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## Taking Care of Business and Protecting Maine's Employees: Supervisor Liability for Employment Discrimination Under the Maine Human Rights Act

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sor and if the employer has a defense, then you have someone who has no remedy whatsoever. That is a dangerous thing for us to do. Our Constitution says that everyone should have a remedy.<sup>234</sup>

In conjunction with a desire to hold the actual wrongdoer responsible, this concern about the sexual harassment “loophole” may have ensured the demise of L.D. 1599.<sup>235</sup> After very limited discussion, the House rejected the bill on June 8, 2001, and the Senate followed suit on June 11.

#### IV. A PLEA TO THE MAINE LEGISLATURE

As noted in Part I, the goal of this Comment is to encourage the Maine Legislature to clarify the language of the Maine Human Rights Act so that the Law Court will not have to guess at what the original drafters intended the next time they are asked to decide whether individuals are subject to liability. The clarification is necessary because the Act’s language is undeniably ambiguous. Proponents of individual liability can be counted on to assert that there is nothing ambiguous about language that imposes liability on “any person acting in the interest of any employer . . . .” The fact that every federal circuit and nearly half of the states have found that similar or, in some cases, identical language does not provide for individual liability, however, indicates that there is more than one way to read the “any person” clause.<sup>236</sup>

In addition, *Gordan I* has lead to inconsistent interpretations of the Maine Human Rights Act. Remaining faithful to federal precedent, the Federal District Court for the District of Maine recently held that a supervisor could *not* be held liable for employment discrimination under the Maine Human Rights Act.<sup>237</sup> The

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234. Legis. Rec. H-1370 (2000) (This volume of the Legislative Record is not yet bound; but the debate can be found in the loose-leaf records on June 8, 2001).

235. Recently, United States District Court Judge George Z. Singal suggested some other reasons that L.D. 1599 may have failed. Rejecting plaintiff’s argument that the Maine Legislature’s rejection of L.D. 1599 indicated an intent to impose individual liability, Judge Singal noted:

Other explanations of the legislature’s decision are equally plausible . . . . For example, because the first *Gordan* opinion was withdrawn, and no Law Court precedent currently authorizes individual liability under the [Maine Human Rights Act], a majority of legislators simply may have deemed revision unnecessary. Moreover, the dissenting justice in *Gordan* cautioned that misconstruing the [Maine Human Rights Act’s] “any person” clause would “eliminate[] the statutory basis for agency liability under the Act.” *Gordan*, 2000 ME at ¶ 51. In light of this admonition, many legislators may have been reluctant to excise the “any person” language for fear of throwing the proverbial baby out with the bathwater. In light of these and other competing explanations, the legislature’s refusal to change the statute is inconclusive.

*Gough v. E. Me. Dev. Corp.*, 172 F. Supp. 2d 221, 226 (D. Me. 2001).

236. See *supra* notes 205-207.

237. In *Gough v. E. Me. Dev. Corp.*, 172 F. Supp. 2d 221, 227 (D. Me. 2001), plaintiff Gough alleged that her employer and supervisor discriminated against her on the basis of her depression and other related impairments. *Id.* at 222. She filed suit against both her employer and her individual supervisor under the Maine Human Rights Act. *Id.* at 223. After reviewing the litany of federal precedent disallowing individual liability, Judge Singal addressed plaintiff’s argument that *Gordan I* is evidence that the Law Court would hold individuals liable under the Maine Human Rights Act. He rejected her argument, asserting:

Plaintiff exaggerates the certainty of the Law Court’s position . . . . The withdrawn opinion was a 3-2 decision, with a vigorous dissenting argument that there was no

Maine Human Rights Commission, however, recently found that there were "reasonable grounds" to believe that a supervisor engaged in sexual harassment and violated the Act.<sup>238</sup> State courts have not yet been presented with the issue; how they will rule when the question comes up is anybody's guess. Until the language of the Act is clarified, employers and supervisors will remain in a precarious position, subject to liability of unknowable breadth and cost.

