

CLIENT ALERT: Individual Employees May Be Liable for Discrimination Under New Hampshire State Law

On February 23, 2016, the New Hampshire Supreme Court announced that under the New Hampshire Law Against Discrimination, a person can be individually liable for aiding and abetting workplace discrimination and for workplace retaliation against an employee for engaging in protected activity. In *EEOC v. Fred Fuller Oil Co., Inc.*, the New Hampshire Supreme Court expands the scope of potential defendants in specific complaints of discrimination or retaliation filed under New Hampshire law.

By way of brief, relevant background, plaintiffs sued their former employer, Fred Fuller Oil Company, Inc. ("Fuller Oil") for sexual harassment and retaliation under the New Hampshire Law Against Discrimination, RSA ch. 354-A. Plaintiffs also sued Frederick J. Fuller, an employee of Fuller Oil, individually. Fuller Oil eventually filed for bankruptcy protection, leaving only Mr. Fuller as a potential defendant. The Federal District Court certified two specific questions to the New Hampshire Supreme Court concerning whether New Hampshire law allowed Mr. Fuller to be sued individually under RSA 354-A:2 and RSA 354-A:7 for aiding and abetting discrimination, and under RSA 354-A:19 for retaliation. The Supreme Court found individual liability available under both legal theories.

Pursuant to RSA 354-A:2, XV(d), an unlawful discriminatory practice includes "[a]iding, abetting, inciting, compelling or coercing another or attempting to aid, abet, incite, compel or coerce another to commit an unlawful discriminatory practice or obstructing or preventing any person from complying with this chapter or any order issued under the authority of this chapter." Relying on principles of statutory construction, the Court concluded that individual employees may be liable for aiding and abetting unlawful employment discrimination where the unlawful discriminatory practice was committed by an "employer" as defined by New Hampshire law. In other words, individual employees may be liable for aiding and abetting discrimination under RSA 354-A:2 and RSA 354-A:7, provided that the employer did not have fewer than six employees.

Pursuant to RSA 354-A:19, it is unlawful for any "person engaged in any activity to which this chapter applies to discharge, expel or otherwise retaliate or discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under this chapter." Again relying on principles of statutory construction, the Court found that individual employees may be liable for retaliation under the statute. The Court specifically did not rule on whether a putative retaliator who is not employed by the plaintiff's employer would be liable under New Hampshire law.

While the full contours of the *Fred Fuller Oil Co., Inc.* decision will be teased out in future cases, in practice, we expect complainants and plaintiffs will name individual employees in their future cases with the New Hampshire Commission for Human Rights and in court. The concept of individual liability for aiding and abetting and retaliation is more developed in other jurisdictions, including Massachusetts. For now, at least, a supervisor or Human Resources employee in New Hampshire who aids and abets harassing behavior or who retaliates against another employee may be subjected to

individual liability.

The best way to avoid liability for these claims is, of course, to ensure that the workplace is free from unlawful harassment and retaliation. Employers in New Hampshire should work with their MBJ attorney to develop policies and practices intended to minimize the risk of claims and ensure that when claims are brought, the company and its managers respond appropriately.

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