

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

RAYMOND GOSSELIN,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Civil No. 08-162-P-H</i>
)	
BORALEX LIVERMORE FALLS, LP,)	
<i>et al.,</i>)	
)	
<i>Defendants</i>)	

RECOMMENDED DECISION ON MOTIONS FOR SUMMARY JUDGMENT

The defendants move for summary judgment on both counts of the First Amended Complaint. Defendants’ Motion for Summary Judgment (“Defendants’ Motion”) (Docket No. 24) at 2. The plaintiff moves for summary judgment on the claim that the defendants violated his rights under the Maine Human Rights Act (“MHRA”) when they offered him a job conditioned on a medical examination. Plaintiff’s Motion for Partial Summary Judgment (“Plaintiff’s Motion”) (Docket No. 26) at 1. I recommend that both motions be denied.

I. Summary Judgment Standard

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party.” *Rodríguez-Rivera v. Federico Trilla Reg’l Hosp. of Carolina*, 532 F.3d

28, 30 (1st Cir. 2008) (quoting *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008)). “A fact is material if it has the potential of determining the outcome of the litigation.” *Id.* (quoting *Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

“This framework is not altered by the presence of cross-motions for summary judgment.” *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 6 (1st Cir. 2003). “[T]he court must mull each motion separately, drawing inferences against each movant in turn.” *Id.* (citation omitted); *see also, e.g., Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996) (“Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment *per se*. Cross motions simply require us to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed. As always, we

resolve all factual disputes and any competing, rational inferences in the light most favorable to the [nonmovant].”) (citations omitted).

B. Local Rule 56

The evidence that the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by reference to each numbered paragraph of the moving party’s statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party’s statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant’s statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(f). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to

search or consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id.*; see also, e.g., *Sánchez-Figueroa v. Banco Popular de Puerto Rico*, 527 F.3d 209, 213-14 (1st Cir. 2008).

II. Factual Background

The parties' respective statements of material facts and responsive statements, submitted pursuant to Local Rule 56, include the following undisputed material facts.

The defendants, Boralex Livermore Falls, LP, Boralex Industries, Inc., Boralex Biomass Operations, Inc., and Boralex, Inc. (collectively, "Boralex"), operate a power plant in Livermore Falls, Maine, that converts wood residue into electricity. Defendants' Statement of Undisputed Material Facts ("Defendants' SMF") (Docket No. 25) ¶ 1; Plaintiff's Response to Defendants' Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 48) ¶ 1. The plaintiff has worked at the Livermore Falls plant since 1992. Plaintiff's Statement of Additional Material Facts ("Plaintiff's SMF") (included in Plaintiff's Responsive SMF beginning at 26) ¶ 96; Defendants' Response to Plaintiff[']s[] Statement of Additional Material Facts ("Defendants' Responsive SMF") (Docket No. 59) ¶ 96. Mike Daigle was Boralex's plant manager at Livermore Falls between 2005 and 2008. Defendants' SMF ¶ 3; Plaintiff's Responsive SMF ¶ 3.

Lori Russell is Boralex's human resources manager for the Livermore Falls plant. *Id.* ¶ 4. David Ettinger was a shift supervisor who worked with the plaintiff at the Livermore Falls plant in July 2006. *Id.* ¶ 5. The Livermore Falls Plant has 11 flights of stairs in its power generation building, as well as a 3-acre fuel yard. *Id.* ¶ 6. The fuel pile is about 200 yards away from the power generation building. *Id.* There is no elevator at the plant. *Id.* ¶ 7. Boralex internally posts positions that are open, and interested employees submit a form stating their interests in particular positions. *Id.* ¶ 8.

The plaintiff suffers from heart disease. *Id.* ¶ 9. He suffered a heart attack in 2000 and has remained on medication for heart disease since then. Plaintiff's SMF ¶ 175; Defendants' Responsive SMF ¶ 175. He disclosed his heart disease to Boralex at the time he was hired in 2001. Defendants' SMF ¶ 10; Plaintiff's Responsive SMF ¶ 10. He made it known to Daigle that he had heart issues and diabetes for which he was going to begin injecting insulin. *Id.* ¶ 11. He also brought the issue of insulin injections to Russell's attention. *Id.* ¶ 12. Over the past five years, the plaintiff's weight has fluctuated between 275 and 310 pounds. *Id.* ¶ 13.

An auxiliary operator at the Livermore Falls plant had a heart attack and died in the plant while climbing stairs in either 2006 or 2007. *Id.* ¶¶ 14-15.

