

**FUHRMANN V. STAPLES OFFICE SUPERSTORE EAST,  
INC.: A SPLIT IN THE LAW COURT AS TO THE  
DEFINITION OF “EMPLOYER” DEMONSTRATES  
THE NEED FOR LEGISLATIVE ACTION TO AMEND  
THE MAINE HUMAN RIGHTS ACT IN ORDER TO  
PROTECT MAINE EMPLOYEES**

*Stephen B. Segal*

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*Stephen B. Segal\**

I. INTRODUCTION

In *Fuhrmann v. Staples Office Superstore East, Inc.*,<sup>1</sup> Jamie Fuhrmann submitted a complaint to the Maine Human Rights Commission (Commission) against her former employer, Staples Office Superstore East, Inc. (Staples), and four of her individual supervisors.<sup>2</sup> After the Commission granted her right to sue, she filed a complaint in court alleging whistleblower retaliation under the Whistleblowers’ Protection Act (WPA)<sup>3</sup> and the Maine Human Rights Act (MHRA),<sup>4</sup> as well as sex discrimination under the MHRA.<sup>5</sup> Specifically, Fuhrmann alleged that Staples and her supervisors “unlawfully discriminated against her based both on her status as a woman with children and in retaliation for reporting what she believed to be illegal conduct.”<sup>6</sup> The Superior Court granted Staples’ motion for summary judgment on all counts,<sup>7</sup> and granted the four supervisors’ motions to dismiss on the grounds that individual supervisor liability is not permitted under either the WPA or MHRA.<sup>8</sup>

On appeal, the Maine Supreme Judicial Court, sitting as the Law Court, vacated the grant of summary judgment as to Fuhrmann’s whistleblower claim on the grounds that there was enough evidence to raise a genuine issue of material fact as to why Staples refused to accommodate Fuhrmann’s work schedule.<sup>9</sup> In addition, the Law Court was asked to rule for the first time “whether the MHRA and the WPA provide for individual liability of supervisory employees.”<sup>10</sup>

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1. 2012 ME 135, 58 A.3d 1083.

2. *Id.* ¶ 10.

3. 26 M.R.S.A. § 833(1)(A) (2007).

4. 5 M.R.S.A. § 4572(1)(A) (2013).

5. *Fuhrmann*, 2012 ME 135, ¶ 10, 58 A.3d 1083.

6. *Id.*

7. *Id.* ¶ 11. Fuhrmann alleged in her complaint that after she informed Staples of a “coding discrepancy” she discovered, *id.* ¶ 5, Staples refused to change her employment status from full-time to part-time, *id.* ¶ 8. As a result, she felt forced to resign. *Id.* ¶ 9. In granting Staples its motion for summary judgment, the Superior Court concluded that there was “no causal link between her” report of potential illegal conduct, and Staples’ refusal to change her work schedule. *Id.* ¶ 11.

8. *Id.* ¶ 10.

9. *Id.* ¶ 21.

10. *Id.* ¶ 22. The Law Court had previously addressed the question of individual supervisor liability and ruled that such liability was allowable under the MHRA in a withdrawn opinion. *Gordan v.*

Although the Commission interpreted the MHRA as allowing for “individual supervisor liability for employment discrimination” and argued that the Law Court should hold that the WPA does as well,<sup>11</sup> the Law Court ruled in a 4-3 decision that neither the WPA nor the MHRA provides for individual supervisor liability in employment discrimination claims, and thereby affirmed the supervisors’ motions to dismiss.<sup>12</sup> In coming to its conclusion, the majority reasoned that based on the purpose of both statutes in conjunction with how each defines “employer,” only the business itself is to be held liable for the conduct of its employees.<sup>13</sup> The majority also noted that “[i]f the Legislature had intended to create individual supervisor liability it would have done so explicitly in much clearer terms.”<sup>14</sup> Justice Levy, in writing for the dissent, disagreed that individual supervisor liability could not be maintained under the MHRA because the definition of employer does in fact allow for such liability, and the court “should [also] defer to the reasonable interpretation of the . . . Commission.”<sup>15</sup> The dissent also noted that any policy concerns existent within the “plain language of the statute” should be left to the Legislature to address—not the judiciary.<sup>16</sup>

This Note considers whether the majority in *Fuhrmann* properly concluded that individual supervisor liability is nonexistent under the WPA and MHRA, or if the Law Court should have interpreted the language of the MHRA to provide for such liability and give deference to the Commission’s reasonable interpretation, as the dissent argues. This Note begins in Part II with a brief examination of the purposes of the WPA and MHRA, as well as the function of the Commission as the administering agency of the MHRA. This part will also explore how the court has determined when it is “reasonable” to defer to the interpretation given to a statute by an administering agency. In Part III, this Note analyzes how *Fuhrmann* will clearly prevent plaintiffs from suing the individual wrongdoer(s) in employment discrimination claims. In Part IV, this Note proposes that the Legislature should explicitly declare whether or not the MHRA provides for individual supervisor liability, but until that happens, the court should have deferred to the Commission’s interpretation because it was reasonable. Finally, in Part V, this Note concludes by arguing that the Legislature should declare that individual supervisor liability exists under the MHRA, at least in narrow circumstances, because invoking such liability would be consistent with the overall purposes of the Act: to prevent unlawful employment discrimination and ensure that discriminated employees have suitable recourse.

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Cummings, No. CUM-99-254, 2000 WL 419716 (Me. Apr. 19, 2000), *withdrawn and replaced by* 2000 ME 68, 756 A.2d 942. Because the opinion was not binding on the court, however, the majority chose not to follow its reasoning in the present case. *Fuhrmann*, 2012 ME 135, ¶ 22 n.6, 58 A.3d 1083.

11. *Fuhrmann*, 2012 ME 135, ¶ 31, 58 A.3d 1083.

12. *Id.* ¶ 35.

13. *Id.* ¶ 32.

14. *Id.* ¶ 34.

15. *Id.* ¶ 36 (Levy, J., dissenting). The dissent agreed with the majority, however, in vacating the motion for summary judgment. *Id.*

16. *Id.* ¶ 49.

