

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>ALBERT JOHNSON,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 02-73-P-H</b>
	)	
<b>SPENCER PRESS OF MAINE, INC.,</b>	)	
<b>et al.,</b>	)	
	)	
<b>Defendants</b>	)	

**RECOMMENDED DECISION ON DEFENDANTS’  
MOTIONS FOR SUMMARY JUDGMENT**

Defendant Spencer Press, Inc. (“SPI”) moves for summary judgment as to all claims against it, and SPI and co-defendant Spencer Press of Maine, Inc. (“SPM”) (together, “Defendants”) move for partial summary judgment as to specific claims and damages in this action alleging (i) religious discrimination and harassment in violation of Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), 42 U.S.C. § 2000e, *et seq.*, and the Maine Human Rights Act (“MHRA”), 5 M.R.S.A. § 4551, *et seq.*, (ii) disability discrimination and harassment in violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et seq.*, and the MHRA and (iii) unlawful retaliation in violation of Title VII, the ADA and the MHRA. Complaint and Demand for Jury Trial (“Complaint”) (Docket No. 1) ¶ 1; Defendant Spencer Press, Inc.’s Motion for Summary Judgment on Plaintiff’s Complaint (“Motion/SPI”) (Docket No. 14); Motion for Partial Summary Judgment re Disability Discrimination Claims – Lack of Legally Protected Disability (“Motion/Disability”) (Docket No. 16); Motion for Partial Summary Judgment re Damage Claims for Back Pay/FrontPay (“Motion/Pay”)

(Docket No. 18); Motion To Dismiss or Motion for Partial Summary Judgment on Count III of Plaintiff's Complaint ("Motion/Count III") (Docket No. 20); Motion for Partial Summary Judgment on Punitive Damages ("Motion/Punitives") (Docket No. 22). For the reasons that follow, I recommend that two of the motions (the Motion/SPI and the Motion/Disability) be granted and that the remaining three (the Motion/Pay, the Motion/Count III and the Motion/Punitives) be denied.<sup>1</sup>

### **I. Summary Judgment Standards**

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy*

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<sup>1</sup> In an unusual move, the Defendants in this case chose to file five discrete summary judgment motions, generating a total of fifteen supporting and opposing statements of material facts. The better practice is to file a consolidated motion/memorandum together with a consolidated statement of facts. To the extent a movant desires to highlight discrete groupings of facts, it can do so in other ways (for example, by the use of subheadings in a statement of material facts). To the extent a movant is concerned about page limits, it should file a motion for leave to exceed those limits if in good faith it believes it requires more than the permitted number of pages to state its (continued on next page)

*Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

## II. Facts Common to All Motions

The parties’ statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following facts relevant (at the least, as background) to all five motions:<sup>2</sup>

Johnson was an employee of the housekeeping janitorial department (“Housekeeping Department”) of SPM from 1991 through May 2, 2000. Defendant’s [sic] Statement of Undisputed Material Facts re Partial Summary Judgment Motion on Back Pay/Front Pay (“Defendants’ SMF/Pay”) (Docket No. 19) (sealed)<sup>3</sup> ¶ 1; Plaintiff’s Opposition to Defendants’ Statement of Facts re Partial Summary Judgment Motion on Back Pay/Front Pay (“Plaintiff’s Opposing SMF/Pay”) (Docket No. 30) ¶ 1.<sup>4</sup> On Saturday, April 29, 2000, Johnson gave SPM a letter of resignation that included his two-week notice. *Id.* ¶ 2. The same day, he applied for employment with Hannaford Bros. (“Hannaford”). *Id.* ¶ 5. He was next scheduled to work at SPM on May 3, 2000. *Id.* ¶ 4.

On or about May 1, 2000 Johnson was offered a job with Hannaford, and he commenced full-time work there on May 3, 2000. *Id.* ¶¶ 6-7. Johnson remained continuously employed as a full-time

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position.

<sup>2</sup> Johnson qualifies many of these facts. To the extent those qualifications are relevant, they are incorporated into the factual sections of specific motions.

<sup>3</sup> In connection with the instant motions, the parties filed several documents under seal; however, with regard to two such items (Docket Nos. 16 and 17), the Defendants neglected to file public, redacted copies as is required by the parties’ stipulated protective order. See Stipulated Protective Order (Docket No. 5) at 4. The Defendants are directed to file such versions of those documents forthwith.