Prior to April 2005, the plaintiff worked as a shift supervisor at the plant. *Id.* ¶ 17. Between April 2005 and July 2007, he held the position of control room operator. *Id.* ¶ 18. When he changed from the former position to the latter, his compensation was not reduced. *Id.* ¶ 19. Daigle denies that he ever told the plaintiff that he thought the plaintiff should transfer to the control room operator position because of his heart disease. Plaintiff's SMF ¶ 103; Defendants' Responsive SMF ¶ 103. Daigle claims that the plaintiff asked Daigle's predecessor, Kevin McKeen, to transfer him to the position of control room operator before Daigle became plant manager. *Id.* ¶ 104. McKeen was not concerned that stress from work would adversely affect the plaintiff because of his heart disease. *Id.* ¶ 106.

The shift supervisor position is much more physically active than the position of control room operator. Defendants' SMF ¶ 22; Plaintiff's Responsive SMF ¶ 22. Shift supervisors cover the entire plant during a normal shift. *Id.* ¶ 23. Control room operators usually stay in the control room for the duration of their shifts. *Id.* ¶ 24. A shift supervisor needs to respond wherever there is a problem or issue at the plant. *Id.* ¶ 25. When he was a shift supervisor, the

plaintiff made it a practice to go up the 11 flights of stairs in the plant at least once a shift. *Id.* ¶ 26. A shift supervisor can climb stairs a dozen times to deal with a single problem in the plant. *Id.* ¶ 27.

The plaintiff submitted an internal position request form when a position as shift supervisor opened up at the Livermore Falls plant in February 2006. *Id.* ¶ 28. On the form, he stated, “I’d like a chance to sit down with you to discuss any misgivings you might have relative to my health or qualifications.” *Id.* ¶ 29. The plaintiff told Daigle that he was going to contact a lawyer and would pursue legal action if he did not get the shift supervisor position because of his heart disease. Plaintiff’s SMF ¶ 109; Defendants’ Responsive SMF ¶ 109. Daigle documented this conversation in an e-mail to Russell dated June 15, 2006. *Id.* ¶ 110. Daigle subsequently told the plaintiff that he planned to give the plaintiff a trial run in the position in September 2006. *Id.* ¶ 109. The defendants never gave the plaintiff this trial run. *Id.*

In September 2002 and February 2004, the plaintiff was involved in separate incident with co-workers. Defendants’ SMF ¶ 30; Plaintiff’s Responsive SMF ¶ 30. He was disciplined in February 2004 following an angry outburst. *Id.* According to the plaintiff, an incident in the control room on July 31, 2006, began when Ray Morrell reported a statement made by Robert Wranosky, the plant’s maintenance manager, to shift supervisors. *Id.* ¶ 36. Morrell told the plaintiff that Wranosky had instructed the shift supervisors to tell employees that they could not record all of the time they worked during shift turnover on their timesheets. *Id.* The plaintiff stormed out of the control room to find Wranosky but was unable to speak with him. *Id.* ¶ 37. After that date, the plaintiff made no attempt to speak with Wranosky about what Wranosky had said to the shift supervisors. *Id.* ¶ 38. The plaintiff did encounter Ettinger outside the plant when

he tried to find Wranosky. Plaintiff's SMF ¶¶ 135-36; Defendants' Responsive SMF ¶¶ 135-36. He decided to raise his complaint with Ettinger. *Id.*

Wranosky reported the events of July 31, 2006, to Russell. *Id.* ¶ 142. Russell and Ettinger claim that the plaintiff screamed at Ettinger on that day. *Id.* ¶ 143. Ettinger claims that the plaintiff was flailing his arms when he spoke to Ettinger that day. *Id.* ¶ 145. The plaintiff denies this. *Id.* Ronald Bisson, who was in the control room on July 31, 2006, claims that the plaintiff's actions that day concerned him so much that he immediately went to Wranosky to report them. *Id.* ¶ 148.¹ Russell investigated the events of July 31, 2006. *Id.* ¶ 149. She reviewed statements from Ettinger and Bisson. *Id.* ¶ 152. On September 1, 2006, the plaintiff was disciplined for the control room incident. Defendants' SMF ¶ 39; Plaintiff's Responsive SMF ¶ 39.

On September 1, 2006, Daigle and Russell met with the plaintiff to inform him that he would not be considered for promotion. *Id.* ¶ 41.² During the meeting, Daigle handed the plaintiff a letter that stated reasons for this decision. *Id.* Neither Daigle nor Russell mentioned the plaintiff's health during this meeting. *Id.* ¶ 46. The letter references the alleged confrontation with Ettinger on July 31, 2006. Plaintiff's SMF ¶ 155; Defendants' Responsive SMF ¶ 155. The defendants promoted Dan Jean to the shift supervisor position in 2006. *Id.* ¶ 166. Jean had less experience than the plaintiff. *Id.* The plaintiff, unlike Jean, had worked as a shift supervisor at the Livermore Falls plant for 13 years. *Id.* ¶ 168.

