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Memo

Date: April 11, 2013

To: Commission Staff

From: John Gause, Commission Counsel

Re: Individual liability after *Fuhrmann v. Staples*

The question has been coming up whether individuals are still proper respondents in Commission employment discrimination complaints in light of the Law Court's decision in *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, 58 A.3d 1083. *Fuhrmann* held that supervisors are not individually liable as "employers" within the meaning of subsection 4553(4) of the Maine Human Rights Act ("MHRA") or the Whistleblowers' Protection Act ("WPA"), *id.* at ¶¶ 24, 35, 58 A.3d at 1094, 1098, but it did not address whether individuals may be liable under other provisions of the MHRA. Following *Fuhrmann*, we should no longer investigate complaints against individuals as "employers" under subsection 4553(4) or the WPA, but we should continue to accept and investigate employment discrimination complaints against individual respondents on other grounds, when the allegations indicate that those provisions may be applicable, including the following:

1. Interference Claims

An individual respondent alleged to be responsible for an adverse employment action that forms the basis for an unlawful employment discrimination complaint against an employer (e.g.,

a supervisor who made a racially-motivated hiring or firing decision) or who creates a hostile work environment on the basis of protected-class status (e.g., a coworker or supervisor who sexually harasses complainant) may be liable in his individual capacity for interfering with complainant's enjoyment of the rights granted or protected by the MHRA. *See* 5 M.R.S. § 4633(2) ("It is unlawful for a person to … interfere with any individual in the exercise or enjoyment of the rights granted or protected by this Act").[1]

A "person" is defined to include "individuals." 5 M.R.S. § 4553(7). The rights granted or protected by the MHRA include the right to be free from unlawful employment discrimination. *See* 5 M.R.S. §§ 4571-4576. Therefore, an individual whose conduct constitutes unlawful employment discrimination may be liable in his individual capacity for interfering with complainant's right to be free from that discrimination. *See* 5 M.R.S. § 4633(2). *Cf. Lopez v. Com.*, 978 N.E.2d 67, 77 (Mass. 2012) (interpreting similar provision in Massachusetts law); *Martin v. Irwin Indus. Tool Co.*, 862 F.Supp.2d 37, 40-41 (D.Mass. 2012) (same).[2]

Most allegations against individuals will fall within this section and should be analyzed under it. In most cases, the investigation of the complaint against an individual respondent

[1] Subsection 4633(2) provides, in full:

> It is unlawful for a person to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted or protected by this Act or because that individual has exercised or enjoyed, or has aided or encouraged another individual in the exercise or enjoyment of, those rights.

5 M.R.S. § 4633(2). Individuals may be named under any of the categories in this subsection.

[2] Conduct that "interferes" with complainant's rights must be intentional. *See Lopez v. Com.*, 978 N.E.2d at 78-79. Therefore, an individual supervisor would not violate subsection 4633(2) by negligently failing to prevent or correct unlawful harassment. *Compare Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 27, 969 A.2d 897, 904 (employer liable for coworker sexual harassment when it "knew or should have known of the charged sexual harassment and failed to take immediate and appropriate corrective action"). An individual supervisor is also not subject to "respondeat inferior" liability for a subordinate's harassment. *Compare* 94-348 C.M.R. ch. 3, § 3.06(I)(2) (2008) (respondeat superior liability for supervisor harassment).

should focus on whether he engaged in conduct that subjected complainant to unlawful employment discrimination. If so, the individual may be liable under subsection 4633(2).

2. Failure to Hire – Age

In cases alleging a failure to hire because of age, individuals may still be named as "employers" notwithstanding *Fuhrmann*. A provision of the MHRA that was not at issue in *Fuhrmann* makes it "unlawful employment discrimination . . . [f]or any employer to fail or refuse to hire any applicant for employment because of the age of the individual." 5 M.R.S. § 4574(3)(A). "Employer" is separately defined in this section as "any individual or type of organization, including domestic and foreign corporations and partnerships, doing business in the State." 5 M.R.S. § 4574(1)(A) (emphasis added). Because *Fuhrmann* did not interpret this definition, complainants should still be afforded the opportunity to name respondents in their individual capacity under it. The investigation of a complaint against an individual under this section will otherwise use the same legal analysis as is used for an employer who is alleged to have refused to hire an applicant because of age.