## II. LEGAL BACKGROUND

A. *The WPA and MHRA*

The Maine WPA is a public policy measure designed to protect an employee from employer retaliation (such as termination from employment) after reporting potential illegal conduct to his employer.<sup>17</sup> Specifically, the Act provides as follows:

No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because: The employee, acting in good faith . . . reports orally or in writing to the employer or a public body what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States.<sup>18</sup>

In order for an employee to come within the Act's protection, he must first report the conduct to his supervisor, thus allowing the employer an opportunity to correct the issue if necessary.<sup>19</sup> The only exception to this general rule is when an employee has "specific reason" to think that reporting the possible violation to the employer will not provide a quick remedy.<sup>20</sup> If an employee follows these requirements and believes that his rights as a whistleblower have been violated, he may file a complaint with the Commission and request that an investigation be conducted.<sup>21</sup> By following this process, the WPA creates "a right to the discharged employee, and a remedial scheme to vindicate that right."<sup>22</sup>

Examples of complaints alleging violations of the Maine WPA have included a factory employee's claim that he was unlawfully discharged after reporting that he smelled "noxious fumes" and believed certain products were being labeled improperly;<sup>23</sup> a nurse's claim that she was unlawfully terminated after informing the hospital that nurses were not receiving breaks during the workday;<sup>24</sup> and a husband and wife's claim that they were unlawfully discharged from their duties as hatcheries after reporting possible environmental violations.<sup>25</sup>

A WPA violation in and of itself does not create a cause of action because the Act "does not itself provide a judicial remedy."<sup>26</sup> Instead, the MHRA allows an employee to pursue a cause of action based on a claim of discrimination as a whistleblower under the WPA:

It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification: For any employer to fail or refuse

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17. *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 156 (Me. 1991).

18. 26 M.R.S.A. § 833(1)(A) (2007).

19. *Id.* § 833(2).

20. *Id.*

21. *Id.* § 834-A. See discussion on procedures before the Commission *infra* Part II.B.

22. *Bard*, 590 A.2d at 156.

23. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257 (1st Cir. 1999).

24. *Roussel v. St. Joseph Hosp.*, 257 F. Supp.2d 280, 283-84 (D. Me. 2003).

25. *Smith v. Heritage Salmon, Inc.*, 180 F. Supp.2d 208, 212 (D. Me. 2002).

26. *Me. Human Rights Comm'n v. Me. Dep't of Def. & Veterans' Servs.*, 627 A.2d 1005, 1007 n.8 (Me. 1993).

to hire or otherwise discriminate against any applicant . . . because of previous actions taken by the applicant that are protected under [the WPA] . . . or, because of those reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment . . . .<sup>27</sup>

In essence, the MHRA seeks to provide remedies to victims who have been subjected to unlawful employment discrimination.<sup>28</sup> In addition to providing protection for those subject to whistleblower retaliation, the Act also prohibits employment discrimination on the bases of race, sexual orientation, sex, disability, religion, age, or national origin.<sup>29</sup> As will be discussed in more depth in Part II.B of this Note, the Commission must first investigate whether there is enough evidence to warrant a finding that the complainant has been subjected to unlawful discrimination.<sup>30</sup> If the Commission concludes that no “reasonable grounds” exist for such a finding, then it has the authority to dismiss the investigation.<sup>31</sup> On the other hand, if the Commission believes that reasonable grounds do exist, it may attempt to settle the issue, file an action in court, or the complainant may request a “right-to-sue” letter from the Commission and pursue litigation himself if the Commission has not “entered into a conciliation agreement” or filed suit itself.<sup>32</sup>

The Maine Legislature has made itself clear through enactment of the WPA and MHRA that its goal is to provide civil remedies for employees who are unlawfully discriminated against. Prior to *Fuhrmann*, however, there remained some question as to who constitutes an “employer” under both the WPA and MHRA. In other words, who may the employee attempt to bring a claim against? The WPA defines an employer as “a person who has one or more employees. ‘Employer’ includes an agent of an employer and the State, or a political subdivision of the State.”<sup>33</sup> An agent is generally defined as “[o]ne who is authorized to act for or in place of another; a representative.”<sup>34</sup> In contrast, the MHRA defines an employer as “any person acting in the interest of any employer, directly or indirectly.”<sup>35</sup> A person is defined under the MHRA as “one or more individuals, partnerships, associations, organizations, corporations, municipal corporations, legal representatives, trustees, trustees in bankruptcy, receivers and other legal representatives, labor organizations, mutual companies, joint-stock companies and unincorporated organizations and includes the State and all agencies

27. 5 M.R.S.A. § 4572(1)(A) (2013).

28. Katharine I. Rand, Comment, *Taking Care of Business and Protecting Maine’s Employees: Supervisor Liability for Employment Discrimination Under the Maine Human Rights Act*, 55 ME. L. REV. 427, 444 (2003) (explaining that the legislative record reveals that the MHRA was enacted in order to replace then existing criminal laws that punished the discriminator).

29. 5 M.R.S.A. § 4572(1)(A).

30. *Id.* § 4612(1)(B).

31. *Id.* § 4612(2).

32. *Id.* § 4612(3)-(4), (6).

33. 26 M.R.S.A. § 832(2) (2007).

34. BLACK’S LAW DICTIONARY 73 (9th ed. 2009). *See also* RESTATEMENT (SECOND) OF AGENCY § 387 cmt. a (1958) (defining an agent as “one who acts on behalf of the principal and only for his benefit”).

35. 5 M.R.S.A. § 4553(4) (2013).

thereof.”<sup>36</sup>

Neither definition of “employer” explicitly allows or prevents suit against an employee’s individual supervisor(s) who committed the alleged discrimination. Complicating matters even more, the legislative history is silent regarding the definitions and does not address whether the Acts are intended to support individual liability or only vicarious liability under the theory of respondeat superior.<sup>37</sup> Although the Legislature was presented with bills in 2001 and 2003 to either explicitly include or exclude individual supervisor liability under the MHRA, the Legislature failed to act in either instance.<sup>38</sup>

*B. The Maine Human Rights Commission and Its Interpretation of “Employer”*

As a result, lower courts have struggled to reach a uniform decision on the matter, but the Commission has spoken in favor of individual supervisor liability for almost two decades. The MHRA provides that the Act shall be carried out by the Commission, which has the central task of investigating claims of discrimination prohibited under the Act, and upon completion of its investigation, the Commission may make recommendations as to the proper course of action moving forward.<sup>39</sup> Among those recommendations, the Commission has the right to appear in court,<sup>40</sup> or file suit in Superior Court on behalf of the complainant.<sup>41</sup> After 180 days have passed since the complaint was filed, and if the Commission has not filed in court or become part of a conciliation agreement, “the complainant may request a right-to-sue letter” to file in court on his own behalf.<sup>42</sup> If the letter is granted, the Commission must conclude its investigation.<sup>43</sup> Furthermore, the complainant may then “file a civil action in the Superior Court against the person or persons who committed the unlawful discrimination.”<sup>44</sup>

Before 1995, the Commission took the position that individual supervisors

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36. *Id.* § 4553(7). The majority in *Fuhrmann* noted that nowhere within the MHRA definition is “supervisor” listed. *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, ¶ 24, 58 A.3d 1083.