¹ The parties disagree about whether Wranosky had already left the plant, thus making it impossible for Bisson to report to him "immediately." Plaintiff's SMF ¶ 148; Defendants' Responsive SMF ¶ 148.

² The plaintiff purports to deny this paragraph of the defendants' statement of material facts, Plaintiff's Responsive SMF ¶ 41. However, the substance of the denial does not challenge the substance of the statements from that paragraph that I have set out in the text, and, because those statements are supported by the citations to the summary judgment record given by the defendants, they are deemed admitted.

In December 2006, the plaintiff refused to take a work-related pulmonary fitness test that checked whether his lung capacity was adequate to allow him to breathe through an air respirator. Defendants' SMF ¶ 47; Plaintiffs' Responsive SMF ¶ 47. He refused due to issues related to his heart problems. *Id.* ¶ 48. The test was intended to prepare the defendants' employees in the event they had to wear respiratory masks at the plant, although the defendants did not ultimately require their employees to wear such masks. *Id.* ¶ 49. Every employee other than the plaintiff took the pulmonary fitness test. *Id.* ¶ 50. Daigle found out that the plaintiff did not take the test at the end of 2006, when he received a report from Franklin Occupational Health. *Id.* ¶ 52. Neither Daigle nor any other official of the defendants asked the plaintiff about his refusal to participate in the test. *Id.* ¶ 53.

The plaintiff submitted another internal request form for an open shift supervisor position at the Livermore Falls plant on May 7, 2007. *Id.* ¶ 54. On May 30, 2007, he was interviewed by Daigle and Russell in connection with this position. *Id.* ¶ 55. According to Daigle, the plaintiff did well technically. *Id.* Between his September 1, 2006, disciplinary meeting and his subsequent request to be considered for promotion, Daigle felt that the plaintiff was more cooperative and showed an improvement in his job performance. *Id.* ¶ 56.³

During the May 30 interview, neither Russell nor Daigle asked the plaintiff any questions about his health; a single question about health appeared on the first page of the interview form. *Id.* ¶ 57. That question was, "Can you perform the functions of the job for which you are applying with or without reasonable accommodation?" *Id.* During the interview, the plaintiff

³ The plaintiff purports to deny this paragraph, but only asserts that he was not in fact more cooperative nor did his job performance improve. Plaintiff's Responsive SMF ¶ 56. As the paragraph is phrased in terms of what Daigle felt or believed, this is not a denial. The statement is supported by the citation given to the summary judgment record and therefore is deemed admitted.

himself raised the issue of “not being able to run from one end of the plant to the other.” *Id.* ¶ 58.

The auxiliary operator’s death at the plant made Daigle concerned about the plaintiff’s health, knowing that he had a heart condition. *Id.* ¶ 59. According to the plaintiff, that death “was fresh in everyone’s mind” during his interview for the shift supervisor position. *Id.* ¶ 60. Daigle did not want to put the plaintiff at risk to cause any further health problems, based on what the plaintiff had told him about having heart issues and diabetes. *Id.* ¶ 61. Daigle wanted to make sure that the plaintiff had the ability to perform the job safely and without hurting himself. *Id.* ¶ 62.

Russell and Daigle felt that the plaintiff was the best candidate for the promotion and decided to offer him the open shift supervisor position. *Id.* ¶ 63. The defendants decided to require the plaintiff to complete a medical examination before beginning work as a shift supervisor, as explained in its June 19, 2007, offer letter to him. *Id.* ¶ 64. Russell asked the defendants’ occupational health contractor, Joseph Conrad, to plan and coordinate the components of the medical examination. *Id.* ¶ 65. Conrad reviewed the plaintiff’s medical history and considered his risk factors before deciding how to evaluate his ability to perform the duties of a shift supervisor. *Id.* ¶ 66.

Conrad arranged for the plaintiff to have consultations with physicians who could specifically establish his cardiac risk in the performance of the shift supervisor job. *Id.* ¶ 67. Conrad contacted the plaintiff’s primary care physician, Dorothy Thayer, who arranged a stress test and a rest study for the plaintiff and selected the persons to administer those tests. *Id.* ¶ 68. The plaintiff agreed to undergo the medical examination, which was completed in July 2007. *Id.*

¶ 69. After the medical examination, the defendants notified the plaintiff that he was cleared to begin work as a shift supervisor and provided him with a copy of Conrad's report. *Id.* ¶ 70.