<sup>4</sup> I will refer to the plaintiff’s separately numbered statement of additional facts, which begins on page 7 of the same document, as (*continued on next page*)

employee at Hannaford until December 8, 2000. *Id.* ¶ 9. He was fired from Hannaford for violating its company work rules by taking and consuming food on the job without payment. *Id.* ¶ 11. In December 2000 Johnson applied for and subsequently qualified for full non-service-related disability from the Veterans Administration. *Id.* ¶ 15. He remains on full disability. *Id.*

### **III. Motion/SPI**

#### **A. Factual Context**

The parties' statements of material facts submitted in support of and in opposition to the Motion/SPI, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision:

SPI began in approximately 1940 in the basement of the now-deceased John Spenlinhauer.<sup>5</sup> Statement of Undisputed Material Facts in Support of Defendant Spencer Press, Inc.'s Motion for Summary Judgment on Plaintiff's Complaint ("Defendants' SMF/SPI") (Docket No. 15) ¶ 1; Plaintiff's Opposition to Defendants Spencer Press, Inc.'s Statement of Facts re Motion for Summary Judgment ("Plaintiff's Opposing SMF/SPI") (Docket No. 38) (sealed) ¶ 1.<sup>6</sup> SPI was incorporated in Massachusetts in 1948. *Id.* ¶ 2. Over time, SPI expanded and eventually established operations in Hingham, Massachusetts. *Id.* ¶ 3.

In 1980, J & S Trust of Maine (formerly JRS Realty Trust) ("J & S Trust") purchased property and started construction on a factory building located at 90 Spencer Drive in Wells, Maine ("Wells Property"). Defendants' SMF/SPI ¶ 5; Affidavit of Eugene R. Sullivan ("Sullivan Aff."), Tab 1 thereto, ¶ 6. J & S Trust is controlled by John and Stephen Spenlinhauer, each of whom owns 49½

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"Plaintiff's Additional SMF/Pay."

<sup>5</sup> The Defendants spell the name as "Spelinhauer," Defendants' SMF/SPI ¶ 1; however, this evidently is a typographical error inasmuch as the surname consistently is spelled elsewhere "Spenlinhauer."

<sup>6</sup> I will refer to the plaintiff's separately numbered statement of additional facts, which begins on page 7 of the same document, as "Plaintiff's Additional SMF/SPI."

percent of SPI and is a member of its board of directors. Plaintiff's Opposing SMF/SPI ¶¶ 5-6; Rule 30(b)(6) Deposition of Spencer Press, Inc. through its designee Eugene R. Sullivan ("Sullivan Dep."), attached thereto, at 8, 16-17. SPM was incorporated in Maine in 1980 and is a wholly owned subsidiary of SPI. Defendants' SMF/SPI ¶ 7; Plaintiff's Opposing SMF/SPI ¶ 7.

Over time, assets in the form of machinery, office equipment and printing presses were transferred from SPI to SPM in Maine. *Id.* ¶ 10. In the late 1980s, SPI operations in Hingham were closed down. *Id.* ¶ 11. SPI's assets were transferred to SPM without consideration. Plaintiff's Additional SMF/SPI ¶ 4; Sullivan Dep., attached thereto, at 13-14, 37-38. An "intercompany account" is kept on the books to show SPM's debt to SPI arising from the historical equipment transfers. Defendants' SMF/SPI ¶ 27; Plaintiff's Opposing SMF/SPI ¶ 27. However, the debt is made irrelevant by the fact that the two companies file consolidated income tax returns. Plaintiff's Additional SMF ¶ 4; Sullivan Dep., attached thereto, at 38.

The corporate headquarters for both SPM and SPI are located at 90 Spencer Drive, Wells, Maine. Plaintiff's Opposing SMF/SPI ¶ 4; Sullivan Dep., attached thereto, at 18.<sup>7</sup> SPM uses the name "Spencer Press, Inc.," and the "names are interchangeable." Plaintiff's Opposing SMF/SPI ¶ 4; Sullivan Dep., attached thereto, at 14. SPM and SPI file consolidated tax returns. Defendants' SMF/SPI ¶ 8; Plaintiff's Opposing SMF/SPI ¶ 8. The property taxes listed as a deduction in the consolidated tax returns relate to property that is owned by both SPI and SPM. Plaintiff's Additional SMF/SPI ¶ 6; Sullivan Dep., attached thereto, at 47. SPI and SPM also prepare joint financial reports and undergo the same budget preparation process. Plaintiff's Additional SMF/SPI ¶ 5; Sullivan Dep., attached thereto, at 34-35.