37. *See* *Rand*, *supra* note 28, at 444-46 (discussing the lack of legislative history to clarify the definition of employer under the MHRA). For a discussion of the concept of respondeat superior liability, *see* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (defining the concept as one in which “[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment.”).

38. L.D. 1599 (120th Legis. 2001) (proposing that individual liability should be explicitly excluded under the Act); L.D. 523 (121st Legis. 2003) (proposing that individual supervisor liability should be explicitly included under the Act). *See also* *Rand*, *supra* note 28, at 457-61 (discussing the proponents and opponents’ arguments that were raised when L.D. 1599 was put before the House and Senate before it was ultimately voted down); Brief of Maine Human Rights Commission as Amicus Curiae at 17, *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, 58 A.3d 1083 (No. YOR-11-551) [hereinafter Brief of Maine Human Rights Commission] (explaining that L.D. 523 was never voted on by the Legislature).

39. 5 M.R.S.A. § 4566. A complainant must file a charge of discrimination with the Commission within 300 days of the date of accrual. *Id.* § 4611.

40. *Id.* § 4566(8).

41. *Id.* § 4612(4)(A).

42. *Id.* § 4612(6).

43. *Id.*

44. *Id.* § 4621.

could not be held liable under the MHRA.<sup>45</sup> This was a consistent position with the current stance taken generally by the Circuit Courts of Appeals that the definitions of “employer” under federal antidiscrimination statutes such as Title VII of the Civil Rights Act of 1964 (Title VII),<sup>46</sup> the Age Discrimination in Employment Act of 1967 (ADEA),<sup>47</sup> and the Americans with Disabilities Act of 1990 (ADA)<sup>48</sup> do not permit individual supervisor liability because Congress intended to incorporate only vicarious liability under these laws.<sup>49</sup> Nevertheless, the Circuit Courts of Appeals also currently hold generally that the definitions of “employer” under the Family Medical Leave Act of 1993 (FMLA),<sup>50</sup> and the Fair Labor Standards Act of 1938 (FLSA)<sup>51</sup> do allow for individual supervisor liability.<sup>52</sup> The construction of federal employment law by federal courts has been deemed to be a relevant guide to Maine courts interpreting the WPA and MHRA.<sup>53</sup> Yet, federal courts do not unanimously hold that all federal laws governing employment adopt vicarious liability exclusively.<sup>54</sup>

Members of the Commission changed their positions entirely after 1995, and held that individual supervisors *could* be subject to liability under the MHRA.<sup>55</sup> By 2003, the Commission officially adopted this position, which continued through the *Fuhrmann* decision.<sup>56</sup> The Commission has maintained its position even in light of several Maine district court decisions that have expressly held that individual supervisor liability does not exist under the MHRA.<sup>57</sup> Other states, however, have ruled that individual supervisor liability may be maintained under its applicable

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45. Brief of Maine Human Rights Commission, *supra* note 38, at 18.

46. 42 U.S.C. § 2000e(b) (2012) (defining employer as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person.”).

47. 29 U.S.C. § 630(b) (2012) (defining employer as “a person engaged in an industry affecting commerce who has twenty or more employees” and includes “any agent of such a person.”).

48. 42 U.S.C. § 12111(5)(A) (defining employer as “a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person.”).

49. *See Fantini v. Salem State Coll.*, 557 F.3d 22, 30 (1st Cir. 2009); *Roman-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 52 (1st Cir. 2011).

50. 29 U.S.C. § 2611(4) (defining employer as “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees . . . includ[ing] any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.”).

51. *Id.* § 203(d) (defining employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”).

52. *See Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) (reasoning that the Family Medical Leave Act allows for individual liability); *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. 2007) (holding that the general view is that a corporation and its corporate officer may be held jointly and severally liable under the Fair Labor Standards Act); *Haybarger v. Lawrence Cnty. Adult Prob. and Parole*, 667 F.3d 408, 413 (3d Cir. 2012) (holding that the definition of an employer under the Family Medical Leave Act allows for individuals other than the employer to be liable).

53. *See Currie v. Indus. Sec., Inc.*, 2007 ME 12, ¶ 13, 915 A.2d 400 (explaining that the court’s “constru[ing] of the MHRA and [W]PA has [long] been guided by federal law”).

54. For further discussion on this split in the federal realm, *see Mitchell H. Rubinstein, Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 653-57 (2012).

55. *See Memorandum from Commission Counsel on Individual Liability of Supervisors* (Feb. 22, 1995), *reprinted in* Brief of Maine Human Rights Commission, *supra* note 38, Ex. B.

56. Brief of Maine Human Rights Commission, *supra* note 38, at 18.

57. *See Quiron v. L.N. Violette Co., Inc.* 897 F. Supp. 18, 20-21 (D. Me. 1995); *Gough v. E. Me. Dev. Corp.*, 172 F. Supp.2d 221, 224-25 (D. Me. 2001).

antidiscrimination statute.<sup>58</sup> For example, in Washington, the State Supreme Court held that such a construction was logical and appropriate because “enabling employees to sue individual supervisors who have discriminated against them is consistent with the broad public policy to eliminate all discrimination in employment.”<sup>59</sup>

In a withdrawn opinion, the Law Court ruled that individual supervisor liability did exist under the MHRA based on the plain language of the statute, and because “[t]he purpose of the statute is to discourage discrimination, and the best way to achieve that purpose is to hold the actual wrongdoer liable for his or her discriminatory actions.”<sup>60</sup> Upon withdrawal of its opinion, however, the court declined to answer the question of whether individual supervisor liability existed under the MHRA because the plaintiff’s claim was deemed to be moot.<sup>61</sup>

Clearly, there are differing opinions as to whether the definition of “employer” is meant to incorporate individual liability or only vicarious liability under the MHRA. Even the Commission has changed its position over the years despite federal courts’ interpretation of the Act. As discussed in Part II.C of this Note, the Law Court will defer to the interpretation of the administering agency whenever possible.