The plaintiff began working as a shift supervisor in July 2007 and has continued to do so since then. *Id.* ¶ 71. The defendants have implemented, without limitation, the restrictions identified for the plaintiff in Conrad's report. *Id.* ¶ 72. The defendants require all newly-hired employees to complete a post-offer medical examination before beginning work. *Id.* ¶ 73.

In 2005, the U.S. Department of Labor undertook an investigation of the defendants' wage payment practices involving employees at the Livermore Falls plant. *Id.* ¶ 74. During that investigation, the defendants negotiated a settlement with the Department of Labor and issued settlement checks to several employees, including the plaintiff, in October 2005. *Id.* ¶ 75. The defendants did not concede any violation of the Fair Labor Standards Act ("FSLA") or any liability in connection with the investigation or the settlement. *Id.* ¶ 76.

The employees at the Livermore Falls plant work on shifts. Plaintiff's SMF ¶ 114; Defendants' Responsive SMF ¶ 114. When one shift relieves another, the employees have to communicate in order to ensure that the operation continues to run smoothly. *Id.* The period of time when the employees communicate is called shift turnover. *Id.* During the time that the plaintiff has worked for the defendants, employees at the Livermore Falls plant have worked the schedule of 48 hours one week and 36 hours the next. *Id.* ¶ 115.

The plaintiff probably saw and reviewed a March 2004 memo from a senior Boralex official stating, "Employees are required to record all time worked." Defendants' SMF ¶ 79; Plaintiff's Responsive SMF ¶ 79. According to the plaintiff, the defendants revise their employee handbook often and regularly issue revised handbooks to their Livermore Falls employees. *Id.* ¶ 80. The plaintiff received both the June 2005 and the January 2007 handbooks.

Id. ¶ 81. These handbooks expressly clarify that employees are expected to record all time worked on their timecards. *Id.* ¶ 82.

In October 2005 and July 2006, the plaintiff received copies of timekeeping memoranda distributed by the defendants which described in specific terms how employees were expected to record time and when they were to report for work. *Id.* ¶¶ 83-84. The defendants expected the plaintiff to review those documents. *Id.* ¶ 86. The 2005 memorandum stated that “[e]mployees may not clock in any earlier than five (5) minutes before the beginning of their designated shift, unless they obtain advance permission of their supervisor[,]” and that “[e]mployees are required to clock out no later than five (5) minutes following the end of their designated shift, unless they obtain advance permission of their supervisor.” Plaintiff’s SMF ¶ 119; Defendants’ Responsive SMF ¶ 119. The July 2006 memorandum contained the same language. *Id.* ¶ 120. The policy has not changed since then. *Id.* Wranosky testified that, under this policy, supervisors may not give their employees permission to start or end work more than 5 minutes before or after their designated shifts unless there is an emergency or unusual circumstance of some kind. *Id.* ¶ 121. The positions of shift supervisor and control room operator are hourly positions. *Id.* ¶ 122.

According to the plaintiff, the only Boralex official who ever raised the issue of the plaintiff’s health directly with him was Daigle. Defendants’ SMF ¶ 87; Plaintiff’s Responsive SMF ¶ 87. No other Boralex official has ever told the plaintiff that his health issues were affecting his ability to do his job. *Id.* The plaintiff recalls only two occasions on which he raised timekeeping issues with Boralex officials: July 31, 2006, and December 2008, when he spoke with Ettinger to request that he “clarify the Company’s policies on changeover time.” *Id.* ¶ 88.

III. Discussion

A. Medical Examination Claim

The plaintiff and the defendants have moved for summary judgment on this claim. The plaintiff claims that the defendants violated his rights under the Maine Human Rights Act (“MHRA”) when they conditioned their 2007 offer of the shift supervisor position on a favorable medical examination. Plaintiff’s Motion at 1. The defendants contend that the offer was consistent with the requirements of the MHRA and, in any event, did not cause the plaintiff any injury. Defendants’ Motion at 11-16.

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

C. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant and may condition an offer of employment on the results of the examination, if:

(1) All entering employees are subjected to the same examination regardless of disability[.]

* * *

D. A covered entity may not require a medical examination and may not make inquiries of an employee as to whether the employee is an individual with a disability or as to the nature or severity of the disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity.

5 M.R.S.A. § 4572(2).

A section of the federal Americans with Disabilities Act has essentially identical language:

(3). A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if:

(A) All entering employees are subjected to such examination regardless of disability[.]

* * *

(4). A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. § 12112(d).