3. Aiding, abetting, inciting, compelling or coercing

Individuals may also be named in employment discrimination complaints under the aiding and abetting provision in the MHRA, which prohibits "[a]iding, abetting, inciting, compelling or coercing another to do [unlawful employment discrimination]." 5 M.R.S. §

4553(10)(D).[3] *See also* Shannon Clark Kief, *Individual Liability of Supervisors, Managers, Officers or Co-Employees for Discriminatory Actions Under State Civil Rights Act*, 83 A.L.R. 5th 1 (2001) (analogous state law provisions "usually have been construed to provide a basis for suing individual supervisors or co-workers").

In an aiding and abetting claim, complainant must show (1) the employer or a person other than the individually-named respondent committed a wholly individual and distinct wrong separate and distinct from the claim in main; (2) that the individually-named respondent shared an intent to discriminate not unlike that of the other party; (3) that the individually-named respondent knew of his or her supporting role in an enterprise designed to deprive complainant of a right guaranteed him or her under the MHRA; and (4) that the individually-named respondent substantially assisted the other party's violation. *See Lopez v. Com.*, 978 N.E.2d at 82 (supra); *Tarr v. Ciasulli*, 853 A.2d 921, 929 (N.J. 2004) (interpreting the New Jersey Law Against Discrimination). *See also* Restatement (Second) of Torts § 876 (1979).

The requirement of an individual and distinct wrong makes this type of violation rarer than an interference claim. To establish this claim, the individually-named respondent must have aided and abetted *another* in committing a wrong; he cannot aid and abet himself. *See* 5 M.R.S. § 4553(10)(D); *Arens v. O'Reilly Automotive, Inc.*, 874 F.Supp.2d 805, 808 (D.Minn. 2012); *Wasik v. Stevens Lincoln-Mercury, Inc.*, 2000 WL 306048, *7 (D.Conn. 2000). Therefore, a

[3] This provision defines the following as "unlawful discrimination" without limiting its application to an "employer":

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

5 M.R.S. § 4553(10)(D). An individual may be named as a respondent in any of these areas, including aiding and abetting.

greater showing is required than that an employer is liable for a supervisor's conduct. *See id.* An individual is not liable for "aiding and abetting" simply because he engaged in unlawful harassment or made an adverse employment decision for which the employer is liable. *See id. But see Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317 (2nd Cir. 1995) (abrogated on other grounds) (holding that "a defendant who actually participates in the conduct giving rise to a discrimination claim may be held personally liable" under a New York aiding and abetting prohibition).

The following factors may be considered in determining whether there was substantial assistance: (1) the nature of the act encouraged, (2) the amount of assistance given by the respondent, (3) whether the individual respondent was present at the time of the asserted unlawful activity, (4) the respondent's relations to the others, and (5) the state of mind of the respondent. *See Tarr v. Ciasulli*, 853 A.2d at 929.

4. Retaliation

Individuals may also be named in retaliation complaints. As is the case with the interference provision, the MHRA provides that "[a] person may not discriminate against any individual because that individual has opposed any act or practice that is unlawful under this Act or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this Act." 5 M.R.S. § 4633(1) (emphasis added). Again, the term "person" includes individuals. *See* 5 M.R.S. § 4553(7).[4] In these cases, we should apply the same legal analysis to a complaint against an individual respondent as we do for a retaliation complaint against an employer.

[4] Individuals may also be named under the non-retaliation language in paragraph 4553(10)(D), which prohibits "punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act or for testifying in any proceeding brought in this subsection." 5 M.R.S. § 4553(10)(D).