### *C. How Maine Decides When to Defer to the Interpretation Given to a Statute by an Administering Agency*

When examining the language of a statute, the Law Court first analyzes its “plain meaning.”<sup>62</sup> The court will rule based solely on the language contained in the statute unless it is ambiguous, in which case the court will also look to “the context of the whole statutory scheme to indicia of legislative intent such as the statute’s history and its underlying policy.”<sup>63</sup> A statute may be ambiguous if prone to multiple interpretations that are reasonable.<sup>64</sup> In addition, if the ambiguous statute in question is carried out by an administering agency, the court will uphold the interpretation given to the statute by the agency so long as it is reasonable, and so long as it does not “plainly compel[] a contrary result.”<sup>65</sup> This analysis is similar to the federal standard, where if:

[T]he court determines Congress has not directly addressed the precise question at

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58. *See, e.g.*, *Genaro v. Cent. Transp., Inc.*, 703 N.E.2d 782, 787-88 (Ohio 1999) (holding that for purposes of the Ohio employment antidiscrimination statute, “a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of [the statute.]”); *Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921, 928 (Wash. 2001) (“We hold individual supervisors, along with their employers, may be held liable for their discriminatory acts.”).

59. *Brown*, 20 P.3d at 928.

60. *Gordan v. Cummings*, No. CUM-99-254, 2000 WL 419716 (Me. Apr. 19, 2000), *withdrawn and replaced by* 2000 ME 68, 756 A.2d 942. For quoted material from withdrawn opinion, *see Rand, supra* note 28, at 448-49.

61. *Gordan v. Cummings*, 2000 ME 68, ¶¶ 10-11, 756 A.2d 942.

62. *Kimball v. Land Use Regulation Comm’n*, 2000 ME 20, ¶ 18, 745 A.2d 387.

63. *HL 1, LLC v. Riverwalk, LLC*, 2011 ME 29, ¶ 17, 15 A.3d 725.

64. *Estate of Joyce v. Commercial Welding Co.*, 2012 ME 62, ¶ 12, 55 A.3d 411.

65. *Goodrich v. Me. Pub. Emps. Ret. Sys.*, 2012 ME 95, ¶ 6, 48 A.3d 212.



issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>66</sup>

For example, in *FPL Energy Maine Hydro LLC v. Dep't of Env'tl. Prot.*,<sup>67</sup> the Law Court held that the administering agency's interpretation of an ambiguous statute was reasonable.<sup>68</sup> In that case, the Board of Environmental Protection (Board), which is the administering agency in charge of water quality in the state pursuant to Maine statute,<sup>69</sup> ruled that the statute required FPL to either seek approval from the Environmental Protection Agency (EPA) or follow an alternative review of its tests before continuing its dam project because FPL had implemented a new standard for evaluating water quality.<sup>70</sup> The court reasoned that while the statute was ambiguous based on its plain meaning,<sup>71</sup> the legislative history demonstrated that the Board's interpretation of the statute requiring EPA approval based on the facts was reasonable, and thus, it would defer to the Board's interpretation.<sup>72</sup> While explaining its position in granting great deference to the Board when the interpretation of a statute is reasonable, the court concluded "that the [Board] has greater expertise in matters of environmental concern and greater experience administering and interpreting those particular statutes."<sup>73</sup>

Similarly, in *Watt v. UniFirst Corp.*,<sup>74</sup> the Law Court held that the interpretation given to a provision of the MHRA by the Commission was a reasonable one when both the plain language of the statute and the legislative intent was ambiguous.<sup>75</sup> The plaintiff sought damages from her employer on the basis of sexual harassment at the workplace<sup>76</sup> by a co-worker who was not in a supervisory role.<sup>77</sup> The Commission interpreted the statute to mean that employers are to be held liable not only for sexual harassment claims brought against its supervisors, but also against its other employees.<sup>78</sup> The court upheld the Commission's interpretation on the grounds that legislative intent was unclear, and such an interpretation was "within the particular expertise of the [Commission]."<sup>79</sup> Furthermore, because the rule adopted by the Commission was not arbitrary or contrary to the law, the court agreed to follow its position on this particular issue.<sup>80</sup>

As *FPL Energy Maine Hydro LLC* and *Watt* demonstrate, the Law Court will

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66. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

67. 2007 ME 97, 926 A.2d 1197.

68. *Id.* ¶ 1.

69. 38 M.R.S.A. § 465 (2001 & Supp. 2012).

70. *FPL Energy Maine Hydro LLC*, 2007 ME 97, ¶¶ 6-7, 926 A.2d 1197.

71. *Id.* ¶ 28.

72. *Id.* ¶ 39.

73. *Id.* ¶ 24 (quoting *S.D. Warren Co. v. Bd. of Env'tl. Prot.*, 2005 ME 27, ¶ 5, 868 A.2d 210).

74. 2009 ME 47, 969 A.2d 897.

75. *Id.* ¶ 27.

76. 5 M.R.S.A. § 4572(1)(A) (2013).

77. *Watt*, 2009 ME 47, ¶ 25, 969 A.2d 897.

78. *Id.* ¶ 26.

79. *Id.* ¶ 27.

80. *Id.*

typically defer to an administering agency's reasonable interpretation of an ambiguous statute whenever possible. In addition, these cases indicate that such deference will typically be given to an agency regardless of the particular law it governs. By adhering to such an approach, the court has recognized that when a statute is unclear and the Legislature has not clarified its position, it makes sense for the administering agency to have the first opportunity to carry out the statute as it believes the Legislature intended as opposed to the court assuming that role. Thus, the Law Court has followed a standard in which it will only overrule an agency's interpretation of an ambiguous statute when absolutely necessary under the circumstances.

### III. THE *FUHRMANN* DECISION

#### A. *Factual Background*

While employed at Staples, Fuhrmann, a mother of two children, worked a set Monday through Friday schedule from 8:00 a.m. to 4:30 p.m.<sup>81</sup> In 2006, Fuhrmann was granted her request to be transferred from the South Portland store to the Biddeford store "in order to be closer to her children's new daycare."<sup>82</sup> Approximately one year later, Fuhrmann filed three internal reports with Staples' senior loss prevention manager regarding possible violations of company policy and tax law.<sup>83</sup> The two reports involving violations of company policy ultimately led to disciplinary action for the general manager and operations manager.<sup>84</sup> The third report, which described a potential "coding discrepancy" in the Staples computer system that Fuhrmann believed may constitute a violation of tax law, was confirmed to be accurate following an internal investigation.<sup>85</sup> In November 2007, although neither the senior loss prevention manager nor the district manager were able to determine who in fact had been responsible for the miscoding, the general manager eventually took the blame because of her leadership position at the store.<sup>86</sup>

Also in November 2007, Fuhrmann was informed at a meeting with the general manager and operations manager that she would have to start working nights and weekends sporadically.<sup>87</sup> Although disputed by Staples, Fuhrmann alleged that when she responded that she could not change her set work hours due to her children's daycare schedule and would rather change to part-time status, the general manager denied her request "and told her she had one week to rearrange her schedule."<sup>88</sup> Fuhrmann was ultimately granted an additional month by human resources "to determine if she could work a non-set schedule" in the manner requested of her, but because of her children's daycare hours, Fuhrmann felt forced

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81. *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, ¶ 2, 58 A.3d 1083.