The Maine Human Rights Act's goals are, in short, to eradicate discrimination in the workplace and to compensate victims of discrimination.<sup>239</sup> The ultimate question, then, is whether individual liability does anything to bring Maine closer to achieving these goals.

#### *A. Eliminating Discrimination in the Workplace*

Proponents of individual liability, including the majority in *Gordan v. Cummings*, argue that imposing liability on individuals is the best way to eliminate discrimination in the workplace, presumably because the threat of personal liability will deter discriminatory behavior.<sup>240</sup> This argument is flawed because it assumes that employer liability is insufficient and that supervisors who are not individually liable will have no (or not enough) incentive to avoid discriminating. As the Eighth Circuit has asserted, however, "employees who unlawfully discriminate against their fellow employees, and who thereby expose their employer to liability, do not get anything like a 'free pass' to continue their wrongdoing with impunity."<sup>241</sup> On the contrary, employers can be counted on to terminate or at least discipline discriminating supervisors whose actions lead to lawsuits.

Moreover, a supervisor whose discriminatory conduct results in a judgment against the employing entity has more to fear than disciplinary action or termination. The employer, who has been held vicariously liable, may pursue a common law claim, such as breach of duty of care or loyalty, against the discriminating supervisor.<sup>242</sup> There is, therefore, a significant common law financial deterrent that discourages supervisors from discriminating against employees. Supervisors who discriminate risk unemployment and employer-initiated lawsuits even if they are not statutorily liable under the Maine Human Rights Act. Thus, statutory liability for supervisors is really unnecessary to deter discrimination.

Not only is individual liability unnecessary as a deterrent, it may actually frustrate the Maine Human Rights Act's goal of eliminating discrimination. The "chilling effect" discussed in Part III poses a very real threat to effective business deci-

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reason to distinguish the [Maine Human Rights Act] from federal precedent . . .

More importantly, whatever its motivation, the Law Court deemed it prudent to withdraw the earlier opinion. This Court respects the Law Court's demonstration that it is not yet prepared to rule on this issue and will not second guess its decision by resurrecting the withdrawn opinion as precedent.

*Id.* at 226 (citation omitted).

238. Maine Human Rights Commission Minutes, Feb. 25, 2002, available at <http://www.state.me.us/mhrc/02MINUTES/Feb02minutes.htm> (last visited Apr. 17, 2002).

239. See 5 M.R.S.A. § 4552 (1989 & Supp. 2001).

240. See *Gordan v. Cummings I*, 2000 ME. 68, ¶ 20 (withdrawn).

241. *Lendhardt v. Basic Inst. of Tech.*, 55 F.3d 377, 381 (8th Cir. 1995).

242. See RESTATEMENT (SECOND) OF AGENCY § 401 (1958). "An agent is subject to liability for loss caused to the principal by any breach of duty." *Id.*

sion-making; it also encourages supervisors to engage in "reverse discrimination."<sup>243</sup> Fearful of personal liability or of having to defend oneself in a discrimination suit, supervisors charged with making hiring, firing, promotion, or relocation decisions will be less likely to make merit-based decisions that adversely affect members of protected classes. For obvious reasons, supervisors who make decisions solely to avoid personal liability are not acting in the best interests of their employers. This result is clearly bad business. More importantly, however, it undermines the Maine Human Rights Act's goal of creating a "level playing field" among employees regardless of race, gender, religion, or age.

The Maine Human Rights Act subjects "employers" to liability because its focus is on eliminating discrimination in the employment relationship. A non-"employer" individual cannot violate the Act by engaging in discriminatory behavior, no matter how abhorrent that behavior is. Individuals who do not allow African-Americans into their homes do not violate the Maine Human Rights Act. This is because the Act is not attempting to eliminate individual prejudices, but rather discrimination that is enabled by the employment relationship. Employers, by formulating anti-discrimination policies and enforcing them and by teaching their employees that discrimination will not be tolerated, are in the best position to evaluate the existence of, and then eliminate discrimination in, the workplace. The best way to eliminate employment discrimination and to ensure that supervisors make valid business decisions without fear is to hold employers vicariously liable for the discriminatory acts of their supervisors.

