Table 7 – "Risky Business": Liability in Owning or Operating a Business

The Expanding Field of Discrimination and Retaliation Claims

By: Erin A. McKeag, Esq.

Liability for discrimination and retaliation has traditionally been limited to employers for permitting unlawful discriminatory practices to occur. Employees and owners were exempt from liability in their individual capacity. Likewise, only the individual who was retailed against for engaging in a protected activity could file a retaliation claim. However, recent court decisions have broadened the reach of discrimination laws and opened up retaliation claims to third parties. This trend brings with it a host of new liability considerations for employers as well as potential new avenues for relief for employees.

Federal Retaliation Claims: *Burlington* and *Thompson*

Title VII of the Civil Rights Act of 1964 protects individuals from employment discrimination based on race, color, religion, sex, or national origin.[1] Title VII also protects employees from retaliation by prohibiting an employer from discriminating against an employee who has opposed a discriminatory practice or made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing.[2]

A typical Title VII hostile work environment claim must provide a cause of action for employer conduct "so severe or pervasive that it create[s] a work environment abusive to employees." To succeed, a plaintiff must show: (1) membership in a protected class, (2) subjection to unwelcome conduct, (3) conduct that is based on membership in the protected class, (4) conduct that is sufficiently severe or pervasive so as to alter the terms and conditions of employment, (5) conduct that is both objectively and subjectively offensive, and (6) a basis for employer liability.[3]

A Title VII retaliation claim requires a plaintiff to prove that (1) he or she undertook protected conduct, (2) his or her employer took adverse action against them, and (3) a causal nexus exists between the protected conduct and the adverse action.[4] In 2006, the Supreme Court noted an important difference between Title VII's anti-discrimination provision and anti-retaliation provision, holding in *Burlington N. & S. F.R. Co. v. White* that a retaliation claim, unlike a discrimination claim, is not limited to actions that affect the terms and conditions of employment.[5] The Court adopted a broader standard of Title VII's anti-retaliation provision stating that it prohibits any employer action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[6]

The Court further expanded the scope of retaliation claims to third parties in 2011. In *Thompson v. North American Stainless, LP*, the Court held that retaliation claims could be based on employer actions taken against a third party, as opposed to just actions directed against the reporting employee.[7] Therefore, a plaintiff asserting a third-party retaliation claim must prove that: (1) someone closely related to the plaintiff engaged in an activity protected under Title VII, (2) the plaintiff's employer took adverse action against him or her, and (3) that there is a causal link between the protected activity engaged in by the individual closely related to the plaintiff and the adverse action.[8] As to what types of relationships count as actionable third-party claims, the Court explained that it expects "firing a close family member will almost always meet the *Burlington* standard, and that inflicting a milder reprisal on a mere acquaintance will almost never do so."[9] While the Court acknowledged that it created a gray area in determining what types of relationships were entitled to protection, it declined to outline a bright-line rule explaining, "the significance of any given act of retaliation will often depend upon the particular circumstances."[10]

New Hampshire Discrimination and Retaliation Claims: The Fred Fuller Oil Co. Decision

New Hampshire courts relied on the expanded federal standard in interpreting New Hampshire law in the case against Fred Fuller, owner of a local heating oil supply company. The United States District Court held that one of the plaintiff's had a viable sexual harassment claim based on the totality of the circumstances and permitted her third-party retaliation claim to go forward.[11] In addition, the New Hampshire Supreme Court held that individual employees could be held liable for both aiding and abetting workplace discrimination as well as for engaging in retaliatory conduct.[12] To understand how the courts reached this conclusion it is helpful to go back and examine the trajectory of the Fuller case.

The plaintiffs, Nichole Wilkins and Beverly Mulcahey, did not start their case by filing a lawsuit against Fred Fuller personally. Nichole Wilkins initially brought a complaint against his company, Fred Fuller Oil Co., to the Equal Employment Opportunity Commission (EEOC) in October 2011.[13] The EEOC, on behalf of Wilkins and Mulcahey, later brought suit against the company in June 2013.[14] Fuller Oil challenged Mulcahey's claims arguing that her sexual harassment claim was deficient because the alleged harassment she suffered was neither severe nor pervasive, and that her relationship with Wilkins was not sufficiently close to support her retaliation claim. The U.S. District Court disagreed in an Order issued on January 31, 2014.

Although Wilkins appeared to bear the brunt of the sexual harassment alleged in the complaint, Mulcahey was also subject to unwelcome interactions with Fred Fuller and was privy to the sexual harassment that Wilkins and other female co-workers were forced to endure. In deciding whether Mulcahey had a viable sexual harassment claim, the Court examined the allegations "in light of the record as a whole and the totality of the circumstances" including the frequency of discriminatory conduct, its severity, whether it is physically threatening or

humiliating, and whether it unreasonably interfere with an employee's work performance.[15] Likewise, the Court noted that "evidence of the harassment of third parties can help to prove a legally cognizable claim of a hostile environment" in addition to evidence of widespread sexual favoritism.[16] Ultimately, the Court concluded that Mulcahey's allegations of being forced to endure multiple sexually charged comments from Fuller, witnessing Fuller hugging and flirting with female co-workers on multiple occasions, forced to do a disproportionate amount of work because of an environment of sexual favoritism, and that she knew of Fuller's repeated sexual harassment of Wilkins were more than sufficient to plead a claim of sexual harassment.[17]

Mulcahey's retaliation claim was based on Wilkin's act of threatening to file, and then filing an EEOC complaint, and that Fuller Oil terminated Mulcahey in retaliation for her close friend's actions. In determining whether Mulcahey's retaliation claim was viable, the Court noted that the Supreme Court recently permitted third-party retaliation claims in *Thompson* and that retaliation claims cover "a broad range of employer conduct."[18] The Court decided that the relationship between Wilkins and Mulcahey likely "exists somewhere in the fact-specific gray area between close friend and casual acquaintance."[19] The women worked together at a prior company, Wilkins was influential in procuring Mulcahey's job with Fuller Oil, Mulcahey's desk displayed holiday cards from Wilkins, pictures of their children as well as the plaintiffs together, and Fuller also allegedly knew of the women's close friendship and that they spent time together outside of work.[20] While the Court could not definitively hold that such a friendship supports a successful claim, it also could not determine as a matter of law that it did not.

The case was set to go before a jury on November 12, 2014, but the company filed for Chapter 11 bankruptcy protection on November 11, 2014 and sold the business a week later.[21] As a result, the U.S. District Court "statistically closed" the lawsuit, which ended the proceeding

but did not dismiss the case.[22] The plaintiffs then filed to restart the harassment case against Fred Fuller in an individual capacity in January 2015.[23] That prompted the U.S. District Court to certify two questions of law to the NH Supreme Court regarding the Fuller case.

The NH Supreme Court was tasked with deciding: (1) Whether RSA 354-A:2 and 354-A:7 impose individual employee liability for aiding and abetting discrimination in the workplace, and (2) Whether RSA 354-A:19 imposes individual employee liability for retaliation in the workplace.[24] To answer these questions the Court examined the text and legislative intent of the statutes. The statutes in question fall under RSA chapter 354-A, which is known as the "Law Against Discrimination." It prohibits "unlawful discrimination based upon age, sex, race, creed, color, marital status, familial status, sexual orientation, physical or mental disability or national origin in employment, housing accommodations, and places of public accommodations."[25] The Court noted that the statute includes a directive for the provisions of the chapter to be "construed liberally" in order to effectuate the purpose of the statute.[26]

In answering the first question, whether an individual could be liable for aiding and abetting workplace discrimination, the Court compared the definitions under RSA 354-A:2 to the what constitutes an unlawful employment action under RSA 354-A:7. The Court noted that RSA 354-A:2, XV(d) does not specify "*who* may be liable for aiding and abetting an unlawful discriminatory practice."[27] Rather, it states 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 chapter is itself an unlawful discriminatory practice."[28] As a result, the Court concluded that, in the employment context, it is an unlawful discriminatory practice to aid and abet an employer to commit an unlawful discriminatory practice.[29] Therefore, any person may file a complaint against a "person,

employer, labor organization, employment agency or public accommodation alleged to have committed the unlawful discriminatory practice […] of aiding and abetting discrimination in the workplace."[30]

The Court applied the same logic in answering the second question, whether an individual could be liable for workplace retaliation. The Court analyzed RSA 354-A:19 by referring to the definition of "person" under RSA 354-A:2, XIII noting that the legislature did not limit the term "person" to an employer.[31] Therefore, the Court determined that "any person who retaliates against another person in the workplace because he or she has taken any of the specified protected actions is liable […] for an unlawful discriminatory practice."[32] However, due to the language of RSA 354-A:2, VII, individual liability for retaliation only applies to those employed by an employer with at least six employees.[33]