82. *Id.*

83. *Id.* ¶ 4. As for Fuhrmann's belief that tax law(s) had been violated, Staples disputed that such a belief ever existed. *Id.*

84. *Id.*

85. *Id.* ¶¶ 4-5.

86. *Id.* ¶ 6.

87. *Id.* ¶ 7.

88. *Id.* ¶ 8. It is not known for certain whether Staples' management asked other employees to change their schedules in a similar manner as was asked of Fuhrmann. *Id.*

to resign and worked her last day at Staples near the beginning of 2008.<sup>89</sup>

### *B. Procedural History*

After filing an initial complaint with the Commission in April 2008, Fuhrmann was granted authorization by the Commission to sue Staples, as well as her four supervisors consisting of the senior loss prevention manager, general manager, operations manager, and district manager.<sup>90</sup> She sued on the bases of whistleblower retaliation as outlawed under the MHRA and WPA, as well as sex discrimination outlawed under the MHRA, and sought punitive damages.<sup>91</sup> In particular, she claimed that both Staples and the four supervisors retaliated against her “for reporting what she believed to be illegal conduct,” and that they also unlawfully discriminated against her on the basis of being a mother.<sup>92</sup>

Staples and the four individual supervisors filed motions to dismiss; the lower court granted the supervisors’ motions on the grounds that individual supervisor liability does not exist under the WPA or MHRA.<sup>93</sup> Although Staples was denied its motion to dismiss,<sup>94</sup> it later prevailed on its motion for summary judgment on all counts, and with regard to the whistleblower retaliation claim, the lower court “concluded that the evidence showed that there was no causal link between her internal report about the miscoding of items for donation and the request that she change her work schedule.”<sup>95</sup> Fuhrmann appealed to the Law Court with regard to her claims against both Staples and her supervisors.<sup>96</sup>

### *C. Arguments*

On appeal, Fuhrmann first argued that the court erred when it granted summary judgment in favor of Staples because there remained a genuine issue of material fact as to the cause of her forced resignation.<sup>97</sup> Next, she argued that Maine should recognize individual supervisor liability under the MHRA because it “was not intended to preclude individual supervisors from the definition of ‘employer.’ The plain language of the statute bears this out.”<sup>98</sup> She pointed to the relevant provision of the MHRA defining “employer” to support this argument,<sup>99</sup> as well as to the fact that the MHRA explicitly exempts State of Maine employees from paying punitive damages arising from claims against them that occurred

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89. *Id.* ¶ 9.

90. *Id.* ¶ 10. The action was filed in court in October 2009. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* ¶ 11.

96. *Id.* ¶ 12.

97. Amended Brief of Appellant at 13, *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, 58 A.3d 1083 (No. YOR-11-551). For further argument made by Fuhrmann that the Superior Court erred in granting Staples its motion for summary judgment, *see id.* at 10-20.

98. *Id.* at 21.

99. “[A]ny person in this State employing any number of employees, . . . any person acting in the interest of any employer, directly or indirectly.” 5 M.R.S.A. § 4553(4) (2013).

during the scope of their employment.<sup>100</sup>

The converse, then, is also true: that non-governmental individual employees, acting within the course or scope of employment, can be held liable for punitive damages *personally*. It appears intuitive that if individual liability for private employees was not contemplated by the MHRA, then there would be no need to exempt public employees from claims involving punitive damages.<sup>101</sup>

Furthermore, Fuhrmann urged the court to consider the reasoning from its prior withdrawn opinion in 2000 which had held that individual liability did exist under the MHRA.<sup>102</sup> Lastly, recognizing that Maine had never ruled as to whether individual liability exists under the WPA, Fuhrmann concluded that because a claim under the WPA may only be brought through the MHRA, then individual liability must exist under the Act as well based on the same reasoning.<sup>103</sup>

The Commission submitted an amicus curiae brief in support of Fuhrmann's position, noting its agreement with Fuhrmann that the MHRA is unambiguous because the "plain meaning" of the Act permits individual supervisor liability.<sup>104</sup> The Commission further argued that individual supervisor liability makes sense because it goes in line with the main purpose of the Act—to stop unlawful discrimination, especially in the employment setting.<sup>105</sup> It also contended that the MHRA definition of "employer" should be construed in the same light as the FMLA and FLSA definitions (which federal courts have generally found permit individual supervisor liability) because the wording is significantly similar, unlike the Title VII, ADEA, and ADA definitions (which federal courts have generally found do *not* permit individual supervisor liability) which do not contain similar wording.<sup>106</sup> Furthermore, the Commission argued that even if the Law Court were to find that the language of the Act was ambiguous, it should defer to the reasonable interpretation of the Commission as the Act's administering agency.<sup>107</sup> The Commission concluded by arguing that the plain meaning of the WPA also permits individual supervisor liability.<sup>108</sup>

In contrast, Staples argued that the Superior Court did not err by granting its motion for summary judgment for a number of reasons.<sup>109</sup> The individual supervisors then argued that the Law Court should decline to answer the question

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100. *Id.* § 4613(2)(B)(8)(i).

101. Amended Brief of Appellant, *supra* note 97, at 22.

102. *Id.* at 23.

103. *Id.* at 24.

104. Brief of Maine Human Rights Commission, *supra* note 38, at 4-6.

105. *Id.* at 6-7.

106. *Id.* at 10-12.

107. *Id.* at 17-18.

108. *Id.* at 19. The Maine Employment Lawyers Association (MELA) also submitted an amicus curiae brief in support of Fuhrmann, arguing that deference should be given to the Commission's interpretation. Brief of Maine Employment Lawyers Association as Amicus Curiae at 2-4, Fuhrmann v. Staples Office Superstore East, Inc., 2012 ME 135, 58 A.3d 1083 (No. YOR-11-551) [hereinafter Brief of MELA]. MELA also argued that even if the Act's definition of "employer" sets forth respondeat superior liability, it does not preclude individual supervisor liability, *id.* at 7-9, and that public policy supports the allowance of supervisor liability under the Act, *id.* at 9-14.

