STATE OF MAINE
ANDROSCOGGIN, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-13-176
MGK-AND-11-18-14

JANET ENOS,

Plaintiff

v.

ORTHOPEDIC & SPINE PHYSICAL THERAPY OF L/A, INC., and SHAN TEIXEIRA,

Defendants

ORDER

Before the court is Defendant Shan Teixeira's Motion to Dismiss Plaintiff Janet Enos's Complaint against him pursuant to Rule 12(b)(6). Enos's Complaint is for declaratory and injunctive relief as well as monetary damages pursuant to the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.* This court held a hearing on Teixeira's Motion, and has reviewed each party's filings regarding the Motion.

I. Factual Background

The following facts are gathered from the Complaint. Defendant Orthopedic & Spine Physical Therapy of LA, Inc. ("Orthopedic & Spine") is a Maine Corporation located in Lewiston. Teixeira is the owner and sole professional provider at Orthopedic & Spine. From approximately February 2007 to April 19, 2012, Enos was employed by Orthopedic & Spine as a receptionist and office manager. Teixeira supervised Enos directly and completed all of her annual reviews and evaluations. Enos received excellent annual reviews.

In August of 2009, Enos took a continuing education course on physical therapy coding and billing. She completed the class on August 14, 2009, and on August 18, 2009 Enos brought possible billing errors, including potentially fraudulent billings, to Teixeira's attention.

Teixeira informed Enos that instituting or requiring new policies was not a part of her role, but that he would take her concerns under consideration. Enos also raised concerns to Teixeira regarding his treatment notes, the inadequacy of treatment notes to justify MaineCare and Medicare billings, and possible overbilling. Teixeira defended his notes, and when Enos stated she did not want to be a party to potentially fraudulent billings, Teixeira allegedly responded along the lines of if Enos was not actually performing the billing then she was not committing fraud.

While Enos continued to do the in-house billing, she would raise concerns with Teixeira, who responded by yelling and defending his practices, and telling Enos all she needed to do was enter and bill. Enos eventually ceased to question Teixeira.

Insurance companies would sometimes ask for additional notes and support for treatments billed by the Defendants. Teixeira sometimes asked that Enos enter additional notes into bills that insurance companies questioned, and the Defendants asked that she make changes to files or notes, but Enos refused. The Defendants also failed to change their billing practices.

Enos subsequently reported the Defendants to Medicare and MaineCare authorities. After a MaineCare audit began around late 2011 or early 2012, Teixeira repeatedly asked Enos to make changes to records, notes and time entries, which Enos once again declined to do. In 2011, Medicare also requested and reviewed files. The requests from the Defendants continued (and were denied by Enos) after MaineCare issued a recoupment payment letter based upon unclear

billing and inadequate notes and the Defendants appealed the letter. The Defendants paid on MaineCare's final recoupment request.

The relationship between the Defendants and Enos worsened and Teixeira began to look for a candidate to replace Enos. She was eventually fired on April 19, 2012. Teixeira attributed Enos's firing to the fact that they were not getting along and, Enos's refusal to cooperate with some of his past requests. Enos stated that she felt Teixeira's requests were illegal and she requested a separation letter. The separation letter did not state why Enos was fired. Enos claims the Defendants justifications for her termination were pretextual, and asserts she was fired for complaining about what she perceived to be, or what actually were, illegal activities on the part of the Defendants.

Enos filed a complaint with the Maine Human Rights Commission ("MHRC") claiming discrimination based on retaliation. On November 13, 2013, after investigating the Plaintiff's complaints, the MHRC dismissed the action and issued a right to sue letter.

II. Discussion

> When considering a motion to dismiss under Rule 12(b)(6) the Law Court has held that:
>
> '[w]e view the material allegation of the complaint as admitted and examine the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory. A dismissal is appropriate only when it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim. The legal sufficiency of a complaint is a question of law.'

Thompson v. Dep't of Inland Fisheries & Wildlife, 2002 ME 78, ¶ 4, 796 A.2d 674 (quoting *New Orleans Tanker Corp. v. Dep't of Transp.*, 1999 ME 67, ¶ 3, 728 A.2d 673).

The complaint is intended to give the defendant notice of the claims that the opposing party will bring. Claims for relief must "contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief which the pleader seeks." M.R. Civ. P. 8(a). The rules require that "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." M.R. Civ. P. 8(e)(1). The Law Court explained that "[t]he conception underlying Rule 8 M.R.C.P. is that the function of the complaint is to give fair notice of the claim, and this may be '. . . sufficiently performed by a rather generalized statement.'" *Casco Bank & Trust Co. v. Rush*, 348 A.2d 239, 241 (Me. 1975) (quoting 1 F.McK.& W., Me.Civ.Pr.2d, pp. 192, 193).)

The Supreme Court has held, however, that a complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

While Enos's Complaint fails to state the section or sections of the Maine Human Rights Act ("MHRA") that form the basis for her Complaint, on its face Enos's claim appears to be for unlawful employment discrimination based upon Whistleblowers' Protection Act ("WPA") protected activity. Such a claim falls under unlawful employment discrimination as defined in 5 M.R.S.A.§4572(1)(A) of the MHRA. The MHRA provides that an employer cannot discriminate based upon activity protected under the WPA, and states that:

> It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification:

> **A.** For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin, . . . or because of previous actions taken by the applicant that are protected under [the Whistleblowers' Protection Act]; 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 . . . .