Now What?: Takeaways for Businesses and Employees

With the expansion of liability for workplace discrimination and retaliation to individuals as well as opening up retaliation claims to third parties, there are some important takeaways for both employers and employees. Employers should hold training sessions to update supervisors and employees on the changes in the law and reinforce existing anti-discrimination, harassment, and retaliation policies.[34] Employers and managers should take particular care in documenting the reasons for terminating an employee to avoid potential retaliation claims.[35] It would also be wise to examine current workplace culture and determine if changes need to made. Finally, businesses should re-evaluate their insurance coverage for discrimination and harassment claims to see if those policies provide sufficient coverage for individual employees who could be named as defendants.[36] Employers who choose to remain uninsured should adopt policies outlining the

circumstances where they will or will not indemnify employees who are named as individual defendants in discrimination and retaliation cases.[37]

Interestingly, employees now have more options to pursue workplace discrimination and retaliation claims but also may be more vulnerable now. Employees who have been discriminated or retaliated against in the workplace can now include both their employer and any individual employees who assisted the harasser or prevented compliance with the law. However, it may not always be beneficial to bring a claim against an individual as opposed to an employer. In most cases, an individual employee will not have "big pockets" like businesses do. While employees now have more choices in filing suit for discrimination and retaliation, the Fuller decision means that individual employees must also be more cautious about their actions in the workplace. Employees cannot use the defense of "just following orders" to avoid liability. For instance, a manager who was instructed by his superior to fire an employee who complained of sexual harassment as well as the alleged harasser could be individually liable for retaliation.[38]

With these new implications it is even more important now for business and individuals to use common sense and do the right thing. Businesses should make sure that employees understand discrimination and retaliation laws, and to consult with counsel before making a rash decision. Likewise, employees should not feel pressured to take actions that they do not feel comfortable with and should inquire whether the company would cover the costs if they were added as defendants in a lawsuit.

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[1] 42 U.S.C. §2000e-2.
[2] 42 U.S.C. §2000e-3.
[3] *EEOC v. Fred Fuller Oil Co., et al.*, No. 13-cv-295-PB (D. N.H. 2014).
[4] *Id.*
[5] 548 U.S. 53, 64 (2006).
[6] *Id.* at 68.
[7] 131 S. Ct. 863, 868-69 (2001).
[8] Devine Millimet, *New Hampshire Court Allows Lawsuit by Employee Who Claims She Was Discharged in Retaliation for Friend's Harassment Complaint*, March 7, 2014, https://www.devinemillimet.com/uploads/docs/

enews/Labor-Employment/03-07-14/lawsuit-allowed-by-employee-discharged-for-friends-harassment-complaint.html.
[9] *Thompson*, 131 S. Ct. at 868.
[10] *Id*.
[11] *EEOC v. Fred Fuller Oil Co., et al.*, No. 13-cv-295-PB (D. N.H. 2014).
[12] *U.S. EEOC v. Fred Fuller Oil Co., Inc*, 134 A.3d 17 (N.H. 2016).
[13] Pat Grossmith, *$3.76m judgment against Fred Fuller in sex discrimination case*, New Hampshire Union Leader, May 12, 2016, http://www.unionleader.com/courts/376m-judgment-against-fred-fuller-in-sex-discrimination-case-20160512.
[14] David Brooks, *Ex-employees of Fred Fuller get millions in settlements from sex-harassment lawsuit*, Concord Monitor, May 11, 2016, http://www.concordmonitor.com/Fred-Fuller-oil-and-propane-harassment-lawsuit-settled-2072177.
[15] *EEOC v. Fred Fuller Oil Co., et al.*, No. 13-cv-295-PB (D. N.H. 2014).
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] David Brooks.
[22] *Id*.
[23] *Id*.
[24] *Fred Fuller Oil Co.*, 134 A.3d at 18.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] Devine Millimet.
[35] *Id*.
[36] Anna B. Cole and Laurel A.V. McClead, *Liability in bias cases: NH Supreme Court ruling makes all employees potentially liable for workplace harassment*, New Hampshire Business Review, May 13, 2016, http://www.nhbr.com/May-13-2016/Liability-in-bias-cases/.
[37] *Id*.
[38] J. Daniel Marr, *Discrimination and Retaliation in New Hampshire*, March 9, 2016, https://www.nashualaw.com/discrimination-and-retaliation-in-new-hampshire/.

TITLE XXXI
TRADE AND COMMERCE

CHAPTER 354-A
STATE COMMISSION FOR HUMAN RIGHTS

Section 354-A:2

354-A:2 Definitions. – In this chapter:

I. "Commercial structure" means any building, structure, or portion thereof which is continuously or intermittently occupied or intended for occupancy by a commercial or recreational enterprise, whether operated for profit or not, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

II. "Commission," unless a different meaning clearly appears from the context, means the state commission for human rights created by this chapter.

III. "Covered multifamily dwellings" means:

(a) Buildings consisting of 4 or more units if such buildings have one or more elevators; and

(b) Ground floor units in other buildings consisting of 4 or more units.

IV. "Disability" means, with respect to a person:

(a) A physical or mental impairment which substantially limits one or more of such person's major life activities;

(b) A record of having such an impairment; or

(c) Being regarded as having such an impairment.

Provided, that "disability" does not include current, illegal use of or addiction to a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802 sec. 102).

V. "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

VI. "Employee" does not include any individual employed by a parent, spouse or child, or any individual in the domestic service of any person.

VII. "Employer" does not include any employer with fewer than 6 persons in its employ, an exclusively social club, or a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private profit, as evidenced by declarations filed with the Internal Revenue Service or for those not recognized by the Internal Revenue Service, those organizations recognized by the New Hampshire secretary of state. Entities claiming to be religious organizations, including religious educational entities, may file a good faith declaration with the human rights commission that the organization is an organization affiliated with, or its operations are in accordance with the doctrine and teaching of a recognized and organized religion to provide evidence of their religious status. "Employer" shall include the state and all political subdivisions, boards, departments, and commissions thereof.

VIII. "Employment agency" includes any person undertaking to procure employees or opportunities to work.

IX. "Familial status" means one or more individuals, who have not attained the age of 18 years of age, and are domiciled with:

(a) A parent, grandparent or another person having legal custody of such individual or individuals; or

(b) The designee of such parent or other person having such custody, with the written permission of such parent or other person.

"Familial status" also means any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

X. "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

XI. "Multiple dwelling" means 2 or more dwellings, as defined in paragraph V, occupied by families living independently of each other.

XII. "National origin" includes ancestry.

XIII. "Person" includes 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.

XIV. "Place of public accommodation" includes any inn, tavern or hotel, whether conducted for entertainment, the housing or lodging of transient guests, or for the benefit, use or accommodations of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store or other establishment which caters or offers its services or facilities or goods to the general public. "Public accommodation" shall not include any institution or club which is in its nature distinctly private.

XIV-a. "Qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this chapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

XIV-b. "Reasonable accommodation" may include:

(a) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities.

(b) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

XIV-c. "Sexual orientation" means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. This definition is intended to describe the status of persons and does not render lawful any conduct prohibited by the criminal laws of this state or impose any duty on a religious organization. This definition does not confer legislative approval of such status, but is intended to assure basic rights afforded under this chapter.

XIV-d. "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in this paragraph. In determining whether an accommodation would impose an undue hardship on an employer, factors to be considered include:

(a) The nature and cost of the accommodation needed under this chapter.

(b) The overall financial resources of the facility involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.

(c) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; and the number, type, and location of its facilities.

(d) The type of operation or operations of the employer, including the composition, structure, and functions of the workforce of such employer; the geographic separateness, administrative, or fiscal relationship of the facility in question to the employer.

XV. "Unlawful discriminatory practice" includes:

(a) Practices prohibited by RSA 354-A;

(b) Practices prohibited by the federal Civil Rights Act of 1964, as amended (PL 88-352);

(c) Practices prohibited by Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. §&sec 3601-3619);

(d) Aiding, 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.

Source. 1992, 224:1. 1997, 108:9. 2006, 181:1, eff. Jan. 1, 2007; 274:1, eff. July 1, 2006.

TITLE XXXI
TRADE AND COMMERCE

CHAPTER 354-A
STATE COMMISSION FOR HUMAN RIGHTS

Equal Employment Opportunity

Section 354-A:7

354-A:7 Unlawful Discriminatory Practices. – It shall be an unlawful discriminatory practice:

I. For an employer, because of the age, sex, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.

II. For a labor organization, because of the age, sex, race, color, marital status, physical or mental disability, creed, or national origin of any individual, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.

III. For any employer or employment agency to print or circulate or to cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, sex, race, color, marital status, physical or mental disability, religious creed or national origin or any intent to make any such limitation, specification or discrimination in any way on the ground of age, sex, race, color, marital status, physical or mental disability, religious creed or national origin, unless based upon a bona fide occupational qualification; provided, however, that nothing in this chapter shall limit an employer after the offer of hire of an individual from inquiring into and keeping records of any existing or pre-existing physical or mental conditions. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.

IV. For any employee to be required, as a condition of employment, to retire upon or before reaching a specified predetermined chronological age, or after completion of a specified number of years of service unless such employee was elected or appointed for a specified term or required to retire pursuant to Pt. II, Art. 78 of the constitution of New Hampshire. It shall not be unlawful for an employer to:

(a) Establish a normal retirement age, based on chronological age or length of service or both, which may be used to govern eligibility for and accrual of pension or other retirement benefits; provided that such normal retirement age shall not be used to justify retirement of or failure to hire any individual; or

(b) Require any individual employee to retire on the basis of a finding that the employee can

no longer meet such bona fide, reasonable standards of job performance as the employer may have established.