109. Brief of Appellees at 20-41, Fuhrmann v. Staples Office Superstore East, Inc., 2012 ME 135, 58 A.3d 1083 (No. YOR-11-551).

of whether individual supervisor liability exists under the MHRA or WPA because the issue was moot in light of Staples' favorable motion for summary judgment, but should the court choose to rule on the issue, it should hold that "there is no potential liability for any of the individual defendants under the MHRA or [WPA]." <sup>110</sup> Because the court generally looks to federal case law interpretation of federal anti-discrimination statutes, the individual defendants pointed to the fact that every Circuit Court of Appeals found that individual supervisor liability did not exist under Title VII, the ADA, or the ADEA. <sup>111</sup> In addition, the individual defendants noted that all trial courts in Maine that have dealt with the definition of "employer" under the MHRA and WPA have found that it does not allow for individual supervisor liability. <sup>112</sup> The defendants also argued that the prior withdrawn opinion in 2000, which had originally held that individual liability could be maintained under the MHRA, should not receive any weight in the court's determination because, *inter alia*, "it[] [is] not controlling precedent here, or indeed precedent at all." <sup>113</sup>

The Maine State Chamber of Commerce and other Maine trade and business associations submitted an amici curiae brief in support of the individual defendants' positions, contending that neither the MHRA nor WPA allow for individual liability, and it has been "well-settled law upon which Maine employers have long relied." <sup>114</sup> The organizations further argued that if individual liability were allowed, it would "handicap[] the Maine economy," and "supervisory employees would fear potential civil liability in nearly every aspect of performing their supervisory functions . . . [and] would fundamentally alter the way supervisors perceive and perform the everyday responsibilities of their jobs." <sup>115</sup> As a result, when supervisors consider taking action that could be perceived as discriminatory when in fact it is not, they will consciously choose not to act to ensure that they do not later get personally sued for those decisions, rather than act for the benefit of their employer's interest. <sup>116</sup>

#### *D. Decision of the Law Court*

The Law Court began by vacating the summary judgment motion as it pertained to Fuhrmann's WPA claim because there was enough evidence to generate a genuine issue of material fact as to why Staples changed Fuhrmann's schedule. <sup>117</sup> It then proceeded to affirm the individual defendants' motions to dismiss by a vote of 4-3 on the grounds that neither the WPA nor MHRA permit individual supervisor liability. <sup>118</sup> In coming to its ruling, the majority first looked

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110. *Id.* at 42 (citations omitted).

111. *Id.* at 45-46.

112. *Id.* at 46.

113. *Id.* at 47.

114. Amici Brief of Maine State Chamber of Commerce and Other Maine Business and Trade Associations at 2, *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, 58 A.3d 1083 (No. YOR-11-551).

115. *Id.* at 5.

116. *Id.* at 9.

117. *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, ¶ 21, 58 A.3d 1083.

118. *Id.* ¶ 35.

to the definitions of “employer” under the WPA and MHRA,<sup>119</sup> and noted that while the definitions were not identical, “they both identify the same person, because an agent of an employer is by definition a person who acts in the employer’s interest.”<sup>120</sup> Because it was not clear from the plain meaning whether the Acts provided for vicarious liability and/or individual supervisor liability, the majority deemed the language to be ambiguous and proceeded to look to legislative intent for interpretation.<sup>121</sup>

The majority began by declining to determine legislative intent based on federal cases interpreting federal anti-discrimination statutes because “[r]elying on either strain of federal law to the exclusion of the other would ignore our long-standing instruction to read seemingly contradictory statutes in a way that leaves the efficacy of both intact and achieves a harmonious result.”<sup>122</sup> In addition, the majority found the legislative history to be of little assistance, and therefore, looked to the Commission’s interpretation as the administering agency of the MHRA.<sup>123</sup>

In assessing the reasonableness of the Commission’s interpretation of the Acts as permitting individual supervisor liability, the majority held that such an interpretation was not in accord with the intent of the Legislature.<sup>124</sup> Both Acts purport to provide an employee with recourse against unlawful discrimination, but when reading the definition of “employer” under either Act “in light of those purposes . . . [they] are meant to hold the principal/employer liable for acts of its agents/employees.”<sup>125</sup> The majority went on to explain that the Acts are intended to hold only the employer liable because only it “[has] the power and resources to remedy discrimination by implementing antidiscrimination policies, reinstating employees, or paying penalties. The remedies and penalties expressly established in the MHRA are indicative of the Legislature’s understanding of that fact, as they are clearly designed to apply to employers, not individual supervisors.”<sup>126</sup> Thus, if it were the intent of the Legislature to incorporate individual supervisor liability into the MHRA, “it would have done so explicitly in much clearer terms.”<sup>127</sup>

Although the dissent concurred in vacating Staples’ motion for summary judgment, it disagreed that the MHRA does not provide for individual supervisor liability for three reasons.<sup>128</sup> First, the plain language of the definition of “employer” under the MHRA and WPA is unambiguous and allows an employee to sue his individual supervisors,<sup>129</sup> as the dissent reasoned that it is clear that “the

119. *Id.* ¶ 24.

120. *Id.* ¶ 25.

121. *Id.* ¶ 26.

122. *Id.* ¶ 27.

123. *Id.* ¶¶ 28-29.

124. *Id.* ¶ 31.

125. *Id.* ¶ 32.

126. *Id.* ¶ 33 (citations omitted). Such remedies cited by the majority include “a cease-and-desist order; an order to employ or reinstate the victim with or without back pay; civil penal damages for employers with fourteen or fewer employees; and, for employers with more than fourteen employees, compensatory and punitive damages commensurate to the size of the employer.” *Id.* (citing 5 M.R.S.A. § 4613(2)(B)(1)-(2), (7)-(8) (2013)).

127. *Id.* ¶ 34.

128. *Id.* ¶ 36 (Levy, J., dissenting).