The plaintiff contends that it is therefore appropriate for this court to rely on federal precedent interpreting the federal statute in resolving disputes under the MHRA. Plaintiff's Motion at 3. This is the correct approach. *Winston v. Maine Tech. College Sys.*, 631 A.2d 70, 74-75 (Me. 1993). *See also Kvorjak v. Maine*, 259 F.3d 48, 50 n.1 (1st Cir. 2001).

The defendants rely on 5 M.R.S.A. § 4572(2)(B), which they contend allows them to make pre-employment inquiries into the ability of an applicant to perform job-related functions. Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment ("Defendants' Opposition") (Docket No. 46) at 1-2. The plaintiff's response is apparently that only subsection (2)(C) may be applied to his claim. Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment ("Plaintiff's Reply") (Docket No. 56) at 1.

The statutory language at issue provides: "A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions." 5 M.R.S.A. § 4572(2)(B). The basis for the plaintiff's position is that the defendants made their request for a medical exam post job offer. Plaintiff's Reply at 4. In distinguishing the case cited by the defendants, *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (1st Cir. 1995), the plaintiff asserts that "the Defendant[s] asked Mr. Gosselin to undergo a medical exam after it conditionally offered him the Shift Supervisor job." *Id.*

In support of this assertion, the plaintiff cites paragraph 7 of his statement of material facts. Plaintiff's Motion at 2. That paragraph, which the defendants admit, provides:

In a letter dated June 19, 2007, the Defendants offered the position to Mr. Gosselin but conditioned the offer on his successful completion of a medical examination. In this letter, Mr. Daigle stated that the Defendants wanted Mr. Gosselin to assume his new job duties “as soon as possible” and that he would begin earning more per hour once he commenced his new job duties.

Plaintiff’s SMF ¶ 7 (citations omitted); Defendants’ Responsive SMF ¶ 7. In order for the differences in the language between subsections (2)(B) and (2)(C) in 5 M.R.S.A. § 4752 to have substance, rather than meaning essentially the same thing, an offer of employment conditioned on a medical examination cannot be the same thing as a “preemployment inquir[y].” I agree that subsection (2)(C) is applicable on the facts admitted here.

The defendants contend that the requirement that the plaintiff undergo a medical examination was job-related and consistent with business necessity, and therefore allowed under the MHRA, specifically 5 M.R.S.A. § 4572(2)(D). Defendants’ Motion at 12-15. The plaintiff responds, again, that only subsection (2)(C) applies to the circumstances in this case. Plaintiff’s Response to Defendants’ Motion for Summary Judgment (“Plaintiff’s Opposition”) (Docket No. 45) at 27. The plaintiff offers, in his own motion, a quotation from the Equal Employment Opportunity Commission’s publication “Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act” to the effect that “[a]fter the employer extends an offer for the new position [to an existing employee], it may . . . require a medical examination as long as it does so for all entering employees in the same job category.” Plaintiff’s Motion at 4. It is undisputed that “Boralex requires all external applicants to complete a post-offer medical examination before commencing work.” Defendants’ SMF ¶ 73; Plaintiff’s Responsive SMF ¶ 73. However, it is also admitted that Boralex has allowed other incoming shift supervisors to begin work without first going through the medical examination it required of the plaintiff. Plaintiff’s SMF ¶ 12; Defendants’ Responsive SMF

¶ 12.⁴ If the EEOC interpretation applies here, therefore, it could be argued that the defendants have violated subsection (2)(C).

Still, the defendants have cited case law in which employers with knowledge that particular employees suffered from particular disabilities have been allowed to require medical examinations of existing or returning employees. Defendants' Motion at 13-14; Defendants' Opposition at 2-6. In addition, it would be illogical to interpret either the state or the federal statute to prohibit employers from seeking medical examinations of existing employees when they apply internally for new positions but to allow such demands of existing employees who are merely staying in the same job. *See, e.g., Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 518 (3d Cir. 2001) (ADA case; “[i]f we are to compare the application of an I[n]dependent M[edical] E[xamination] requirement across employees, we must first establish that the employees are, in fact, similarly situated.”).

In this regard, the defendants rely on *Grenier*, a case that originated in this district. In that case, the plaintiff, an employee of the defendants, was questioned by his employer about vandalism of plant machinery that had occurred during his shift. 70 F.3d at 669. He responded emotionally and failed to report for his next scheduled shift. *Id.* His supervisor placed him on medical leave and informed him in writing that in order to return to work he would have to be medically screened and cleared to return to work by the employer's medical department. *Id.* He remained on indefinite disability leave for 17 months, after which his employment terminated automatically. *Id.* He received disability benefits for two years. *Id.* at 670.