V. Harassment on the basis of sex constitutes unlawful sex discrimination. Unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature constitutes sexual harassment when:

(a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

VI. (a) For the purposes of this chapter, the word "sex" includes pregnancy and medical conditions which result from pregnancy.

(b) An employer shall permit a female employee to take leave of absence for the period of temporary physical disability resulting from pregnancy, childbirth or related medical conditions. When the employee is physically able to return to work, her original job or a comparable position shall be made available to her by the employer unless business necessity makes this impossible or unreasonable.

(c) For all other employment related purposes, including receipt of benefits under fringe benefit programs, pregnancy, childbirth, and related medical conditions shall be considered temporary disabilities, and a female employee affected by pregnancy, childbirth, or related medical conditions shall be treated in the same manner as any employee affected by any other temporary disability.

VII. (a) For any employer not to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee, unless such employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.

(b) For any employer to deny employment opportunities, compensation, terms, conditions, or privileges of employment to a job applicant or employee who is a qualified individual with a disability, if such denial is based on the need of such employer to make reasonable accommodation to the physical or mental impairments of the applicant or employee.

Source. 1992, 224:1. 1997, 108:12. 2006, 181:2, eff. Jan. 1, 2007.

TITLE XXXI
TRADE AND COMMERCE

CHAPTER 354-A
STATE COMMISSION FOR HUMAN RIGHTS

Retaliation

Section 354-A:19

354-A:19 Retaliation and Required Records. – 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.

Source. 1992, 224:1, eff. May 13, 1992.

EEOC v Fred Fuller Oil Co., et al. 13-CV-295-PB 1/31/14

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Equal Employment Opportunity Commission

v.

Civil No. 13-cv-295-PB
Opinion No. 2014 DNH 020

Fred Fuller Oil Company, Inc., et al.

MEMORANDUM AND ORDER

The Equal Employment Opportunity Commission (EEOC) sued Fred Fuller Oil Company, Inc. on behalf of two former employees, Nichole Wilkins and Beverly Mulcahey. The complaint alleges that Fred Fuller, the owner of Fuller Oil, sexually harassed both women. It also charges that the company fired Mulcahey in retaliation for her close friend, Wilkins, complaining about the harassment she had suffered prior to her constructive discharge. Fuller Oil has filed a motion for partial judgment on the pleadings, challenging only Mulcahey's claims. It argues that Mulcahey's sexual harassment claim is deficient because the harassment she allegedly suffered was neither severe nor pervasive. It challenges her retaliation claim by arguing that Mulcahey's alleged relationship with Wilkins is not sufficiently

close to support a retaliation claim based on Wilkins's sexual harassment complaint. I reject both arguments.

I. BACKGROUND[1]

A. Wilkins's Allegations

Wilkins alleges that Fred Fuller subjected her to offensive sexual conduct and unwelcome sexual comments on multiple occasions during the time she worked for Fuller Oil. For example, Fuller asked Wilkins if she would strip for his son's bachelor party. When Wilkins was a tenant in an apartment owned by Fuller, he told her he was installing cameras in her apartment "to keep an eye on her." In 2010, Fuller also began requesting that Wilkins wear more revealing clothing, including shirts that showed off her breasts. Fuller told Wilkins that the "only good thing about the company t-shirts" was that they allowed his name to be on her breasts. Fuller looked down Wilkins's shirt whenever possible and commented on her breasts, referring to them by various vulgar nicknames. Fuller told Wilkins that she would have to let Fuller "play with [her]

[1] Unless otherwise specified, all facts are taken from the EEOC's complaint. Doc. No. 1.

boobs" the next time that her co-worker went on vacation, and that he would show her his "night crawler." He also requested that she laugh "so he could watch her breasts bounce up and down," and he told Wilkins that neither he nor his son – who also worked for the company – had been circumcised. Fuller's offensive remarks were not limited to Wilkins. Fuller habitually commented on female employees' appearance, once commenting to Wilkins about "how great a co-worker's ass looked." He also remarked that female colleagues were "on the prowl" depending on how they dressed.

In the final months of 2010, Fuller's actions toward Wilkins progressed to unwanted and inappropriate touching, which always occurred without witnesses present. On at least three occasions, he put his fingers inside Wilkins's blouse and touched her breasts. He would also frequently brush his hands against her breasts while grabbing objects from her desk. In March 2011, Fuller approached Wilkins from behind her desk and put his hands on her breasts, rubbing them.

On July 11, 2011, Wilkins alleges the following:

> Fuller came to Wilkins's desk, stood behind her, cupped both his hands over her breasts inside her shirt and squeezed. Wilkins hunched over and pushed her back up to try to get his hands off her breasts, but Fuller pressed her chair against the desk to

> prevent her from moving. Fuller squeezed harder with his fingers on her nipples until they became erect. While doing this, Fuller whispered in her ear that when her co-worker left on vacation, "we are definitely taking these guys out to play with." Fuller moaned and commented how it did not take long for her nipples to become erect and that she must really want it. Fuller then jiggled her breasts up and down and backed away. Fuller then pointed to his penis inside his pants and said, "He's so bad, getting hard." Wilkins was so upset, she got up from her desk and grabbed her purse on the floor next to her, at which point Fuller whispered, "You have really nice tits and you were great, nice and hard fast."

In tears, Wilkins reported the incident to a female co-worker to whom she had previously reported other instances of Fuller's harassment. The co-worker responded "well, you can't tell anyone. You need your job." Fuller's harassment made Wilkins fearful of going to work, and she resigned the next day, explaining her resignation to a Fuller Oil employee by saying, "Fred knows why and he knows what he did."

Five minutes after Wilkins resigned, Fuller left a message on her cell phone saying "we need to talk." On July 17, 2011, Fuller sent Wilkins an apologetic email stating, in part, "it should not of [sic] happened." Wilkins pressed criminal charges based on the incident and on April 19, 2012, Fuller was arrested for forcibly fondling Wilkins, a misdemeanor sexual assault. On November 14, 2012, Fuller entered a no contest plea to a reduced

charge of simple assault.

B. Mulcahey's Allegations

Mulcahey was also employed at Fuller Oil, where she had worked since September 2006. Mulcahey alleges her own unwelcome interactions with Fred Fuller. For example, when Mulcahey once requested time off, Fuller grabbed his crotch and asked "[w]hat can you do for me?" He also cornered her in the kitchen and told her "she looked very nice" in a disturbing manner, and similarly cornered her by the copy machine "in an inappropriately close manner" and suggestively told her that she looked nice. Fuller also commented to Mulcahey that she was "showing off the right amount of cleavage, not too much and not too little." Finally, he made sexually suggestive comments to Mulcahey regarding a "play date" between himself, Mulcahey, Wilkins, and Wilkins's young daughter.

Mulcahey notes other behavior on the part of Fuller that was not specifically directed at her but contributed to her discomfort in the workplace. Wilkins told her of the sexual harassment that she was forced to endure and Mulcahey also witnessed Fuller hugging women alone in the kitchen and generally flirting with female co-workers. When Mulcahey complained that she was being forced to carry a disparate amount

of the workload because of sexual favoritism, her complaints fell on deaf ears, as managers explained to her that "Fuller liked the women."

C. Relationship Between Mulcahey and Wilkins

The complaint alleges that Wilkins and Mulcahey had a "very close friendship." Prior to their employment at Fuller Oil, Wilkins and Mulcahey had worked together for a different heating oil supplier. When Wilkins was hired by Fuller Oil, she recommended to Fuller that he hire Mulcahey and gave him her resume. Mulcahey's desk was adorned with birthday and mother's day cards from Wilkins, as well as a picture of Wilkins and Mulcahey together and a picture of Wilkins's young daughter. Wilkins and Mulcahey often spent time talking together at work and saw each other socially outside of work.

The complaint further alleges that Fuller was aware of the close friendship between the two women. Not only did Mulcahey display tokens of their relationship on her desk, but Fuller's request for a "play date" indicated that he knew the women likely spent time together outside of the office. Beginning immediately after Wilkins resigned, Fuller frequently asked Mulcahey if she had heard from Wilkins. He also asked Mulcahey for Wilkins's personal email address. Once it became obvious

that Wilkins was not returning to Fuller Oil, however, Fuller became cold to Mulcahey and would often refuse to acknowledge her.

D. Wilkins's EEOC Complaint and Mulcahey's Termination

On October 18, 2011, Wilkins's attorney sent Fuller Oil a letter notifying the company of her plan to file a discrimination charge with the New Hampshire Commission for Human Rights and the EEOC. The letter included a signed copy of the proposed filing and stated that Wilkins would file the charge unless Fuller responded – presumably with a settlement offer - by November 6, 2011.

On November 10, 2011, Billy Fuller – Fred Fuller's son – terminated Mulcahey, explaining that "it was not working out," that her performance was poor "because she was not making enough phone calls," and that Fred Fuller had made the final decision. At the time of her termination Mulcahey claims to have been "performing well, as she always had." When notified of her termination, Mulcahey angrily said "[t]his is because of Nic[hole]!" – an allegation to which Billy Fuller did not respond.