129. *Id.* ¶¶ 37, 39.

injured party may file suit against any individual responsible for the unlawful discrimination.”<sup>130</sup> Second, the definition of “employer” under the MHRA should be read in light of the entire statutory scheme, and by refusing to recognize individual supervisor liability, the majority ignores the Act’s provision regarding punitive damage awards against a state employee (as Fuhrmann argued).<sup>131</sup> Finally, the dissent urged the court to “exercise restraint and defer to that interpretation [given by the Commission] because it is reasonable and because the MHRA does not compel a contrary interpretation.”<sup>132</sup> In particular, Justice Levy acknowledged that while several of the specific remedies cited by the majority would only apply to employers, the majority ignored the instructions of the Legislature to select an “*appropriate* remedy from the optional, nonexhaustive list provided by the statute.”<sup>133</sup> Also, the Commission’s interpretation furthers the purpose of the Act by allowing an employee to sue both his employer and the individual wrongdoer.<sup>134</sup>

#### IV. ANALYSIS

##### A. *The Likely Consequences of Fuhrmann*

The *Fuhrmann* decision definitively restricts an employee from suing his individual supervisor(s) under the MHRA or WPA when claiming employment discrimination. Although the Commission had maintained a consistent position since 2003 that such liability did exist under the MHRA, the Law Court chose to adopt the opposite position on the grounds that the Commission’s interpretation was unreasonable as evidenced by the overall purposes of the Act to only allow for vicarious liability. As a result, not only will employees be prevented in the future from bringing whistleblower and sex discrimination claims against their supervisors (as Fuhrmann had done), but they will also be prevented from bringing any other claim of unlawful discrimination against their supervisors under the MHRA, including on the bases of race, sexual orientation, disability, religion, age, or national origin.<sup>135</sup>

Employees will now only have one party—their employer—to seek recourse against when alleging unlawful discrimination in the workplace. In some situations, dismissal will be the proper outcome as the employee may not have a

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130. *Id.* ¶ 38.

131. *Id.* ¶ 41. “Punitive damages may not be included in a judgment or award . . . against an employee of a governmental entity based on a claim that arises out of an act or omission occurring within the course or scope of that employee’s employment.” 5 M.R.S.A. § 4613(2)(B)(8)(i) (2013) (emphasis added).

132. *Fuhrmann*, 2012 ME 135, ¶ 43, 58 A.3d 1083.

133. *Id.* ¶ 44. When a court finds that unlawful discrimination has occurred, it “must specify an appropriate remedy or remedies . . . [and those] remedies may include, but are not limited to . . .” 5 M.R.S.A. § 4613(2)(B).

134. *Fuhrmann*, 2012 ME 135, ¶ 47, 58 A.3d 1083.

135. Commission Counsel interprets the *Fuhrmann* decision much more narrowly, arguing that individuals may still be liable for their actions in employment discrimination claims that do not involve the WPA or 5 M.R.S.A. § 4553(4). Memorandum from John Gause, Commission Counsel, Maine Human Rights Commission, to Commission Staff on Individual liability after *Fuhrmann v. Staples* (Apr. 11, 2013), available at [http://www.maine.gov/mhrc/guidance/memo/20130411\\_g.pdf](http://www.maine.gov/mhrc/guidance/memo/20130411_g.pdf).

valid claim to raise a genuine issue of material fact against his employer. On the other hand, if one of the purposes of the MHRA is to combat unlawful discrimination, and the court has the power to provide an “appropriate remedy” based on the circumstances, it logically follows that it may make sense in some situations to hold individual supervisors liable for their illegal conduct if such a remedy is deemed appropriate.

While the majority in *Fuhrmann* rightfully concluded that the definitions of “employer” under the MHRA and WPA are ambiguous, it should have deferred to the Commission’s interpretation because such a construction was reasonable and did not plainly compel a contrary result. Moreover, the Legislature should be called upon to clarify whether the MHRA provides for individual supervisor liability. Upon doing so, the Legislature should declare once and for all that individual supervisor liability exists under the MHRA in narrow circumstances because such a construction supports the purposes of the Act, and provides an employee the option of recovery from his supervisor when appropriate.

*B. The Fuhrmann Majority Should Have Adopted the Commission’s  
Interpretation of “Employer” Because It Was Reasonable*

The majority in *Fuhrmann* correctly found that the definitions of “employer” under both the MHRA and WPA are ambiguous based on its plain meaning. For instance, nowhere within the MHRA definition does one find the word “supervisor,” but the definition does include a “person” who acts on behalf of an employer. The definition of a person includes an “individual.” Is an individual synonymous with a supervisor? In addition, the majority properly declined to clarify these ambiguities by examining the interpretations given by the Circuit Courts of Appeals to federal antidiscrimination statutes because these courts do not hold that all five statutes identified in Part II.B of this Note only incorporate vicarious liability. The language under the WPA reads similarly to the federal statutes deemed to only allow vicarious liability, while the language under the MHRA reads similarly to those statutes deemed to allow individual liability. Considering the MHRA authorizes a cause of action under the WPA, favoring one federal interpretation over the other would not achieve the court’s rightful desire for a “harmonious result.”

The majority then purported to apply its highly deferential standard to the Commission’s interpretation of the MHRA as the administering agency, much like it has done in other contexts involving administering agencies, as seen in *FPL Energy Maine Hydro LLC and Watt*. In this case, however, the majority clearly showed no such deference to the Commission, and instead, declined to adopt its position on the grounds that employers are best suited to discipline its supervisory employees, and the Legislature clearly meant to only incorporate vicarious liability based on the specific remedies noted in the Act. As the dissent correctly pointed out, this reasoning is flawed because the remedies section is not an exhaustive list—the court has the power to implement “appropriate” remedies not otherwise listed. Thus, the remedies section does not clarify legislative intent.

Furthermore, if the majority had been applying its typical test for reasonableness in relation to an administering agency’s interpretation of an



ambiguous statute, it should have found that the Commission's interpretation in this case was reasonable because it did not "plainly compel a contrary result." In other words, it could not be said that the Commission's interpretation was so obviously the opposite of what the Act could allow for. Unlike *Watt*, where the court deferred to the Commission's interpretation in part because of legislative intent being unclear, the majority attempted to clarify legislative intent itself rather than leaving that to the job of the Commission. Analogizing to the federal standard outlined in *Chevron*, the majority did not need to impose its own construction of the statute, because the interpretation given by the Commission was based on a permissible construction of the statute. Moreover, as the dissent correctly argued, in light of the purposes of the Act to both prevent unlawful employment discrimination and provide victims with suitable remedies, such an interpretation by the Commission could not be said to plainly compel a contrary result.<sup>136</sup> Therefore, the majority should have accepted the position of the Commission on this issue, because as noted in *FPL Energy Maine Hydro LLC* and *Watt*, administering agencies are in a better position than the court to interpret ambiguous statutes.

