a disability based on protected class status~~ has been shown to be job-related and
18 consistent with business necessity, and such performance can not be accomplished by
19 reasonable accommodation, as required by this subchapter.

20 **Sec. 4. 5 MRSA §4573-A, sub-§1-B**, as enacted by PL 1995, c. 511, §1 and
21 affected by §3, is repealed.

22 **Sec. 5. 5 MRSA §4592, sub-§7, ¶B**, as amended by PL 2007, c. 664, §6, is
23 further amended to read:

24 B. That perpetuate the discrimination of others who are subject to common
25 administrative control; and

26 **Sec. 6. 5 MRSA §4592, sub-§8**, as amended by PL 2015, c. 457, §4, is further
27 amended to read:

28 **8. Service animals.** For any public accommodation or any person who is the owner,
29 lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any
30 place of public accommodation to refuse to permit the use of a service animal or
31 otherwise discriminate against an individual with a physical or mental disability who uses
32 a service animal at the public accommodation unless it is shown by defense that the
33 service animal poses a direct threat to the health or safety of others or the use of the
34 service animal would result in substantial physical damage to the property of others or
35 would substantially interfere with the reasonable enjoyment of the public accommodation
36 by others. The use of a service animal may not be conditioned on the payment of a fee or
37 security deposit, although the individual with a physical or mental disability is liable for
38 any damage done to the premises or facilities by such a service animal. This subsection

1 does not apply to an assistance animal as defined in section 4553, subsection 1-H unless
2 the assistance animal also qualifies as a service animal-; and

3 **Sec. 7. 5 MRSA §4592, sub-§9** is enacted to read:

4 **9. Unlawful public accommodations.** For any public accommodation to designate
5 a single-occupancy toilet facility as for use only by members of one sex. A single-
6 occupancy toilet facility may be identified by a sign, as long as the sign does not indicate
7 that the facility is for use by members of one specific sex. For the purposes of this
8 subsection, a "single-occupancy toilet facility" is a restroom for use by one user at a time
9 or for family or assisted use and that has an outer door that can be locked by the
10 occupant.

11 **Sec. 8. 5 MRSA §4633**, as enacted by PL 1993, c. 303, §3, is amended by
12 enacting a new first paragraph to read:

13 Notwithstanding any other provision of this Act to the contrary, a person may be held
14 liable for that person's actions taken in violation of this section, without regard to whether
15 such person would otherwise be a covered employer, housing provider, public
16 accommodation, educational institution or other covered entity under this Act, when the
17 individual engages in individual and independent unlawful conduct outside the scope of
18 the individual's actions on behalf of a covered entity.

19 SUMMARY

20 This bill makes changes to the Maine Human Rights Act in order to clarify its proper
21 application and interpretation. In particular, the bill describes the behaviors that may
22 constitute harassment in reference to unlawful discrimination; clarifies the Act's coverage
23 of claims based on association and based on the perception that an individual belongs to a
24 protected class; and provides a definition of "gender identity." The bill provides needed
25 clarification related to several Maine Human Rights Act provisions highlighted by recent
26 court decisions, including confirming that a leave of absence can be a reasonable
27 accommodation for a disability in employment, and that individual employees may be
28 liable for their discriminatory behavior in certain circumstances. The bill also makes
29 grammatical changes and corrects cross-references.