II. STANDARD OF REVIEW

"The standard for evaluating a Rule 12(c) motion for judgment on the pleadings is essentially the same as that for deciding a Rule 12(b)(6) motion." Pasdon v. City of Peabody, 417 F.3d 225, 226 (1st Cir. 2005). The plaintiff must make factual allegations sufficient to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is facially plausible when it pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted). In deciding such a motion, the court views the facts contained in the pleadings in the light most favorable to the non-movant and draws all reasonable inferences in his or her favor. Zipperer v. Raytheon Co., Inc., 493 F.3d 50, 53 (1st Cir. 2007). "Judgment on the pleadings is proper 'only if the uncontested and properly considered facts conclusively establish the movant's entitlement to a favorable judgment.'" Id. (quoting

Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 54 (1st Cir. 2006)). Put another way, "[t]he motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court." 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1367 (Civil 3d ed. 2004).

III. ANALYSIS

Fuller Oil argues that the EEOC has not sufficiently pleaded hostile work environment and retaliation claims on Mulcahey's behalf. I address each claim in turn.

A. Hostile Work Environment

Title VII hostile work environment claims provide a cause of action for employer conduct "so severe or pervasive that it create[s] a work environment abusive to employees." Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993). To succeed on such a claim, a plaintiff must show (1) membership in a protected class; (2) subjection to unwelcome conduct; (3) conduct that is based on membership in the protected class; (4) conduct that is sufficiently severe or pervasive so as to alter the terms and conditions of the plaintiff's employment; (5) conduct that is

both objectively and subjectively offensive; and (6) a basis for employer liability. Medina-Rivera v. MVM, Inc., 713 F.3d 132, 136 n.2 (1st Cir. 2013).

Fuller Oil argues that the pleadings do not sufficiently allege that she was a victim of severe or pervasive harassment. Although Mulcahey was employed by Fuller Oil for six years, the company charges, she has identified only six comments that were addressed to her, none of which involved physical contact or threats of physical harm. At most, it claims, these comments included only a single crude gesture - the crotch grab - amid other statements and actions that could not be considered objectively offensive. I disagree.

A court must examine allegations of sexual harassment "in light of the record as a whole and the totality of the circumstances." O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986)). Although the relevant test lacks "mathematical[ ] precis[ion]," courts should examine the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Billings v. Town of Grafton, 515

F.3d 39, 48 (1st Cir. 2008) (quoting Harris, 510 U.S. at 23). Courts "are by no means limited to [these factors], and 'no single factor is required.'" Id. (quoting Harris, 510 U.S. at 23).

The First Circuit has determined that "[e]vidence of the harassment of third parties can help to prove a legally cognizable claim of a hostile environment." Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 55 n.4 (1st Cir. 2000); see also Cummings v. Standard Register Co., 265 F.3d 56, 63 (1st Cir. 2001). Other circuits also recognize that a court may consider "similar acts of harassment of which a plaintiff becomes aware during the course of his or her employment, even if the harassing acts were directed at others or occurred outside of the plaintiff's presence." Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 336 (6th Cir. 2008); Schwapp v. Town of Avon, 118 F.3d 106, 111-12 (2d Cir. 1997). See also Jerome R. Watson & Richard W. Warren, "I Heard It Through the Grapevine": Evidentiary Challenges in Racially Hostile Work Environment Litigation, 19 Lab. Law. 381, 407-13 (2004). Evidence of widespread sexual favoritism can also contribute to a hostile work environment. 1 Barbara T. Lindeman, et al., Employment Discrimination Law § 20.II.B.5.b (5th ed. 2012)

(explaining that such conduct "sends a message that 'engaging in sexual conduct' or 'sexual solicitations' is required for one gender to advance in the workplace."). Finally, although the harassment must be sufficiently severe or pervasive to alter the terms and conditions of employment, a claimant need not allege that the harassment made her unable to complete her work. See Gerald v. Univ. of P.R., 707 F.3d 7, 18 (1st Cir. 2013); Perez-Cordero v. Wal-Mart P.R., Inc., 656 F.3d 19, 30 (1st Cir. 2011) ("[w]e have never required an employee to falter under the weight of an abusive work environment before his or her claim becomes actionable.").

In the present case, the EEOC has alleged that Mulcahey was forced to endure multiple sexually charged comments from Fuller, that she witnessed Fuller hugging and flirting with female co-workers on multiple occasions, that she was forced to do a disproportionate amount of the work because of an environment of sexual favoritism, and that she knew of Fuller's repeated sexual harassment of Wilkins. When these allegations are viewed together, they are more than sufficient to plead a viable claim that Mulcahey was sexually harassed.

B. Retaliation

Fuller Oil also argues that the EEOC's retaliation claim

seeks to extend an unsettled jurisprudence beyond reason. A traditional Title VII retaliation claim requires a plaintiff to prove that (1) he or she undertook protected conduct; (2) his or her employer took adverse action against them; and (3) a causal nexus exists between the protected conduct and the adverse action. Medina-Rivera, 713 F.3d at 139.

Mulcahey does not claim to have engaged in protected conduct prior to her termination. Rather, she asserts that her close friend Wilkins engaged in protected conduct by threatening to file, and then filing, an EEOC complaint, and that Fuller Oil terminated Mulcahey in retaliation for Wilkins having done so. The viability of Mulcahey's claim thus rests on her relationship with Wilkins, a third party.

The Supreme Court recently addressed so-called third party retaliation claims at length in Thompson v. N. Am. Stainless, LP, 131 S.Ct. 863 (2011). In Thompson, the petitioner and his fiancée both worked for respondent NAS. NAS fired the petitioner three weeks after his fiancée filed a formal complaint of harassment, and the petitioner then filed a complaint alleging third party retaliation. Id. at 867. The Court upheld his claim, reasoning that Title VII retaliation claims cover "a broad range of employer conduct," prohibiting

"any employer action that 'might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Id. at 868 (citing Burlington N. & S.F. Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

Keying in on the logic underpinning Burlington Northern, the Court found it "obvious" that a "reasonable worker might be dissuaded from engaging in protected activity" if she knew that her fiancé would be fired. The Court acknowledged potential line-drawing difficulties in less clear cases, but "decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful." Id. As guidance, it advised that "firing a close family member" will almost always meet the Burlington standard, but that "inflicting a milder reprisal on a mere acquaintance" will almost never do so. Id. Beyond that, the Court expressed "reluctan[ce] to generalize," explaining that "Title VII's antiretaliation provision is simply not reducible to a comprehensive set of clear rules." Id. Rather, "the significance of any given act of retaliation will often depend upon the particular circumstances." Id. (quoting Burlington Northern, 548 U.S. at 69).

Focusing its argument on Thompson, Fuller Oil argues that Mulcahey and Wilkins are not close family members, nor is their

relationship "sufficiently close so that the termination, or threatened termination . . . 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Doc. No. 7-1. I reject this argument on the ground that it is premature.

The complaint alleges that Mulcahey was a close friend of Wilkins, the individual who engaged in the protected conduct. The two women worked together at a prior company, and Wilkins was influential in procuring Mulcahey's job with Fuller Oil. On Mulcahey's desk at work she displayed birthday and mother's day cards from Wilkins alongside pictures of Wilkins's daughter and the two women together. The complaint also alleges that Fred Fuller knew of this close friendship. Fuller knew that the two women spoke frequently and spent time together out of work – as demonstrated by his statement about setting up a "play date" with the two women and Wilkins's daughter. When Fuller wanted to contact Wilkins, he asked Mulcahey about her whereabouts and requested her personal email address from Mulcahey. This relationship, as pled, exists somewhere in the fact-specific gray area between close friend and casual acquaintance. Although I could not say that such a friendship definitively supports a successful claim, I also cannot say as a matter of

law that it does not. I may revisit this issue upon a proper motion after discovery. See Lard v. Ala. Alcoholic Beverage Control Bd., No. 2:12-cv-452-WHA, 2012 WL 5966617, at *4 (M.D. Ala. Nov. 28, 2012).

Fuller Oil argues in the alternative that the retaliation claim is defective because it fails to allege any facts beyond "sheer speculation" to support a causal relationship between Wilkins's protected conduct and Mulcahey's termination. Recent precedent affirms that retaliation claims must be proven according to principles of but-for causation, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S.Ct. 2517, 2533 (2013), but the EEOC's allegations of close temporal proximity – a matter of weeks - between Wilkins's threat of filing a complaint and Fuller Oil's decision to fire Mulcahey, when viewed together with the other evidence identified in the complaint, is sufficient to allow this claim to survive a motion for judgment on the pleadings. See, e.g., Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 25-26 (1st Cir. 2004) (a one month interval can provide sufficient temporal proximity to establish a prima facie case of retaliation).

IV. CONCLUSION

For the reasons discussed above, I deny Fuller Oil's motion for judgment on the pleadings. Doc. No. 7.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

January 31, 2014

cc: Elizabeth A. Grossman, Esq.
Robert D. Rose, Esq.
Markus L. Penzel, Esq.
Leslie H. Johnson, Esq.
Martha Van Oot, Esq.
K. Joshua Scott, Esq.