§ 4572(1).

The WPA provides in pertinent part:

> No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because:
>
> **A.** The employee, acting in good faith, or a person acting on behalf of the employee, 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;
> . . .
>
> **D.** The employee acting in good faith has refused to carry out a directive to engage in activity that would be a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States or that would expose the employee or any individual to a condition that would result in serious injury or death, after having sought and been unable to obtain a correction of the illegal activity or dangerous condition from the employer . . . .

26 M.R.S.A. § 833.

Teixeira has moved to dismiss Enos's complaint against him, because he asserts that he cannot be held individually liable for discrimination under the MHRA or WPA. Enos in her Opposition to Teixeira's Motion acknowledges that pursuant to *Fuhrmann v. Staples Office Superstore E., Inc.* Teixeira is not liable under the MHRA as an employer, but Enos argues that Teixeira may be liable under the MHRA for aiding and abetting or interference. 2012 ME 135, 58 A.3d 1083.

In *Fuhrmann*, the Law Court exhaustively analyzed the language in the WPA and MHRA, considered federal case law and found it not dispositive, and examined the legislative history of the MHRA and determined that "the Legislature has had opportunities (1) to expressly incorporate supervisor liability, and (2) to expressly eliminate supervisor liability from the MHRA. It has declined to do either, leaving us to interpret the original language of the statute." 2012 ME 135, ¶ 28, 58 A.3d 1083. The Law Court explained, "The MHRA provides that employment discrimination is committed by one who is an 'employer.'" *Id.* ¶ 24. The court analyzed the definitions of the term "employer", noting that it includes "'any person acting in the interest of any employer, directly or indirectly.'" *Id.* ¶ 24 (quoting 5 M.R.S. § 4553(4) (2011)). Next, the court looked to the definition of the word "person" under the MHRA, and noted that in the definition of the word "person" the word "supervisor" is never used. *Id.* ¶ 24. The court held that "[t]he MHRA's express incorporation of vicarious liability and its employer-specific remedies do not signal any intent to hold individual supervisors liable for employment discrimination." *Id.* ¶ 33. The Law Court ultimately determined that contrary to the interpretation of the MHRC, "[p]ursuant to either [the MHRA or the WPA] statutory definition of 'employer,' there is no individual supervisor liability for employment discrimination." *Id.* ¶ 35.

While nowhere in Enos's Complaint does she specifically mention aiding, abetting, or interference, Enos now employs those claims against Teixeira in what appears to be an attempt to circumvent the *Fuhrmann* decision. The MHRA defines unlawful discrimination to include:

> **A.** Unlawful employment discrimination as defined and limited by subchapter III;
>
> **B.** Unlawful housing discrimination as defined and limited by subchapter IV;
>
> **C.** Unlawful public accommodations discrimination as defined by subchapter V;

> **D.** Aiding, abetting, inciting, compelling or coercing another to do any of such types of unlawful discrimination. . . .

5 M.R.S.A. § 4553(10). The MHRA also includes a claim for interference. Section § 4633(2) provides:

> It is unlawful for a person to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted or protected by this Act or because that individual has exercised or enjoyed, or has aided or encouraged another individual in the exercise or enjoyment of, those rights.

5 M.R.S.A. § 4633

It is unclear to this court, and Enos has provided no persuasive explanation, as to why Maine would allow individual supervisor liability for aiding and abetting discrimination or interference, when there is no individual supervisor liability for employment discrimination. This court bears in mind that after interpreting the statute, the Law Court came to the conclusion in *Fuhrmann* that "we will not undermine the purpose of these statutes by reading them to provide for individual supervisor liability." 2012 ME 135, ¶ 34, 58 A.3d 1083

The Plaintiff has cited to a New Jersey sexual harassment case, *Tarr v. Ciasulli*, 853 A.2d 921 (2004), where the New Jersey Supreme Court did not find aiding and abetting liability, but nevertheless set out a standard for aiding and abetting liability, which the Plaintiff presumes Maine would also follow. The New Jersey Supreme Court found, much like the Law Court, that under its anti-discrimination law an "individual supervisor is not defined as an 'employer' under the LAD." *Tarr*, 853 A.2d 921, 928. It added, however, "Nevertheless, it is unlawful '[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [under the LAD],' and such conduct may result in personal

liability.'" *Tarr*, 853 A.2d 921, 928 (quoting N.J.S.A. 10:5-12e)(alterations in the original). The New Jersey Supreme Court looked to the meaning of the terms, the words the terms aid and abet are surrounded by, the Federal Court's prediction that it would adopt the definitions of aiding and abetting consistent with the Restatement (Second) of Torts, and the Restatement on concert liability itself. *Id.* at 928-929.

