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New Hampshire Supreme Court Holds that Individual Employees can be Liable in Workplace Discrimination and Retaliation Cases

By Adam M. Hamel on February 26, 2016

Earlier this week, the New Hampshire Supreme Court issued an opinion holding that the New Hampshire Law Against Discrimination, RSA Chapter 354-A, can impose liability upon individual employees for aiding and abetting discrimination in the workplace, and for retaliation against another employee in the workplace of a qualifying employer.

The issue came before the New Hampshire Supreme Court in the form of a certified question from the United States District Court for the District of New Hampshire, in connection with a case pending in that court. In the underlying case, a female employee brought suit against her employer for sexual harassment and retaliation under federal law (Title VII) and state law (RSA chapter 354-A). The plaintiff also sued an individual employee under state law. (Under current First Circuit precedent, there is no individual liability under the federal Title VII law.) Because the New Hampshire Supreme Court has never specifically addressed the question of whether individuals can be held liable under Chapter 354-A, the Federal Court asked for clarification on the issue.

The New Hampshire Law Against Discrimination identifies certain acts which, when committed by an “employer,” constitute unlawful discriminatory practices. The New Hampshire Supreme Court pointed out that the law also provides that “any act of aiding, abetting, inciting, compelling or coercing another to commit an unlawful discriminatory practice, or attempting to do so, or obstructing or preventing any person from complying with the [law] is itself an unlawful discriminatory practice.” The Court noted that the law allows an aggrieved person to pursue a claim against a “person, employer, labor organization, employment agency or public accommodation alleged to have committed the unlawful discriminatory practice.” Since “person” is defined in the law as “one or more individuals, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, trustees in bankruptcy, receivers, and the state and all political subdivisions, boards, and commissions thereof,” the Court concluded that individuals can be liable under the New Hampshire Law Against Discrimination.

The New Hampshire Law Against Discrimination only applies to employers with six or more employees. The Court addressed the issue of whether an individual employee of an employer with fewer than six employees could be individually liable. The Court held that one can only be found liable for aiding and abetting discriminatory conduct that is illegal under the New Hampshire Law Against Discrimination. Therefore, if the conduct of a

smaller employer is not actionable because the employer is exempt from the law due to its size, there can be no liability for aiding and abetting.

The Court came to a similar conclusion with regard to individual liability for retaliation under the New Hampshire Law Against Discrimination. The Court held that the statute's language makes clear that "as is relevant in the employment context ... any 'person' may be held liable for retaliation without regard to whether that person is also an 'employer.'" As it did with the question of aiding and abetting, the Court found that "it would be illogical to hold individual employees liable for retaliation when they are employed by an employer that is exempt from liability" due to the size of the employer, and accordingly, the Court held that only individual employees of qualifying employers (i.e., employers with six or more employees) could be held liable for retaliation.

This week's holding brings New Hampshire law in line with existing law in the neighboring Bay State on the issue of individual liability. Under the Massachusetts anti-discrimination statute (G.L. Chapter 151B) "any person, whether an employer or an employee or not," may be held liable for aiding, abetting, inciting, compelling or coercing the doing of any of the acts forbidden under the law.

The case is U.S. Equal Employment Opportunity Commission, et al. v. Fred Fuller Oil Company, et al., Case No. 2015-0258 (Feb. 23, 2016). A copy of the opinion can be downloaded at the Court's website.



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