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<sup>7</sup> The Defendants assert that SPI's principal office is located in Hingham, Massachusetts, *see* Defendants' SMF/SPI ¶ 4; however, for purposes of this motion I view the cognizable evidence in the light most favorable to Johnson.

SPM has at all times rented the Wells Property from J & S Trust and conducted its business operations on this property. Defendants' SMF/SPI ¶ 9; Sullivan Aff., Tab 1 thereto, ¶ 6. Gordon Ayer, Esq., serves as corporate counsel for both SPI and SPM. Plaintiff's Opposing SMF/SPI ¶ 23; Defendant Spencer Press, Inc.'s Reply to Plaintiff's Additional Statement of Material Facts ("Defendants' Reply SMF/SPI") (Docket No. 59) ¶ 23.<sup>8</sup> Both SPI and SPM designated Eugene Sullivan, executive vice-president and chief financial officer of SPM, as their Rule 30(b)(6) designee. Plaintiff's Additional SMF/SPI ¶ 1; Defendants' Reply SMF/Additional/SPI ¶ 1.

Although SPI continues in existence from a corporate-entity standpoint, it does not have any employees or a bank account. Defendants' SMF/SPI ¶ 12; Sullivan Aff., Tab 1 thereto, ¶ 10.<sup>9</sup> However, SPI usually is required to execute guarantees in favor of SPM when SPM borrows money. Plaintiff's Opposing SMF/SPI ¶ 12; Sullivan Dep., attached thereto, at 15. SPM's debt totals \$79 million, of which 25.5 percent, or \$20.1 million, has been guaranteed by SPI. Defendants' SMF/SPI ¶ 27; Plaintiff's Opposing SMF/SPI ¶ 27. SPI also continues to have board meetings. Plaintiff's Opposing SMF/SPI ¶ 12; Sullivan Dep., attached thereto, at 8-9, 37-38. SPI owns land in Maine and owns all of the stock of SPM. Plaintiff's SMF/SPI ¶ 12; Sullivan Dep., attached thereto, at 17, 44. The land, which is unimproved realty in Wells, and the SPM stock are SPI's only assets. Defendants' SMF/SPI ¶ 13; Sullivan Aff., Tab 1 thereto, ¶ 11.<sup>10</sup> SPI has granted a security interest in favor of a lender in its property in Maine to secure debts owed by SPM. Plaintiff's Opposing SMF/SPI ¶ 15;

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<sup>8</sup> I will refer to the Defendants' separately numbered reply to Johnson's additional facts, which begins on page 5 of the same document, as "Defendants' Reply SMF/Additional/SPI."

<sup>9</sup> The Defendants' further statement that SPI does not "conduct any business," *see* Defendants' SMF/SPI ¶ 12, is effectively controverted by Johnson's opposition, which establishes that SPI continues to guaranty debt of SPM, *see* Plaintiff's Opposing SMF/SPI ¶ 12. Arguably, guaranteeing debt is not a core business function; however, to the extent a corporation such as SPI has legal capacity to do so, it may be said to be conducting business. In any event, for purposes of summary judgment I resolve any ambiguity as to the meaning of the phrase "conduct any business" in favor of Johnson as non-movant.

<sup>10</sup> Johnson attempts, but fails, to controvert this statement. Johnson's assertion that, by filing consolidated tax returns, SPI and SPM "claim[] joint ownership of all listed assets," Plaintiff's Opposing SMF/SPI ¶ 13, is not supported by the citations given. The fact that the two entities issue joint financial statements, *id.*, does not establish that one has any ownership interest in the assets of the other.

Defendants' Reply SMF/SPI ¶ 15. John Spenlinhauer used SPI to guarantee a loan for the purchase of a pleasure boat owned by himself and a company set up to "keep his boat in." Plaintiff's Additional SMF/SPI ¶ 8; Defendants' Reply SMF/Additional/SPI ¶ 8. Neither SPI nor SPM has paid dividends in at least fourteen years. *Id.* ¶ 7.