The court stated that "in order to hold an employee liable as an aider or abettor, a plaintiff must show that '(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as a part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.'" *Id.* at 9292 (quoting *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 127 (3d Cir.1999) (quotation omitted)(alteration in the original). To determine whether an individual has provided "substantial assistance", the court looked to five factors listed in the comments to section 876 of the *Restatement*: "(1) the nature of the act encouraged, (2) the amount of assistance given by the supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's relations to the others, and (5) the state of mind of the supervisor." *Tarr*, 853 A.2d 921, 929 (citing *Restatement (Second) of Torts*, § 876(b) comment d (1979); *Hurley*, 174 F.3d at 127 n. 27).

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[1] The court notes that wording regarding aiding and abetting in the MHRA differs from the wording in the New Jersey Law Against Discrimination. The New Jersey provision specifies; that it is either an unlawful employment practice or an unlawful discrimination: "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.'" N.J.S.A. 10:5-12e. Whereas the Maine provision only provides that unlawful discrimination includes "[a]iding, abetting, inciting, compelling or coercing another to do any of such types of unlawful discrimination . . . ." 5 M.R.S.A. § 4553(10).

The Massachusetts Supreme Court defined liability for aiding and abetting differently in a case involving claims of racial discrimination. In *Lopez v. Commonwealth*, the Massachusetts Supreme Court provided that

> In order to prevail on an aiding and abetting claim under § 4(5), a plaintiff must show (1) that the defendant committed "a wholly individual and distinct wrong ... separate and distinct from the claim in main"; (2) "that the aider or abetter shared an intent to discriminate not unlike that of the alleged principal offender"; and (3) that "the aider or abetter knew of his or her supporting role in an enterprise designed to deprive [the plaintiff] of a right guaranteed him or her under G.L. c. 151B."

978 N.E.2d 67, 82 (2012) (quoting *Harmon v. Malden Hosp.*, 19 Mass. Discrimination L. Rep. 157, 158 (1997)).

Even if Maine were to recognize an aiding and abetting claim against an individual supervisor, Enos has not alleged actions taken by Teixeira that constitute aiding or abetting in her Complaint. Considering Enos's allegations contend that Teixeira was the principal actor in terms of the discrimination, Enos has not alleged any "distinct wrong" committed by Teixeira, nor has Enos alleged any actions by Teixeira that involved aiding or abetting another to commit discrimination. *See id.* Similarly, Enos's Complaint does not allege how Teixeira interfered with the Plaintiff carrying out protected activities. Most importantly, Enos failed to mention aiding, abetting, or interference in her Complaint, and therefore failed to give even "fair notice of the claim[s]." *Rush*, 348 A.2d 239, 241 (Me. 1975).

This court finds that allowing these two claims to go forward against Teixeira would be contrary to the Law Court's intent in *Fuhrmann*. "In construing statutes, we look to the overall purpose of the law of which the section at issue forms a part and strive to interpret the language to avoid results that are inconsistent, unreasonable, or inapposite in relation to the law's overall

purpose.'" *Kurhmann*, 2012 ME 135, ¶ 34, 58 A.3d 1083 (quoting *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 19, 845 A.2d 1178). As the Law Court has ruled out individual supervisor liability for employment discrimination, it would be illogical to allow Enos's claims against Teixeira, essentially unlawful employment discrimination claims as articulated in the Complaint, although now framed differently by Enos, to proceed.

Accordingly, the court **ORDERS** that Defendant Teixeira's Motion is **GRANTED**. Plaintiff's Complaint is dismissed as to Defendant Teixeira.

The clerk is directed to incorporate this Order into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: 11/18/14

MaryGay Kennedy
Justice, Superior Court

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SUPERIOR COURT
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Docket No AUBSC CV 2013-00176

DOCKET RECORD

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Filing Document: COMPLAINT Minor Case Type: OTHER STATUTORY ACTIONS
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Docket Events:

12/30/2013 FILING DOCUMENT - COMPLAINT FILED ON 12/30/2013

12/30/2013 Party(s): JANET ENOS
ATTORNEY RETAINED ENTERED ON 12/30/2013
Plaintiff's Attorney: MARC N FRANKLIN

01/03/2014 Party(s): ORTHOPEDIC AND SPINE PHYSICAL THERAPY OF LA
SUMMONS/SERVICE CIVIL SUMMONS SERVED ON 12/27/2013
SHAN TEIXEIRA DBA ORTHOPEDIC AND SPINE PHYSICAL THERAPY OF LA INC

01/03/2014 Party(s): ORTHOPEDIC AND SPINE PHYSICAL THERAPY OF LA
SUMMONS/SERVICE - CIVIL SUMMONS FILED ON 01/03/2014

01/03/2014 Party(s): SHAN TEIXERIA
SUMMONS/SERVICE CIVIL SUMMONS SERVED ON 12/27/2013
SHAN TEIXEIRA

01/03/2014 Party(s): SHAN TEIXERIA
SUMMONS/SERVICE CIVIL SUMMONS FILED ON 01/03/2014

01/16/2014 Party(s): SHAN TEIXERIA
MOTION - MOTION TO DISMISS FILED ON 01/16/2014
WITH MEMORANDUM OF LAW, DRAFT ORDER, NOTICE OF HEARING