Shortly before his disability benefits expired, the plaintiff applied for his former position. *Id.* In response, the defendants asked him to provide a physician's certification that he was

⁴ The defendants qualify this paragraph of the plaintiff's statement of material facts by asserting that no internal applicant for the position of shift supervisor has presented a physical condition or “uncertainties” about his or her physical abilities similar to those presented by the plaintiff. Defendants' Responsive SMF ¶ 12.

prepared to return to work without restrictions or identifying any necessary accommodations. *Id.* The plaintiff provided his therapist's certification that he was disabled and refused to provide any other medical documentation. *Id.* at 670-71. The employer denied the application for reemployment. *Id.* at 671. The plaintiff alleged violations of the ADA and the MHRA. *Id.*

The First Circuit noted that the EEOC explained its regulation under the ADA, 29 C.F.R. § 1630.14(a), as allowing an employer to ask an applicant "whose known disability may interfere with or prevent the performance of a job-related function" to demonstrate how he will be able to perform that function, "whether or not the employer routinely makes such a request of all applicants in the job category." *Id.* at 672. However, the court's subsequent reference to a section of the EEOC's "Enforcement Guidance" suggests that its proviso applies only to "pre-offer inquiries." *Id.* at 673. The differing facts of this case, and the court's emphasis on pre-offer inquiries, limit its value as guidance for the case at hand.

Having concluded that the "business necessity" exception provided in subsection (2)(D) is capable of being applied to this case, I conclude as well that unresolved questions of material fact remain with respect to that standard. I note that the plaintiff has submitted sufficient evidence of potential damages in order to avoid the entry of summary judgment on that basis; the defendants admit that the plaintiff "would begin earning more per hour once he commenced his new job duties," Plaintiff's SMF ¶ 7; Defendants' Responsive SMF ¶ 7, and it is reasonable to infer that his commencement of the new job duties was delayed for at least several days beyond when it would have occurred had he not had to undergo the required medical examinations.

In order successfully to invoke subsection (2)(D), an employer "must show that it had some reason for suspecting that the employee . . . would be unable to perform essential job functions or would pose a danger to the health and safety of the workplace" and that the asserted

business necessity “is vital to the business” and that the request for a medical examination “is no broader or more intrusive than necessary.” *Conroy v. New York State Dep’t of Correctional Servs.*, 333 F.3d 88, 97-98 (2d Cir. 2003).

Here, we know that a shift supervisor has to climb stairs and move around the plant many times during a given shift. We know that the plaintiff told the defendants that he had heart disease and that he said that he could no longer “run from one end of the plant to the other.” Defendants’ SMF ¶ 58; Plaintiff’s Responsive SMF ¶ 58. We do not know whether a shift supervisor was required to run from one end of the plant to the other or whether the plaintiff had demonstrated or even suggested during his work in the control room that he could not climb stairs with the necessary speed or no longer undertake those physical duties which he had satisfied as a shift supervisor prior to his transfer to the control room position. Nor do we know whether the plaintiff’s heart disease had worsened while he worked in the control room.

There are simply too many unknown facts to allow the entry of summary judgment for the defendants on the medical examination claim.

B. Claim Under the Fair Labor Standards Act

Count II of the First Amended Complaint asserts that the defendants violated the FLSA “when [they] discriminated against him because he complained about Boralex’s violations of the FLSA.” First Amended Complaint ¶ 25. The defendants contend that they are entitled to summary judgment on this count because the plaintiff did not engage in any protected activity under the FLSA, he cannot prove that he had a reasonable belief that what he complained about was a violation of law, and Boralex had a legitimate, nondiscriminatory reason for not promoting him in 2006. Defendants’ Motion at 16-20.

1. *Filing a complaint.* The plaintiff responds that his oral complaint to Ettinger on July 31, 2006, constituted protected activity under the FLSA. Plaintiff's Opposition at 24-25. The relevant statutory language provides:

[I]t shall be unlawful for any person –

* * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter[.]

29 U.S.C. § 215(a). In order to establish a retaliation claim under the FLSA, the plaintiff must show that (1) he engaged in statutorily protected activity and (2) his employer thereafter subjected him to an adverse employment action, (3) as a reprisal for having engaged in the protected activity. *Blackie v. State of Maine*, 75 F.3d 716, 722 (1st Cir. 1996). Here, the defendants contend that the plaintiff did not “file[] any complaint.” Defendants' Motion at 17-18.