SPM has never directed any of its revenues to SPI. Defendants' SMF/SPI ¶ 22; Sullivan Aff., Tab 1 thereto, ¶¶ 9, 17.<sup>11</sup> SPI has not loaned funds to SPM, and SPM has not loaned funds to SPI. Defendants' SMF/SPI ¶ 24; Sullivan Aff., Tab 1 thereto, ¶ 16.<sup>12</sup>

In 1994, SPM registered with the State of Maine to do business as "Spencer Press, Inc." Defendants' SMF/SPI ¶ 16; Plaintiff's Opposing SMF/SPI ¶ 16. SPM does business as "Spencer Press, Inc.," issues business cards that say "Spencer Press, Inc." and issues payroll checks with the name "Spencer Press, Inc." on them. Plaintiff's Additional SMF/SPI ¶ 3; Defendants' Reply SMF/Additional/SPI ¶ 3. The issuer of SPM's payroll checks and payroll account has always been, and remains, SPM. Defendants' SMF/SPI ¶ 18; Sullivan Aff., Tab 1 thereto, ¶ 13.<sup>13</sup> SPI and SPM do not share employees. Defendants' SMF/SPI ¶ 20; Sullivan Aff., Tab 1 thereto, ¶¶ 10, 14.<sup>14</sup>

SPM conducts its daily business, such as employment or human resources decisions, without any involvement or input from SPI. Defendants' SMF/SPI ¶ 21; Sullivan Aff., Tab 1 thereto, ¶¶ 10, 14, 18-19.<sup>15</sup> SPM employees' employment-related concerns and complaints are directed to SPM's

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<sup>11</sup> Johnson again tries, but fails, to controvert this statement by noting that SPI and SPM share an intercompany account showing debt owed by SPM to SPI and that the two companies file consolidated tax returns. *See* Plaintiff's Opposing SMF/SPI ¶ 22.

<sup>12</sup> The three facts upon which Johnson relies in denying this statement – that SPI transferred assets to SPM, that an intercompany account shows a debt owed by SPM to SPI, and that SPI guarantees financial obligations of SPM, *see* Plaintiff's Opposing SMF/SPI ¶ 24 – do not effectively controvert it.

<sup>13</sup> Johnson tries to controvert this statement by asserting that in filing consolidated tax returns, SPI and SPM take joint deductions for salaries and wages of employees. *See* Plaintiff's Opposing SMF/SPI ¶ 18. However, this is irrelevant to whether SPI or SPM actually issues the payroll checks.

<sup>14</sup> Johnson attempts to controvert this statement by noting that the Defendants file consolidated tax returns on which a deduction for payroll expenses is taken. *See* Plaintiff's Opposing SMF/SPI ¶ 20. However, one cannot make the leap from this fact that the Defendants share employees.

<sup>15</sup> Johnson denies this statement on the ground that SPI and SPM "are interchangeable," share the same officers, the same board of  
(continued on next page)

human-resources department. Defendants' SMF/SPI ¶ 29; Plaintiff's Opposing SMF/SPI ¶ 29. SPI neither has a human-resources department nor is involved in, or provides input to, SPM's handling of employment-related concerns and complaints. Defendants' SMF/SPI ¶ 30; Sullivan Aff., Tab 1 thereto, ¶¶ 18-19.<sup>16</sup> SPM addresses employment decisions, including hiring and firing, scheduling and salary payment, without any involvement or input from SPI. Defendants' SMF/SPI ¶ 31; Sullivan Aff., Tab 1 thereto, ¶ 19.<sup>17</sup>

## B. Analysis

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directors, and the same management organization chart." Plaintiff's Opposing SMF/SPI ¶ 21; *see also* Plaintiff's Additional SMF/SPI ¶ 2. Johnson relies on a portion of the deposition of Eugene R. Sullivan, Rule 30(b)(6) designee for SPI and SPM, in which, when asked to identify an organization chart titled "Management Organization Chart, Spencer Press Inc.," Sullivan testified that it was "the organization chart of Spencer Press." Sullivan Dep., attached to Plaintiff's Opposing SMF/SPI, at 19; Sullivan Dep. Exh. 3, attached to Plaintiff's Opposing SMF/SPI. Asked what he meant by "Spencer Press," he responded: "As far as I'm concerned, they're [SPI and SPM] interchangeable, and I believe legally, that's been set up that they're interchangeable." Sullivan Dep., attached to Plaintiff's Opposing SMF/SPI, at 19. As the Defendants point out, Sullivan later clarified that by this he meant that the names were interchangeable – consistent with earlier testimony (and other evidence showing) that SPM is registered to do business as "Spencer Press, Inc." *See* Defendants' Reply SMF/Additional/SPI ¶ 2; Sullivan Dep., attached to Plaintiff's Opposing SMF/SPI, at 14, 55-56. Johnson's testimony, as explained and placed in context, cannot fairly be said to raise a genuine issue whether the two companies are "interchangeable" in any substantive sense or share the same organizational chart. Finally, while the Defendants admit that the same persons compose the board of directors of each of the companies, *see* Defendants' Reply SMF/SPI ¶ 21, that alone does not suffice to controvert the Defendants' statement.