THE SUPREME COURT OF NEW HAMPSHIRE

U.S. District Court
No. 2015-0258

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION & a.

v.

FRED FULLER OIL COMPANY, INC. & a.

Argued: September 24, 2015
Opinion Issued: February 23, 2016

Law Office of Leslie H. Johnson, PLLC, of Center Sandwich (Leslie H. Johnson on the brief and orally), and Purcell Law Office, PLLC, of Portsmouth (Ellen Purcell on the brief), for plaintiffs Beverly Mulcahey and Nichole Wilkins.

Jackson Lewis P.C., of Portsmouth (Martha Van Oot and K. Joshua Scott on the brief, and Ms. Van Oot orally), for defendant Frederick J. Fuller.

Law Offices of Nancy Richards-Stower, of Merrimack (Nancy Richards-Stower on the brief), and Backus, Meyer and Branch, LLP, of Manchester (Jon Meyer on the brief), for the New Hampshire Chapter of the National Employment Lawyers Association, as amicus curiae.

CONBOY, J. Pursuant to Supreme Court Rule 34, the United States District Court for the District of New Hampshire (Barbadoro, J.) certified to us the following questions of law:

> 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.

For the reasons stated below, we answer both questions in the affirmative.

The federal district court's order sets forth the following facts regarding the federal court case that led to the certified questions. The plaintiffs, Nichole Wilkins and Beverly Mulcahey, sued their former employer, Fred Fuller Oil Company, Inc. (Fuller Oil), for sexual harassment and retaliation. See 42 U.S.C. § 2000e (2012) (Title VII); RSA ch. 354-A (2009 & Supp. 2015). The plaintiffs also sued Frederick J. Fuller, an employee of Fuller Oil, individually (hereinafter referred to as the defendant). See RSA ch. 354-A.

Prior to trial, the defendant sought to prohibit the plaintiffs from asserting claims against him under RSA chapter 354-A in his individual capacity. The district court thereafter informed the parties that it would not allow the plaintiffs to assert such claims. Subsequently, Fuller Oil filed for bankruptcy protection and, therefore, the case against Fuller Oil was stayed; thereafter the case was reopened as to claims against the defendant. Because the questions of whether an employee can recover damages from another employee for aiding and abetting sexual harassment or for retaliation under RSA chapter 354-A concern unresolved issues of New Hampshire law, the district court certified the questions to this court. Neither named plaintiff U.S. Equal Employment Opportunity Commission nor the other named defendant, Fuller Oil, is a party to this certification proceeding.

Responding to the certified questions requires us to engage in statutory interpretation. We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. Steir v. Girl Scouts of the U.S.A., 150 N.H. 212, 214 (2003). We begin by examining the language of the statute, and if possible, ascribe the plain and ordinary meanings to the words used. Id. When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we decline to consider what the legislature might have said or to add language that the legislature did not see fit to incorporate in the statute. Id. We do not consider words and phrases in isolation; rather, we consider them in the context of the statute as a whole. Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 585

(2003). This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. Id.

RSA chapter 354-A, known as the "Law Against Discrimination," prohibits unlawful discrimination based upon age, sex, race, creed, color, marital status, familial status, sexual orientation, physical or mental disability or national origin in employment, housing accommodations, and places of public accommodations as provided therein. See RSA 354-A:1 (2009) (title and purposes of chapter), :6-:7 (2009) (equal employment), :8-:15 (2009 & Supp. 2015) (fair housing), :16-:17 (2009) (public accommodations). The New Hampshire Commission for Human Rights (HRC) is the agency charged with eliminating and preventing discrimination under RSA chapter 354-A, see RSA 354-A:1, and is authorized "[t]o receive, investigate and pass upon complaints alleging violations of [the] chapter." RSA 354-A:5, VI (2009). When considering the questions posed by the district court, we are mindful of the legislative directive to liberally construe the statutory scheme in RSA chapter 354-A to effectuate its purpose. See RSA 354-A:25 (2009).

I. Aiding and Abetting Unlawful Discrimination in the Workplace

We begin by addressing the first question of whether RSA 354-A:2 (2009) and RSA 354-A:7 impose liability upon individual employees for aiding and abetting discrimination in the workplace. RSA 354-A:2 provides definitions for terms used throughout the chapter. Under RSA 354-A:2, XV(a), an "'[u]nlawful discriminatory practice'" includes "[p]ractices prohibited by RSA 354-A." Unlawful employment discrimination is one of the practices prohibited under RSA chapter 354-A. See RSA 354-A:1, :6, :7. As relevant here, RSA 354-A:7 provides:

> It shall be an unlawful discriminatory practice:
>
> I. For an employer, because of the age, sex, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.

RSA 354-A:7, I. "'Employer'" is defined, in relevant part, as "not includ[ing] any employer with fewer than 6 persons in its employ." RSA 354-A:2, VII. Under RSA 354-A:2, XV(d), "'[u]nlawful discriminatory practice'" also 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."

Both RSA 354-A:7, I, and RSA 354-A:2, XV(d) describe actions that constitute unlawful discriminatory practices under RSA chapter 354-A. RSA 354-A:7, I, identifies certain acts committed by an employer as unlawful discriminatory practices. RSA 354-A:2, XV(d) specifies 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 chapter is itself an unlawful discriminatory practice. As applied in the employment context, RSA 354-A:2, XV(d) makes it an unlawful discriminatory practice to aid and abet an employer to commit an unlawful discriminatory practice under RSA 354-A:7, I. Nothing in the language of RSA 354-A:2, XV(d), however, specifies who may be liable for aiding and abetting an unlawful discriminatory practice. We, therefore, look to other provisions of the statutory scheme for guidance. Cf. In the Matter of B.T., 153 N.H. 255, 260 (2006) ("Where a term or phrase is not specifically defined, we look to other provisions of the statutory scheme for guidance." (quotation omitted)).

RSA 354-A:21 (2009) governs procedures on complaints under RSA chapter 354-A. RSA 354-A:21, I(a) states:

> Any person claiming to be aggrieved by an unlawful discriminatory practice may make, sign and file with the [HRC] 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]. The attorney general or one of the commissioners may, in like manner, make, sign, and file such complaint.

(Emphasis added.); see RSA 354-A:21-a, I (2009) (permitting "[a]ny party alleging to be aggrieved by any practice made unlawful under this chapter" to "bring a civil action for damages or injunctive relief or both, in the superior court for the county in which the alleged unlawful practice occurred or in the county of residence of the party" after a specified period of time from the filing of the complaint with the HRC or sooner if the HRC consents in writing). If the claimant can prove that the respondent alleged to have committed the unlawful discriminatory practice has, in fact, engaged in any unlawful discriminatory practice as defined under the chapter, RSA 354-A:21, II(d) empowers the HRC to take action against the respondent. RSA 354-A:21, II(d).

Reading RSA 354-A:21, I(a) in conjunction with RSA 354-A:2, XV(d) and RSA 354-A:7, I, we conclude that any person may file a complaint against a "person, employer, labor organization, employment agency or public accommodation alleged to have committed the unlawful discriminatory practice," RSA 354-A:21, I(a) (emphasis added), of aiding and abetting discrimination in the workplace, RSA 354-A:2, XV(d); RSA 354-A:7, I. "'Person'" is defined as including "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." RSA 354-A:2, XIII (emphasis added). Thus, individuals may be liable for aiding and abetting unlawful employment discrimination under RSA 354-A:2 and :7.

The defendant argues that liability for aiding and abetting unlawful discrimination under RSA 354-A:2, XV(d) is necessarily limited to employers. Relying upon the definition of employer in RSA 354-A:2, VII, he contends that it would be illogical for the legislature to exempt employers with fewer than six employees from liability for unlawful discriminatory practices, but subject individual employees of such exempt employers to liability for aiding and abetting. The legislature's decision to limit the liability of employers to those employers with six or more employees, however, does not require a conclusion that it intended to exclude all individual employees from liability, regardless of whether their employer is exempt. The defendant's interpretation would absolve an individual employee from any liability for aiding and abetting his employer to commit an unlawful act of discrimination under RSA 354-A:7, I, which action by the employee is specifically defined as an unlawful discriminatory practice under RSA 354-A:2, XV(d). Such an interpretation is plainly inconsistent with the stated intent of RSA chapter 354-A "to eliminate and prevent discrimination in employment." RSA 354-A:1.

Nevertheless, for an individual to be liable for aiding and abetting unlawful employment discrimination under RSA 354-A:2, XV(d), it must be proven that the individual aided and abetted an unlawful discriminatory practice committed by an employer as specified in RSA 354-A:7, I. Thus, if there is no unlawful discriminatory practice by an employer, there can be no individual employee liability for aiding and abetting. Because "employers" with fewer than six employees are exempt from liability under the chapter, see RSA 354-A:2, VII, "unlawful discriminatory practice" under RSA 354-A:7, I, does not include acts committed by an "employer" with fewer than six persons in its employ. It follows, therefore, that an individual employee of an "employer" with fewer than six employees would not have committed an unlawful discriminatory practice under RSA 354-A:2, XV(d).