*C. The Maine Legislature Should Clarify Its Position By Explicitly Declaring That Individual Supervisor Liability Exists Under the MHRA*

As evidenced by the 4-3 split in *Fuhrmann*, the Law Court is divided as to whether the Legislature intended the definition of "employer" to allow individual supervisors to be sued for unlawful discrimination under the MHRA. As noted in Part II.A of this Note, the Legislature had opportunities in 2001 and 2003 to clarify its position on this issue but declined to do so. Nevertheless, the time has come for a new bill to be brought forth to the Legislature to explicitly declare whether an individual supervisor may be sued under the Act. Even if the Legislature were to uphold the ruling in *Fuhrmann*, an explicit declaration would once and for all put an end to the constant debate regarding the wording of the Act that will likely linger despite the *Fuhrmann* ruling.

This Note, however, advocates for the opposite result: the Legislature should proclaim that individual supervisors may in fact be liable for their unlawful acts under the MHRA in narrow circumstances because it goes in line with the purposes of the Act—to prevent unlawful employment discrimination and provide recourse for victimized employees.<sup>137</sup>

Approximately one decade ago, a Comment published in the *Maine Law Review* agreed that the Legislature should clarify its position due to the ambiguity of the language in the Act,<sup>138</sup> but contended that the Act should only allow the

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136. *Fuhrmann*, 2012 ME 135, ¶¶ 46-47, 58 A.3d 1083.

137. In adopting the position of this Note, the Author recognizes that although federal courts have differed in holding for or against individual liability, one commentator argues that "the appellate courts consistently hold that liability should fall solely to the employer, thus prohibiting individual liability, even when the individual is acting as an agent of the employer." Tammi J. Lees, Note, *The Individual vs. The Employer: Who Should Be Held Liable Under Employment Discrimination Law?*, 54 CASE W. RES. L. REV. 861, 863 (2004).

138. Rand, *supra* note 28, at 461.

employer to be sued.<sup>139</sup> First, the author argued that individual liability need not be adopted because “employers can be counted on to terminate or at least discipline discriminating supervisors whose actions lead to lawsuits,” and because such liability would have a ‘chilling effect’ and “pose[] a very real threat to effective business decision-making” (i.e., a supervisor would fear being personally sued for his decisions, and therefore, be more likely to act out of personal interest rather than for the employer’s interest).<sup>140</sup> Much like the majority opinion in *Fuhrmann*, the author assumed that employers will generally discipline its supervisors who commit unlawful discrimination in the workplace, but that is not necessarily true. For instance, there is a higher risk that an employer will not discipline its supervisor(s) if the employer is a family business (e.g., an owner’s son is the individual supervisor who commits unlawful discrimination against an employee). Such an assumption also does not take into account those repeat offender supervisors who violate the MHRA and are either not disciplined at all, or get a “slap on the wrist” and proceed just as before. It simply puts too much faith in employers to consistently discipline its supervisors for their unlawful acts.

As for the “chilling effect” argument, this would seem to be a good thing and promote the purposes of the MHRA because it would make an otherwise discriminatory supervisor conscious of the consequences of his actions (i.e., it prevents unlawful discrimination).<sup>141</sup> Creating such consciousness is simply good policy if the Legislature is serious about preventing all forms of discrimination in the workplace. As one commentator points out, “[p]lacing the blame on the individual discriminator . . . better serves the interests of public policy and justice.”<sup>142</sup> Although a nondiscriminatory supervisor may fear that his actions against an employee could lead to a potential lawsuit against him personally, he need not fear an adverse result if he did not in fact unlawfully discriminate against an employee. In fact, research shows that “juries tend to be more sympathetic to an individual defendant than a corporate defendant and are less likely to assess damages against an individual.”<sup>143</sup> Plus, at least in the corporate context, directors (and officers acting as directors) of a corporation are typically protected by the highly deferential “business judgment” rule.<sup>144</sup>

The author also argued that while victims may have no recourse if the employer is “bankrupt or insolvent,” or raises the *Faragher* defense,<sup>145</sup> neither

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139. *Id.* at 465.

140. *Id.* at 462-63.

141. MELA correctly countered the “chilling effect” proposition in its amicus brief by also arguing that such an effect could promote a positive result. Brief of MELA, *supra* note 108, at 10.

142. Lees, *supra* note 137, at 881.

143. *Ann E. Employee v. You: Personal Liability and the HR Professional*, EMPLOYMENT PRACTICES SOLUTIONS (Apr. 2005), <http://www.epspros.com/NewsResources/Newsletters?find=13954>.

144. Under the “business judgment” rule, in the absence of fraud, self-interest or otherwise unlawful conduct (among other narrow exceptions), corporate directors will not be held personally liable for their business decisions because it is presumed that they acted in good faith on an informed basis, and reasonably believed that their actions were in the best interests of the corporation. *Rosenthal v. Rosenthal*, 543 A.2d 348, 353-54 (Me. 1988).

145. The *Faragher* defense states that an employer is not to be held liable for unlawful sexual harassment committed by its supervisor(s) when “the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and . . . the complaining employee . . . failed to act

situation would require implementation of individual supervisor liability under the MHRA.<sup>146</sup> I recommend that these are two narrow circumstances in which individual supervisor liability should be imposed. Although assets of an individual supervisor could be limited in some situations, especially where an employer is bankrupt or insolvent, it would at least provide an employee with a *possible* remedy by pursuing a suit against the actual wrongdoer. Such a remedy would be particularly appropriate where an individual supervisor does in fact have the assets to satisfy a court judgment. In response to the *Faragher* defense, which exempts an employer from liability if certain conditions are met when an individual supervisor has committed unlawful sexual harassment against an employee, this seems to be the exact situation in which an employee *should* be able to sue his supervisor in light of the employer exemption. In fact, an employee may prefer to sue the wrongdoing supervisor in such a situation where the unlawful discrimination is as egregious and personal as in the context of sexual harassment. Subsequently, a Maine court would then presumably have discretion to provide an appropriate remedy on a case-by-case basis as it may do in accordance with the remedies provision of the Act.

#### V. CONCLUSION

The majority decision in *Fuhrmann* was the improper ruling, because the Commission's interpretation of the definition of "employer" under both the MHRA and WPA were reasonable and did not plainly compel a contrary result. Therefore, the majority should have upheld the Commission's interpretation (as the dissent would have) and ruled that individual supervisor liability is permitted. Nevertheless, the Legislature should take action and declare definitively that individual supervisor liability does indeed exist under the Act. Such a declaration will not only provide clarity to the Act, which will likely still be debated even in light of the ruling in *Fuhrmann*, but more importantly, will promote the overall purposes of the Act to stop unlawful discrimination at the workplace and provide suitable remedies for victimized employees in appropriate and narrow circumstances, such as in the context of employer insolvency and sexual harassment.

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with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided." *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998).

146. *Rand*, *supra* note 28, at 463.

