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Labor & Employment Law:

NH Supreme Court Holds Individuals Liable for Employment Discrimination

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On Feb. 23, 2016, the New Hampshire Supreme Court issued its decision in *EEOC v. Fred Fuller Oil Company Inc.*, holding that individuals can be liable for discrimination under RSA 354-A. The Court answered "Yes" to these questions certified by New Hampshire's federal court:

1. Whether sections 354-A:2 and 354-A:7 of the New Hampshire revised statutes impose individual employee liability for aiding and abetting discrimination in the workplace.

2. Whether section 354-A:19 of the New Hampshire revised statutes imposes individual employee liability for retaliation in the workplace. (Not asked was whether section 354-A:11 imposes individual liability for "interference, coercion or intimidation" on account of an employee's exercise or enjoyment of any right granted by RSA 354-A. The authors disagree on the answer.)

The Equal Employment Opportunity Commission (EEOC) sued Fuller Oil Company Inc. in federal court for discrimination, including sexual harassment under Title VII (42 USC 2000e, et seq.) based mostly on allegations of Nichole Wilkins and Beverly Mulcahey. They personally intervened, filing their own complaint and included claims under RSA 354-A.

But, two days before trial, Fuller Oil filed for bankruptcy, so the federal court closed the case. The individual plaintiffs moved to re-open the case as to Fred Fuller individually, under RSA 354-A, leading to the certified questions.

Federal v. State Discrimination Law

For decades courts have held that there is no individual liability under Title VII of the Civil Rights Act of 1964, as amended, limiting liability to employers: 42 USC 2000e-2(a) states that "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual…"

However, the structure, language and history of RSA 354-A are much different than those of Title VII (though when their coverage overlaps, state courts look to Title VII decisions for guidance).

RSA 354-A:21-a provides parties with the option of litigating in court. The superior courts that have interpreted RSA 354-A found that it did support individual liability for defendants' employees and owners under the (1) aiding and abetting, (2) retaliation; and (3) interference/coercion provisions. However, the federal court always rejected the state courts' reasoning.

History of RSA 354-A

New Hampshire's law against discrimination was first enacted in 1911, creating criminal liability for proprietors, managers and employees of "places of public entertainment" who discriminated against anyone lawfully wearing the uniforms of the NH militia or the United States. The maximum penalty was a $100 fine.

In 1919, the law was expanded to ban advertisements "intended or calculated to discriminate" against any religious sect, nationality or class. By 1925 these were merged into a statute called "Hotels and Other Public Places." In 1955, New Hampshire laws were organized into Revised Statutes Annotated, and the discrimination laws were placed at RSA 354. In 1965, RSA 354 was repealed, and anti-discrimination protections were included in RSA 354-A, which added employment and housing to the amended public accommodations law. RSA 354-A also created the New Hampshire Commission for Human Rights to enforce its civil and criminal anti-discrimination provisions.

The Court's Decision

RSA 354-A:7,I makes it an "unlawful discriminatory practice" for an employer to discriminate on the basis of age, sex, race, color, marital status, physical or mental disability, religious creed, national origin or sexual orientation. RSA 354-A:2,VII excludes employers with fewer than six employees.

RSA 354-A:2,XV(d) states that "unlawful discriminatory practice[s]" include aiding, abetting, inciting, compelling or coercing another to commit an unlawful discriminatory practice, or preventing another from complying with the law. However, the statute doesn't say who may be liable for aiding and abetting, etc., so, the court looked to RSA 354-A:21, I(a) which explains how to file a complaint at the commission:

"Any person claiming to be aggrieved by an unlawful discriminatory practice may make, sign and file with the [commission] a verified complaint in writing which shall state the name and address of the person, employer, labor organization, employment agency or public accommodation alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the [HRC]. (Emphasis added.)

"Person" is defined as including "one or more individuals, partnerships, associations, corporations… and the state and all political subdivisions..." under RSA 354-A:2, XIII (emphasis added).

The Court read these together to conclude that individuals can be held liable for aiding and abetting unlawful employment discrimination under RSA 354-A:2 and :7; and that the Legislature's decision to limit covered employers to those with six or more employees does not mean it excluded individuals from liability. Potential individual defendants, however, must be employed by an employer with at least six employees.

Regarding the retaliation provision at RSA 354-A:19, "It shall be an unlawful discriminatory practice 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." (Emphasis added.)

The court reiterated that under RSA 354-A:2,XIII, "person" included individuals. Thus, "any person who retaliates against another person in the workplace because he or she has taken any of the specified protected actions is liable, under RSA 354-A:19…"

Question: Can the supervisor of an employer with fewer than six employees escape liability for refusing to hire an applicant because he or she filed a discrimination complaint earlier, elsewhere?

Answer: Apparently, yes.

Question: Can liability attach to an employee for "aiding and abetting" the employer, when the employer's only bad acts were those committed by that same employee?

Answer: These authors disagree.

Nancy Richards-Stower co-authored the employees' Amicus Brief in EEOC v. Fuller Oil Company Inc. for the NH Chapter of the National Employment Lawyers Association. Debra Ford's firm represented the defendant.

Nancy Richards-Stower practices plaintiff's employment law in Merrimack. Former chair of the N.H. Commission for Human Rights, she was inducted into The College of Labor and Employment Lawyers in 2003.

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