The evidence in the summary judgment record about the plaintiff's statement to Ettinger on July 31, 2006, is as follows: On July 31, 2006, the plaintiff left the control room to look for Wranosky to complain about what Morrell had told the plaintiff that Wranosky had said about how employees should record their working time. Plaintiff's SMF ¶¶ 132-33.⁵ When the plaintiff instead saw Ettinger, *id.* ¶ 136, he told Ettinger that he had heard that Wranosky had decided to restrict the amount of time that employees could put on their timesheets for shift turnover. *Id.* ¶ 137. He told Ettinger that he thought that the Department of Labor had previously found that Boralex had “violated employees' rights when it prevented them from

⁵ The defendants deny paragraph 132 of the plaintiff's statement of material facts and qualify paragraph 133. Defendants' Responsive SMF ¶¶ 132-33. However, for purposes of the defendants' motion for summary judgment, the question facing the court is not whether there is undisputed evidence that supports the plaintiff's position, but only whether there is evidence which, if believed by the factfinder, would allow the factfinder reasonably to conclude that the FLSA violation that the plaintiff alleges did take place.

reporting all of the time they worked during shift turnover on their timesheets,” and that he planned to call the Department of Labor if this practice continued. *Id.* ¶ 137.

The defendants focus on the facts that the plaintiff was complaining about “a hearsay statement made by another person for which he had no first-hand knowledge and that he [had] never attempted to confirm,” that the plaintiff “has admitted that Mr. Wranosky has never told [the plaintiff] that he was not to record all time worked, that the plaintiff “admitted that Mr. Wranosky has never instructed him to underreport his time,” and that the plaintiff never pursued this issue between July 31, 2006, and his promotion to shift supervisor in 2007. Defendants’ Motion at 17-18.

But, none of these facts negates the possibility that the plaintiff filed a complaint within the terms of the FLSA when he spoke to Ettinger on July 31, 2006. The First Circuit has held that an internal complaint, made only to the employer, is sufficient to constitute the filing of a complaint under the FLSA. *Valerio v. Putnam Assoc., Inc.*, 173 F.3d 35, 41 (1st Cir. 1999). In that case, the First Circuit expressly reserved ruling on the question whether a “wholly oral” complaint would qualify, *id.* at 42 n.4, but I find persuasive the reasoning of the court in *Skelton v. American Intercontinental University Online*, 382 F.Supp.2d 1068, 1076 (N.D. Ill. 2005), and cases cited therein, that conclude that an oral complaint is sufficient based upon the broad, remedial purposes of the FLSA.

The plaintiff has offered evidence that he told a supervisor that his employer was violating the FLSA and that, if the violation continued, he would report it to the Department of Labor. This is sufficient to demonstrate that he engaged in protected activity under the FLSA.

2. *Reasonable belief.* A plaintiff claiming unlawful retaliation under the FLSA must show that he took a protected action that “was based on a reasonable belief that the employer

engaged in . . . conduct contrary to the FLSA.” *Cook v. CTC Communications Corp.*, 2007 WL 3284337 (D.N.H. Oct. 30, 2007) at *6 (quoting *EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998)). Here, the defendants contend that “the totality of the circumstances that existed at the time – July 2006 – shows that he had no reasonable basis for believing that Boralex . . . [was] engaged in violations of the FLSA.” Defendants’ Motion at 18. This is so, they argue, because Boralex had distributed express, written instructions to its employees, including the plaintiff, to the effect that they must not “clock in” or “clock out” more than five minutes before or after their assigned shifts started or ended, and that “off-the-clock” work was prohibited, and that information was inconsistent with what the plaintiff was told Wranosky had said. *Id.* at 18-19.

The plaintiff does not respond to this argument. Nonetheless, I conclude that, while the evidence proffered by the defendants certainly can be viewed as being inconsistent with what the plaintiff alleges that he was told Wranosky had said, that evidence is not sufficient to conclude that no reasonable factfinder could disregard it. Official, written corporate policies have been known to have been disregarded on occasion by the very corporations that promulgate them. Moreover, a company policy that employees must “clock in” no more than five minutes before or after their shifts does not negate a company policy that employees were not to record any time for shift turnover in excess of five minutes. Contrary to the defendants’ suggestion, *id.* at 19, the plaintiff was not required to contact his employer with questions about its timekeeping policy nor to verify whether Wranosky in fact made the reported statement in order to have a reasonable belief that he was reporting a violation of the FLSA.

3. *Nonretaliatory reason.* The burden-shifting framework for analysis that was established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973), applies to FLSA retaliation claims at the summary judgment stage. *Cook*, 2007 WL 3284337 at *5. Once

a prima facie showing of the elements of the claim has been made, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the employment decision. *Id.*

In this case, the defendants contend that the plaintiff “had a well-documented disciplinary record when he submitted his request to be considered for promotion in 2006,” Defendants’ Motion at 19, that he “was expressly warned that any additional disciplinary problems could result in his immediate termination,” and then, “less than three (3) months after he submitted his request to be promoted,” the plaintiff “was involved in a serious incident involving the same type of misconduct for which he had been disciplined in 2002 and 2004.” *Id.* at 20.