#### *B. Compensating Victims of Employment Discrimination*

There are only two situations where plaintiffs may not be able to recover from the employing entity, leaving them without a remedy if individual liability is disallowed: 1) if the employing entity is bankrupt or insolvent, or 2) if the employing entity successfully raises the *Faragher* defense. Neither of these situations warrants an across the board imposition of individual liability.

Where the employing entity is bankrupt or insolvent, imposition of individual liability is unlikely to provide the discrimination victim with relief. The supervisor who engaged in the discrimination may be jobless as a result of the employer's bankruptcy. If still employed, the supervisor, probably a mid-level manager, will likely be judgment-proof. Thus, in the unlikely event that the employing entity is insolvent, resort to the assets of the individual supervisor will rarely be helpful.

The hostile work environment sexual harassment *Faragher* defense that so concerns proponents of individual liability poses a different, more complicated, problem. If Maine adopts the *Faragher* defense, victims of employment discrimination may be without a remedy where the employer had a valid anti-harassment policy in place and the victim failed to take advantage of that policy. A rule that encourages employers to adopt anti-harassment policies and demands that victims of sexual harassment report supervisors' inappropriate behavior before hiring lawyers is appealing. There are, however, other considerations that counsel against adopting this affirmative defense.

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243. Reverse discrimination refers "to the practice of excluding a classification or race of people who have not been historically discriminated against, usually whites, from positions that are made available exclusively to persons or groups that have traditionally been the subject of discrimination . . . ." BARRON'S DICTIONARY OF LEGAL TERMS 429 (3d ed. 1998).

First, the *Faragher* defense is somewhat of a pitfall for the unwary. Most victims of discrimination do not read statutes and case law. They will, therefore, have no idea that in order to pursue a discrimination claim later, they will have to complain about the harassment now. Moreover, hostile work environment sexual harassment can be humiliating for the victim, particularly in cases of same-sex harassment. Harassment victims may be reluctant to report a supervisor's behavior because they are embarrassed or because they fear retaliation on the part of the employer.

Perhaps most troubling is the fact that an employer could comply with the demands of the *Faragher* defense and still discourage employees from complaining about harassment. As Catherine Fisk and Erwin Chemerinsky point out, an employer receiving a complaint from an employee might say:

I can't promise you that the investigation will preserve your anonymity. [(This is a true statement.)] Nor can I promise you that we'll discipline the alleged harasser, because we might conclude that the allegations of harassment aren't well-founded or that the incidents were so minor that discipline is unwarranted. [(This is also true and permissible.)] Thus, it's possible that at the end of all this, you'll still be working for the person whom you say harassed you, that he'll know you registered a complaint against him, and that he'll hold a grudge against you. [(This is also true.)].<sup>244</sup>

If the employer investigates the supervisor and finds no wrongdoing, the victim will return to a very uncomfortable work environment, where the offending supervisor likely knows that the victim filed a complaint. It is not unlikely that, in the face of such an uncomfortable possibility, victims of harassment would choose to tolerate the harassment and forego the complaint procedure. If these same victims later changed their minds and decided to file suit, the elements of the *Faragher* defense would be met and the victims would be left without a remedy.

For these reasons, this Author suggests that the Maine Legislature close the sexual harassment "loophole" and expressly reject the *Faragher* defense when it redrafts the Maine Human Rights Act. Hostile work environments, like other forms of employment discrimination, will sometimes be beyond the employing entity's control. As with other forms of discrimination, however, the employer is in the best position to devote resources to hiring, supervision and training that will undercut sexual harassment and abuse in the workplace.