Accordingly, pursuant to a plain reading of the statute, individual employees may be liable for aiding and abetting discrimination in the

workplace under RSA 354-A:2, XV(d) and RSA 354-A:7. We, therefore, answer the first question in the affirmative.

II. Retaliation in the Workplace

We next turn to the second question, which asks whether RSA 354-A:19 (2009) imposes individual employee liability for retaliation in the workplace. Because the district court has interpreted the claim in the plaintiffs' complaint as alleging that "Fuller retaliated against [plaintiff Mulcahey] in violation of" RSA 354-A:19, we answer the broad question posed as to whether an individual employee can be liable under RSA 354-A:19.

RSA 354-A:19 provides:

> 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.

RSA 354-A:19 (emphasis added).

The defendant argues that "[t]he only logical and rational way to construe RSA 354-A:19" is to interpret the phrase "person engaged in any activity to which this chapter applies" as referring only to the "'persons' in each of the three activities of employment, housing and public accommodations to whom the Legislature specifically concluded that liability for discrimination should attach." He maintains that as to employment, the only "person engaged in any activity to which this chapter applies" is an employer and, therefore, only employers can be liable for retaliation. However, we do not read the phrase "engaged in any activity to which this chapter applies," RSA 354-A:19, as limiting liability for retaliation to employers.

As explained above, RSA 354-A:2, XIII defines "'[p]erson'" as including "one or more individuals." Thus, RSA 354-A:19 applies to "any person," including "one or more individuals," engaged in any of the activities to which RSA chapter 354-A applies. In the context of this case, the chapter applies to the activity of "employment." Therefore, 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, for an unlawful discriminatory practice.

The defendant's interpretation of the statute would require us to ignore the statutory definition of "person." This we will not do. "It is a basic precept of statutory construction that the definition of a term in a statute controls its

meaning." Manchenton v. Auto Leasing Corp., 135 N.H. 298, 303 (1992) (quotation omitted). We presume the legislature knew the meaning of the words it chose, and that it used those words advisedly. See Roberts v. Town of Windham, 165 N.H. 186, 190 (2013). We will not modify, through judicial construction, the legislature's explicit definition of the word "person" as used in RSA chapter 354-A. See Manchenton, 135 N.H. at 303. Had the legislature intended to limit liability for retaliation in the workplace to employers, it could have expressly done so. Instead, as relevant in the employment context, the legislature specified that any "person" may be held liable for retaliation without regard to whether that person is also an "employer" within the meaning of the chapter.

The defendant asserts that, under our interpretation, "a putative retaliator does not even need to be employed by the plaintiff's employer to be liable under RSA 354-A:19." The question before us in this case is whether RSA 354-A:19 imposes liability upon individual employees for retaliation in the workplace. We have answered that it does. Thus, we have no occasion today to address the question of whether individuals who are not employed by the plaintiff's employer may be liable for retaliation under the statute.

Nonetheless, we agree with the defendant that it would be illogical to hold individual employees liable for retaliation when they are employed by an employer that is exempt from liability under the chapter. See State v. Rollins-Ercolino, 149 N.H. 336, 341 (2003) (court will not interpret statute to require an illogical result). RSA 354-A:19 relates to those persons "engaged in any activity to which this chapter applies." The chapter applies only to those employers with six or more employees. See RSA 354-A:2, VII. Thus, consistent with our interpretation of liability under RSA 354-A:2 and RSA 354-A:7, I, we interpret RSA 354-A:19 as imposing liability for retaliation on individual employees in the workplace of a qualifying employer under the chapter. See id.

The defendant further argues that interpreting RSA 354-A:19 as applying to individual persons engaged in the activity of employment, housing, or public accommodations leads to an absurd or illogical result because it is possible that those persons the legislature intended to protect from unlawful discrimination under the chapter could themselves be liable for unlawful retaliation. However, an employee who otherwise enjoys the protection of the statute is not, for that reason, shielded from liability for retaliatory conduct prohibited by the statute. Cf. Martin v. Irwin Indus. Tool Co., 862 F. Supp. 2d 37, 38, 38-40 (D. Mass. 2012) (rejecting co-worker defendant's argument that retaliation provision in Massachusetts' anti-discrimination law applied only to "employers and those 'persons' who exercise similar degrees of authority" and finding that statutory language allowed for a co-employee to be held liable); Beaupre v. Cliff Smith & Associates, 738 N.E.2d 753, 764, 764-67 (Mass. App. Ct. 2000) (recognizing that plain language of retaliation provision in

Massachusetts' anti-discrimination statute "provides on its face for individual personal liability" and upholding jury verdict against employee under statute).

Finally, we note that, if the legislature disagrees with our interpretation of RSA 354-A:19, it is, of course, "free to amend the statute as it sees fit." State v. Mandatory Poster Agency, Inc., 168 N.H. ___, ___ 126 A.3d 844, 849 (2015) (quotation omitted).

For these reasons, we conclude that individual employees may be held liable for retaliation in the workplace under RSA 354-A:19. We, therefore, answer the second certified question in the affirmative.

Remanded.

DALIANIS, C.J., and HICKS and LYNN, JJ., concurred.

INDIVIDUAL LIABILITY FOR EMPLOYMENT DISCRIMINATION AND RETALIATION

By J. Daniel Marr, Esquire

Under New Hampshire statutory law, RSA 354-A, employers with six or more persons in their employ are not allowed to unlawfully discriminate against employees because of certain protected classes including age, sex, race, color, marital status, physical or mental disability, religion, creed, or national origin of the individual.

As noted in the case of EEOC v. Fred Fuller Oil Co., 168 N.H. 606 (2016), individual employees may be liable for aiding and abetting discrimination in the workplace and any person who retaliates against another person in the workplace because he or she has taken any of the specified protected actions is liable for unlawful discriminatory practice. Owners, decision-makers, and mid-level managers of a business who carry out those decisions, could be liable for employment discrimination in addition to workers who may be harassing a fellow employee based upon age; one of the above—protected classes.

Consider the following example: Your client has a small New Hampshire business corporation that has only 8 employees total; six of whom are assemblers of electronic components; one is the sales manager and the other is the general manager. The owner tells the general manager that the company is losing money and they need to cut an individual on the assembly line and the owner suggested to let go of Suzy because she has been complaining about the sales manager Jack harassing her. Since the company obviously needs to keep Jack because he is the one making sure that the company continues to get the sales in order to keep the rest of the assembly line working, Suzy is the logical choice for a lay off. The general manager carries out the directives of the owner. Suzy may have a claim against the company, Jack, the owner, and the general manager. In that situation, if the owner and general manager had been advised

by legal counsel that they risked personal liability they might have been more careful in their decision to lay off Suzy. They could have chosen perhaps another assembler who had not performed the job as well as Suzy and not factored in to the decision that she made a sexual harassment complainant against Jack. Even if none of the claims of Suzy are meritorious, (although in this fact pattern some if not all appear to have merit) there could be significant expenses to defend such claims. If the company is insolvent and does not have employment practice liability insurance coverage, the general manager might personally incur the expense of an attorney in attempting to distinguish himself from the owner and from Jack.

Talking about individual liability in operating the business for employment discrimination, the option of employment practice liability coverage and what it covers and does not, along with other risks of individual liability provides your client with valuable information and distinguishes you from generic on line advice as to how to create a corporation or a limited liability company.

Table 7 – "Risky Business"; Liability in Owning or Operating a Business

NH DRAM SHOP LAW – RSA 507-F

The person Jim allegedly injured while driving home drunk can bring a cause of action against Marr Pub & Eatery, LLC under RSA 507-F, otherwise known as New Hampshire's Dram Shop Law. RSA 507-F imposes a duty on persons licensed or required to be licensed to serve alcohol. The statute considers two classes on injured persons: 1) those injured by an intoxicated patron of a licensee (negligence standard); and 2) those persons intoxicated (reckless standard).

Any person (except the intoxicated person) injured by the negligent service of alcoholic beverages may bring an action against the licensee-defendant.[1] A liquor licensee is any person or entity licensed or required to be licensed to sell alcoholic beverages in New Hampshire, or any employee or agent of such person or entity.[2]

As a licensee under the statute, Marr Pub & Eatery, LLC, through the actions of Barry, would be held to the negligence standard. The statute, in relevant parts, reads as follows:

> I. A defendant who negligently serves alcoholic beverages to a minor or to an intoxicated person is liable for resulting damages, subject to the provisions of this chapter.
>
> II. Service of alcoholic beverages to a minor or to an intoxicated person is negligent if the defendant knows or if a reasonably prudent person in like circumstances would know that the person being served is a minor or is intoxicated.
>
> ****
>
> VII. A defendant is not under a duty to recognize signs of a person's intoxication other than those normally associated with the consumption of alcoholic

[1] RSA 507-F. *See* McNamara, New Hampshire Practice: Personal Injury, Tort and Insurance Practice Ch. 7 (3rd ed.)

[2] RSA 507-F.

> beverages except for intoxication resulting in whole or in part from other drugs consumed on defendant's premises with defendant's actual or constructive knowledge.