Many of the entries in their statement of material facts upon which the defendants’ argument rests are disputed by the plaintiff, making them unavailable as a basis for a grant of summary judgment in the defendants’ favor. *E.g.*, Defendants’ SMF ¶¶ 30-31, 33-35, 37, 39-45; Plaintiff’s Responsive SMF ¶¶ 30-31, ⁶ 33-35, 37, 30-45. Even if that were not the case, the plaintiff has submitted evidence which, although minimal, would allow a reasonable factfinder to conclude that the defendants’ proffered non-retaliatory reason is in fact a pretext, the final step in the burden-shifting framework. *Cook*, 2007 WL 3284337 at *5.

Thus, the plaintiff points to the defendants’ “unfair investigation” of the July 31, 2006, incident, Plaintiff’s Opposition at 26, his different version of what happened that day, Russell’s alleged failure to question the plaintiff or Morrell (a witness to some of the events of that day) during her investigation (although she claimed that she did interview Morrell), Daigle’s allegedly “inconsistent” explanations for the decision not to consider the plaintiff for the shift supervisor position that was available in 2006, and the defendants’ alleged deviation from their own

⁶ The plaintiff’s denial of paragraph 31 of the defendants’ statement of material facts carries little weight. The plaintiff may not effectively deny that his employer warned him in writing that any further incidents might result in immediate termination merely by arguing that he “did not read the part of that disciplinary form” which said so. Plaintiff’s Responsive SMF ¶ 31.

employment policies in their treatment of him, *id.* at 16-18, 21-23 (incorporated by reference into the argument at 26). Shorn of its unnecessarily pejorative language, much of the plaintiff's presentation on this point depends on speculation rather than the drawing of reasonable inferences, but I conclude that there would be enough evidence to allow the plaintiff to prevail on this prong of the *McDonnell-Douglas* burden-shifting analysis, should it be necessary to reach the issue.

The defendants are not entitled to summary judgment on Count II.

C. Count I Claims

The plaintiff's memorandum of law asserts that "[t]he Defendants did not even address two of the Plaintiff's claims and, thus, their motion should be denied on that basis alone." Opposition at 1. If he means that summary judgment should be denied on claims clearly presented in a complaint but not mentioned in a defendant's motion for summary judgment, he is correct. *See Fuller-McMahan v. City of Rockland*, 2005 WL 1645765 (D. Me. July 12, 2005), at *9 (claims not mentioned in motion to dismiss survive). If he means that summary judgment should be denied on all claims if one or more of the asserted claims is not mentioned, he is in error. In any event, the two claims which the plaintiff asserts go unaddressed in the defendants' motion are claims for "disability discrimination" in connection with the shift supervisor's position that was available in 2006, *id.* at 14, and a claim under the Maine Whistleblower's Protection Act, *id.* at 26. Both claims are presented in a single count, Count I of the First Amended Complaint. Complaint ¶¶ 20-23.

The plaintiff's assessment of the defendants' motion is correct. Neither of these two claims is mentioned in the motion for summary judgment. To the extent that the defendants' reply memorandum attempts to address at least the disability discrimination claim, it cannot

remedy the omission of that claim from the initial motion. *In re One Bancorp. Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991). Insofar as those claims are fairly set forth in Count I of the Second Amended Complaint, they remain viable.

IV. Conclusion

For the foregoing reasons, I recommend that both the plaintiff's motion for partial summary judgment and the defendants' motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of May, 2009.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

Plaintiff

RAYMOND GOSSELIN

represented by **PETER L. THOMPSON**
PETER L. THOMPSON &
ASSOCIATES
92 EXCHANGE STREET

PORTLAND , ME 04101
207-874-0909
Fax: 207-874-0343
Email: peter@ptlawoffice.com

ALLAN K. TOWNSEND
PETER L. THOMPSON &
ASSOCIATES
92 EXCHANGE STREET
PORTLAND , ME 04101
207-874-0909
Fax: 207-874-0343
Email: allan@ptlawoffice.com

V.

Defendant

**BORALEX LIVERMORE FALLS
LP**

represented by **MATTHEW J. LAMOURIE**
PRETI, FLAHERTY, BELIVEAU,
PACHIOS & HALEY, LLP
PO BOX 9546
PORTLAND , ME 04112-9546
791-3000
Email: mlamourie@preti.com