The *Ellerth* Court created the *Faragher* defense because it found that neither the "scope of employment" nor the "aided by the agency relation" principles supported vicarious liability.<sup>245</sup> There is another agency principle, however, that supports imposing liability on employers for hostile work environment sexual harassment that is outside the scope of employment and does not result in a tangible job detriment. The Restatement (Second) of Agency provides that employers are subject to liability for torts committed by agents when the agents' conduct "violate[s] a non-delegable duty" of the employer.<sup>246</sup> Justin S. Weddle writes:

A non-delegable duty is an affirmative duty of care that cannot be discharged merely by non-negligently delegating another person to perform the duty. . . . If

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244. Catherine Fisk & Erwin Chemerinsky, *Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 788-89 (1999).

245. See generally *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

246. RESTATEMENT (SECOND) OF AGENCY § 219(2)(c) (1958).

the employer appoints, say, a supervisor to inspect the workplace to ensure that it is safe, and the supervisor does not do so, the employer will be liable for its breach of care. The employer's duty is not satisfied by hiring the (qualified) supervisor and directing the supervisor to inspect the workplace. The employer's non-delegable duty is that it itself use care, or that those acting on its behalf use care. The duty remains the same whether the employer itself acts to carry it out or acts through its agents to carry it out.<sup>247</sup>

Employers have a non-delegable duty to provide a safe workplace;<sup>248</sup> why not one free from harassment and abuse? This Author believes that employers have a non-delegable duty to protect their employees from harm, including sexual harassment and abuse, and asks the Maine Legislature to recognize this duty in the Maine Human Rights Act.

If Maine declines to adopt the *Faragher* defense and elects to hold employers vicariously liable for employment discrimination regardless of whether the discrimination culminates in a tangible job detriment, there will be no need for individual liability. Moreover, employers and employees will have a simple rule to work from. The scope of the employer's liability will be defined and employers will have every incentive to monitor the work environments that their supervisors are creating. Finally, if employers are automatically liable for discrimination in the workplace, discrimination claims will more often be resolved by prompt remedial action, rather than devolving into complicated litigation where employer and supervisor attempt to shift responsibility to the other.

## V. CONCLUSION

The costs of imposing liability on individuals for employment discrimination are high. Individual liability complicates the employment relationship by encouraging employers and supervisors to shift responsibility to the other. The focus, then, is not on the existence and eradication of the discriminatory behavior, but on whom should be held responsible for it. Individual liability also reduces employers' incentives to implement effective policies and to quickly remedy discrimination in the workplace. If individual liability is the rule, employers may be better off remaining "in the dark" in order to minimize their liability. Individual supervisors will dread making employment decisions that affect protected classes and they will fear losing their homes and life savings should a court find that one of those decisions was not merit-based. Neither the original drafters of the Maine Human Rights Act, nor the Legislature that this Author hopes will clarify the statute's language, could support such a result.

Individual liability offers no countervailing benefits to offset these high costs. Employers are capable of deterring discriminatory behavior in the workplace through disciplinary action, so individual liability is really unnecessary to deter discrimination. Moreover, employers are more likely to be in a position to satisfy a judgment. In the rare instance that the employer is bankrupt or unable to pay, the discriminating supervisor will likely be judgment-proof. Holding individuals liable will not increase victims' chances of recovering.

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247. Justin S. Weddle, *Title VII Sexual Harassment: Recognizing an Employer's Non-delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724, 743-44 (1995).

248. E.g., *Porter v. Nutter*, 913 F.2d 37, 39 (1st Cir. 1990).

Sound public policy demands that employing entities, not individual supervisors, “own” the discrimination problem in this state. Employers control the culture of the workplace and vicarious liability encourages them to foster a culture where discrimination is unacceptable. Through proper hiring, training, promulgating of antidiscrimination policies, and enforcement of those policies, employers are able to monitor the “big picture” and are thus uniquely situated to influence the workplace culture.

Finally, a rule that holds employers automatically liable when the supervisors that it invests with authority engage in discrimination that either culminates in a tangible job detriment or creates an abusive work environment is both clear and predictable. If the legislature clarifies the Maine Human Rights Act to disallow individual liability, the legal and business communities can stop wondering what the law is and what the Law Court will do with the question when it properly presents itself.

*Katharine I. Rand*