New Hampshire does recognize responsible business practices as a defense to claims brought under RSA 507-F. Specifically, service of alcoholic beverages is not negligent if the server was adhering to responsible business practices.[3] "Responsible business practices" are those business policies, procedures and actions that a reasonably prudent person would follow in similar circumstances.[4] Evidence of responsible business practices is relevant in determining when a server, who does not have actual knowledge, should have known of the drinker's level of intoxication.[5]

Evidence of responsible business practices includes management policies ensuring the examination of proof of age, training of employees responsible for examining proof of age, and comprehensive training of employees in skills regarding responsible service of alcohol and the handling of intoxicated persons.[6]

[3] RSA 507-F:6, I.

[4] RSA 507-F:6, I.

[5] RSA 507-F:6, II.

[6] RSA 507-F:6.

TITLE LII
ACTIONS, PROCESS, AND SERVICE OF PROCESS

CHAPTER 507-F
ALCOHOLIC BEVERAGE LICENSEE LIABILITY

Section 507-F:1

507-F:1 Definitions. – In this chapter:
I. "Adult" means any person of legal age to purchase alcoholic beverages, or older as defined by RSA 175:1, I.
II. "Alcoholic beverages" means liquor and beverages as those terms are defined in RSA 175:1, VIII and XLII.
III. "Intoxicated person" means an individual who is in a state of intoxication as defined by this chapter.
IV. "Intoxication" means an impairment of a person's mental or physical faculties as a result of drug or alcoholic beverage use so as to diminish that person's ability to think and act in a manner in which an ordinary prudent and cautious person, in full possession of his faculties and using reasonable care, would act under like circumstances.
V. "Licensee" means any person who is required to be licensed to serve alcoholic beverages under RSA 178 and 179.
VI. "Minor" means any person under the legal age to purchase alcoholic beverages.
VII. "Person" means any individual, governmental body, corporation or other legal entity.
VIII. "Premises" means any establishment licensed or required to be licensed under RSA 175:1, LIV.
IX. "Service of alcoholic beverage" or "service" means any sale, gift, or other furnishing of alcoholic beverages.

Source. 1986, 227:11. 1990, 255:13-15, eff. July 1, 1990.

Section 507-F:2

507-F:2 Plaintiff. –
I. Any person who suffers damage, as provided in RSA 507-F:8, may bring an action under this chapter subject to the limitation found in paragraph II of this section.
II. A person who becomes intoxicated may not bring an action under RSA 507-F:4 against a defendant for serving alcoholic beverages to such person.

Source. 1986, 227:11, eff. July 1, 1986.

Section 507-F:3

507-F:3 Defendants. – Any person licensed or required to be licensed under RSA 178:1, I and any employee or agent of such person who commits an act giving rise to liability, as provided in RSA 507-F:4 and 5, may be made a defendant to a claim under the provisions of this chapter.

Source. 1986, 227:11. 1990, 255:16, eff. July 1, 1990.

Section 507-F:4

507-F:4 Negligent Service of Alcoholic Beverages. –

I. A defendant who negligently serves alcoholic beverages to a minor or to an intoxicated person is liable for resulting damages, subject to the provisions of this chapter.

II. Service of alcoholic beverages to a minor or to an intoxicated person is negligent if the defendant knows or if a reasonably prudent person in like circumstances would know that the person being served is a minor or is intoxicated.

III. Proof of service of alcoholic beverages to a minor without request for proof of age as required by RSA 179:8 shall be admissible as evidence of negligence.

IV. Service of alcoholic beverages by a defendant to an adult person who subsequently serves a minor off the premises or who is legally permitted to serve a minor does not constitute service to the minor unless a reasonably prudent person in like circumstances would know that such subsequent service is reasonably likely to occur and is illegal.

V. A defendant does not have a duty to investigate whether a person being served alcoholic beverages intends to serve the alcoholic beverages to other persons off the premises.

VI. A defendant is not chargeable with knowledge of a person's consumption of alcoholic beverages or other drugs off the defendant's premises, when the person misrepresents such consumption or the amount of such consumption, unless the defendant's service to such person qualifies as reckless under RSA 507-F:5.

VII. A defendant is not under a duty to recognize signs of a person's intoxication other than those normally associated with the consumption of alcoholic beverages except for intoxication resulting in whole or in part from other drugs consumed on defendant's premises with defendant's actual or constructive knowledge.

Source. 1986, 227:11. 1990, 255:17. 1993, 48:18, eff. Jan. 1, 1994.

Section 507-F:5

507-F:5 Reckless Service of Alcoholic Beverages. –

I. A person who becomes intoxicated may bring an action against a defendant for serving alcoholic beverages only when the server of such beverages is reckless. The service of alcoholic beverages is reckless when a defendant intentionally serves alcoholic beverages to a person when the server knows, or a reasonable person in his position should have known, that such service creates an unreasonable risk of physical harm to the drinker or to others that is substantially greater than that which is necessary to make his conduct negligent.

II. A defendant who recklessly provides alcoholic beverages to another is liable for resulting damages.

III. Specific serving practices that are admissible as evidence of reckless conduct include, but are not limited to, the following:

(a) Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages.

(b) Service of alcoholic beverages to a person, 16 years of age or under, when the server knows or should reasonably know the patron's age.

(c) Service of alcoholic beverages to a patron that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning.

(d) The active assistance by a defendant of a patron into a motor vehicle when the patron is so intoxicated that such assistance is required, and the defendant knows or should know that the intoxicated person intends to operate the motor vehicle.

Source. 1986, 227:11, eff. July 1, 1986.

Section 507-F:6

507-F:6 Responsible Business Practices Defense. –

I. Service of alcoholic beverages is not negligent or reckless if the defendant, at the time of the service, is adhering to responsible business practices. Responsible business practices are those business policies, procedures, and actions which an ordinarily prudent person would follow in like circumstances.

II. The service of alcoholic beverages to a person with actual knowledge that such person is intoxicated or is a minor is not a responsible business practice. Evidence of responsible business practices pursuant to this section is relevant to determining whether a defendant who does not have such actual knowledge should have known of the person's intoxicated condition or age.

III. With respect to service to intoxicated persons, evidence of responsible business practices may include, but is not limited to, comprehensive training of the defendant and the defendant's employees and agents who are present at the time of service of alcoholic beverages and responsible management policies, procedures, and actions which are in effect at the time of such service.

IV. With respect to service to intoxicated persons, evidence of comprehensive training includes, but is not limited to, the development of knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. Such training shall be appropriate to the level and kind of responsibility for each employee and agent to be trained.

V. With respect to service to intoxicated persons, evidence of responsible management policies, procedures, and actions may include, but is not limited to, those policies, procedures, and actions which:

(a) Encourage persons not to become intoxicated if they consume alcoholic beverages on the defendant's premises.

(b) Promote availability of nonalcoholic beverages and food.

(c) Promote safe transportation alternatives other than driving while intoxicated.

(d) Prohibit employees and agents of defendant from consuming alcoholic beverages while acting in their capacity as employee or agent.

(e) Establish promotions and marketing efforts which publicize responsible business practices to the defendant's customers and community.

(f) Implement comprehensive training procedures.

(g) Maintain an adequate number of trained employees and agents for the type and size of defendant's business.

VI. With respect to service to minors, evidence of responsible business practices may include, but is not limited to:

(a) Management policies which assure the examination of proof of age as required by RSA 179:8, for all persons seeking service of alcoholic beverages who may reasonably be suspected

to be minors.

(b) Comprehensive training of employees who are responsible for such examination regarding the detection of false or altered identification.

VII. Proof of responsible business practices shall be based on the totality of the circumstances, including but not limited to: the availability of training programs and alternative public transportation; the defendant's type and size of business; and the nature of the defendant's previous contacts with the intoxicated person or minor who is served. Evidence of the existence or omission of one or more elements of responsible business practices does not conclusively prove or disprove the responsible business practices defense.

Source. 1986, 227:11. 1990, 255:18, eff. July 1, 1990.

Section 507-F:7

507-F:7 Privileges. –

I. No defendant may be held civilly liable for damages resulting from the refusal to serve alcoholic beverages to any person who:

(a) Fails to show proof of age as required by RSA 179:8; or

(b) Appears to a reasonable person to be a minor; or

(c) Is refused service of alcoholic beverages by defendant in a good faith effort to prevent that person's intoxication.

II. No defendant may be held civilly liable for retaining documents presented as proof of age, provided such retention is for a reasonable length of time in a good faith effort to determine whether the person is of legal age or to notify law enforcement authorities of a suspected violation of law.

III. No defendant may be held civilly liable for using reasonable force to detain a person who is attempting to operate a motor vehicle while intoxicated for a reasonable period of time, necessary to summon law enforcement officers.

IV. This section does not limit a defendant's right to assert any other defense to a civil liability claim otherwise provided by law.

Source. 1986, 227:11. 1990, 255:19, eff. July 1, 1990.

Section 507-F:8

507-F:8 Exclusive Remedy. – This chapter is the exclusive remedy against a defendant for claims by those suffering damages based on the defendant's service of alcoholic beverages.

Source. 1986, 227:11, eff. July 1, 1986.

INDIVIDUAL LIABILITY FOR COMPANY'S FAILURE TO PAY WAGES

By J. Daniel Marr, Esquire

New Hampshire's Wage Statute, RSA 275, imposes liability on employers that permit employees to work, but not get paid. The statute provides for recovery against an employer for the wages due and if the employer willfully and without good cause fails to pay the wages, it could be additionally liable for liquidated damages up to the amount of the unpaid wages; therefore doubling the wages under RSA 275:44(IV). Thereafter the employee, upon success, could recover from the employer a reimbursement of her attorney's fees from the Superior Court under RSA 275:53 (III). When the company does not have the money to pay and an owner/officer does, the employee and his attorneys may seek personal liability.

RSA 275:42(V) states that officers of the corporation or any agents having management of such corporation who knowingly permit the corporation to violate its obligation to pay of wages before or after employment termination would be deemed to be employers of the corporation. In the past, the New Hampshire Department of Labor has interpreted that provision to only deal with corporations. There was a previous Massachusetts decision under a similar Massachusetts statute that would support that. However, since then the case of Cook v. Patient Edu, LLC, 989 N.E.2nd 847 (Mass. 2013) has ruled under the same similar Massachusetts statute that a manager, officer, or agent of an LLC, may be liable to the employee for unpaid wages if he "[c]ontrols, directs, and participates to a substantial degree in formulating and determining policy" of the business entity that results in the violation of the Massachusetts Wage Act. The Supreme Judicial Court of Massachusetts in making that decision focused in on the general definition of employer of a **person having employees in his service**. RSA 275:42(I) generally defines the term employer as any individual, partnership association, joint stock company, trust, corporation, the administrator or executor of an estate of a deceased individual,

or the receiver trustee or successor of any of the same **employing any person**, except employers of domestic labor in the home of the employer or farm labor where less than 5 persons are employed.

In the case of Richmond v. Hutchinson, 149 N.H. 749 (2003), the employer's Chief Operating Officer ("COO") knowingly permitted the employer to violate wage payment statutes and thus the COO was found to be personally liable for the recovery of unpaid wages wherein the COO had responsibility for the employer's day-to-day operations, knew the employer lacked the sufficient funds to meet payroll, and knew of the availability of barter dollars and computer servers to generate funds.

This is an example that may come before any of us in general practice. Our client has been operating a business and either due to changes in the industry or a loss of big client does not have the sufficient cash flow to pay the employees but wants to keep the doors open. He encourages the employees to pull together like he is to work with the promise that their deferred pay will be provided to them as soon as the company has sales they are optimistic will occur in the near future. Employees are not paid on time pursuant to the statute, the company did not get those sale orders, and closes down. The employees may have a claim against that owner or officer who had control over whether to close down the company or not. While the owner or officer may think that the only hope of them getting paid is to keep working, the legal answer is the employees should be laid off. There is a possibility that there might be personal liability to the owner even if the employee comes to you and states that he wants to work for free in the hopes of being paid in the future and signs an agreement to that extent. Your clients are not allowed to **knowingly permit** the employee to work without being timely paid. Different rules may apply if that person is a part owner in the company and depending on the specific circumstances. Also there are still some employees who are under the misguided notion that if they quit while not being paid that they are not entitled to unemployment compensation and therefore continue to work when then employer is not paying them.

PIERCING THE CORPORATE VEIL AND SUCCESSOR LIABILITY FOR TRANSFERRED ASSETS

Individuals may be held liable for the obligations of a New Hampshire corporation or limited liability company if they ignore the formalities and separate identity of the entity, or if they remove assets from the entity before paying creditors. This result is possible under the equitable doctrine of piercing the corporate veil. It is also possible under a theory of successor liability and New Hampshire's Uniform Fraudulent Transfer Act, RSA 545-A.

The New Hampshire Supreme Court has observed, "one of the desirable and legitimate attributes of the corporate form of doing business is the limitation of liability of the owners to the extent of their investment." *LaMontagne Builders, Inc. v. Bowman Brook Purchase Group*, 150 N.H. 270, 275 (2003). The doctrine of piercing the corporate veil is an equitable remedy that circumvents this limitation of liability. A court may pierce the corporate veil, for example, where the owners of the corporation have used the corporate identity to promote injustice or fraud, or where a shareholder "creates a false appearance which causes a reasonable creditor to misapprehend the worth of the corporate obligor." *Peter R. Previte, Inc. v. McAllister Florist, Inc.*, 113 N.H. 579, 582 (1973); *see also Norwood Group v. Phillips*, 149 N.H. 722, 724 (2003); *Mbahaba v. Morgan*, 163 N.H. 561, 569 (2012) (recognizing availability of veil piercing as remedy against member of a limited liability company).

The factors articulated in *Platten v. HG Bermuda Exempted, Ltd*., 437 F.3d 118 128 (1st Cir. 2006), have been employed in the Business and Commercial Dispute Docket ("BCDD") of the New Hampshire Superior Court as a useful framework for analyzing veil piercing claims. In *Platten*, the First Circuit, relying on Massachusetts law, stated that the factors to be considered in determining whether piercing the veil is appropriate may include:

> (1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends (8) insolvency at the time of the litigated transaction; (9) siphoning away of the corporation's funds by dominant shareholder; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud.

Id. at 128.

Application of these factors in *PlasTech Machining & Fabrication, Inc. v. StemTech, Ltd.*, No. 2010-CV-00741 (March 10, 2014), resulted in a sole shareholder being held liable for a judgment entered against his company. In that case, the company operated out of the shareholder's home, but the shareholder could produce no evidence that the company observed even the barest formalities. *Id*. at 2. The entity had no issued shares, no by-laws and no financial records to speak of. *Id*. It could produce no lease for the space it used at the shareholder's home, and the New Hampshire Secretary of State had administratively dissolved it for failing to file annual reports. *Id*. at 2-3. The company's bank account, moreover, showed a series of transactions that lacked any credible explanation but as the personal expenses of the shareholder. *Id*. at 3-4. The shareholder had even opened the bank account using his own Social Security Number rather than an FEIN of the company. *Id*. at 3.

The Court viewed these facts and others as "overwhelming evidence" to support piercing the corporate veil. Most persuasive to the Court was evidence that the shareholder led creditors into believing they were dealing with a corporation, but then took assets of the company at a time when the company was indebted to those creditors. *Id*. at 7-8.

PlasTech is an extreme example of a shareholder's blatant disregard of corporate formalities leading to veil piercing. The far more common scenario that results in individual liability arises when an owner or insider of a company takes assets belonging to the company

before paying company creditors. A number of decisions have issued from the federal courts examining the circumstances under which transfers of assets by those controlling the company can lead to personal liability. *See, e.g.*, *Panther Pumps & Equipment Co., Inc. v. Hydrocraft, Inc*., 566 F.2d 8, 23 (1977); *Explosives Corp. of America v. Garlam Enterprises Corp*., 817 F.2d 894 (1st Cir. 1987); *Minnesota Mining and Manufacturing Company v. Echo Chem, Inc*., 757 F.2d 1256 (Fed. Cir. 1985).

In *Panther Pumps*, for example, the plaintiff obtained a permanent injunction and judgment against Hydrocraft for patent infringement. 566 F.2d at 10-11. Shortly thereafter the owner of Hydrocraft – Beck – caused the company to transfer its inventory to Universal, a new corporation formed by Beck, which immediately began manufacturing the infringing spray system Hydrocraft was enjoined to manufacture. *Id*. The plaintiff moved to add Beck as a defendant to the action under Fed. R. Civ. P. 25(c), which permits the joining of successor entities to an action, even in post-judgment proceedings. *Id*. at 22-23.

The United States Court of Appeals for the Seventh Circuit ruled in the plaintiff's favor. The Court first observed that the property of a corporation is a trust fund for the payment of its debts and that its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. *Id*. at 26. The Court then concluded as follows:

> For $200, Beck became owner of 100% of Hydrocraft's stock. He then proceeded to drain off its only significant asset. At the same time, he caused Hydrocraft to pursue an appeal to this court, seeking reversal of the judgment. If the judgment were reversed, he would pay nothing. If it were affirmed, he would pay also nothing, because he "was not a party" and he had made Hydrocraft judgment- proof. One who attempts fraudulently to evade the judgment of a court does so at his peril. After the entry of judgment in 1970, Beck, by his own acts, made himself successor of Hydrocraft. As such, he acquired not only its assets but its liabilities.

Id. at 28.

The principals articulated in cases like *Panther Pumps* are written into New Hampshire law. Under New Hampshire's Uniform Fraudulent Transfer Act, RSA 545-A, a transfer of a debtor's assets is fraudulent as to an existing creditor of the debtor if the transfer is made to an insider (such as an officer, director or member) for an antecedent debt, the debtor was insolvent at the time of transfer, and the insider has reasonable cause to believe that the debtor was insolvent. RSA 545-A:5, II. Transfers are also fraudulent as to existing creditors if the debtor makes a transfer or incurs an obligation without receiving reasonably equivalent value in exchange and the debtor was insolvent at the time or was made insolvent by the transfer or obligation. RSA 545-A:5, I.

The New Hampshire Fraudulent Transfer Act is powerful not only because creditors can use it to impose direct liability on company insiders who wrongfully take assets without first paying company debts, but it can also be used against third parties who receive the fraudulent transfers.