<sup>16</sup> Johnson denies this statement, citing to testimony by Sullivan that the two companies "are interchangeable," the boards of directors of both are the same and a meeting of one board constitutes a meeting of the other. *See* Plaintiff's Opposing SMF/SPI ¶ 30. For reasons discussed in the context of paragraph 21 of the Defendants' SMF/SPI, Johnson's reliance on Sullivan's testimony concerning the companies' interchangeability is misplaced. The remainder of Johnson's opposing statement does not effectively controvert the Defendants' statement inasmuch as the structure of the companies' boards has nothing to do with the structure of their human-resources departments. In any event, the Defendants neutralize Sullivan's comments regarding the boards by way of subsequent affidavit correcting the earlier testimony. At deposition, when asked if SPM had a board of directors, Sullivan replied: "If in the meeting books, there is an official board of directors, it would be the same three [members], and I don't know in the corporate meeting books whether there is an official board or not." Sullivan Dep., attached to Plaintiff's Opposing SMF/SPI, at 8-9. He then was asked, "When the [SPI] board meets, does that also constitute a meeting of the [SPM] board?" *Id.* at 9. He responded: "In my opinion, yes." *Id.* Later during deposition, he was asked: "With respect to your understanding that to the extent [SPM] has a separate board of directors, it is your understand[ing] that when the [SPI] board of directors meets, it does conduct business involving [SPM], correct?" *Id.* at 56. He responded: "I have to look at the notes of it. If there is a meeting of one, I would assume there is a meeting of the other at the same time." *Id.* The Defendants now proffer an affidavit of Sullivan in which he explains that he testified based on assumption and has since reviewed the corporate record books of both companies (furnished to Johnson during discovery), which reflect that a meeting of one board does not constitute a meeting of both but, rather, that the two boards are distinct and act independently of each other. Defendants' Reply SMF/SPI ¶ 30; Supplemental Affidavit of Eugene R. Sullivan, Tab 1 thereto, ¶ 4.

<sup>17</sup> Johnson's attempted denial of this statement, *see* Plaintiff's Opposing SMF/SPI ¶ 31, falls short for reasons discussed in the context of paragraphs 21 and 30 of the Defendants' SMF/SPI.

SPI seeks summary judgment as to all claims against it on the ground that it never was Johnson's actual or *de facto* employer, failing which it cannot be held liable under Title VII, the ADA or the MHRA. Memorandum in Support of Defendant Spencer Press, Inc.'s Motion for Summary Judgment ("Memorandum/SPI") (Docket No. 14) at 3. Johnson protests that there is a triable issue whether SPI was his *de facto* employer on so-called "integrated enterprise" and "sham" theories. Plaintiff's Opposition to Defendant Spencer Press, Inc.'s Motion for Summary Judgment ("Opposition/SPI") (Docket No. 37) (sealed) at 3. However, on the cognizable evidence, no reasonable fact-finder could conclude that SPI was Johnson's employer via these tests.

As the First Circuit has noted, the "integrated-enterprise test . . . examines four factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership." *Romano v. U-Haul Int'l*, 233 F.3d 655, 662 (1st Cir. 2000).<sup>18</sup> Of these, the third factor is the most important – "a primary consideration in evaluating employer status." *Id.* at 666. Here, there is evidence of interrelation of operations (*e.g.*, preparation of consolidated financial statements, transfer of assets, use of same legal adviser, sharing of name "Spencer Press, Inc.," sharing of office space), *see id.* at 667 n.7, common management (albeit in the sense only of common board directorships, inasmuch as SPI has no employees) and common ownership (the Spenlinhauers control SPI, which in turn owns all the stock of SPM). However, there is no cognizable evidence of the most important factor: control by SPI of SPM's labor relations.

Indeed, one can only reasonably conclude from that evidence that SPI is, as the Defendants describe it, "a passive parent corporation that is totally uninvolved in the day-to-day business and labor operations of its subsidiary." Memorandum/SPI at 7.<sup>19</sup> This is in stark contrast to the evidence

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<sup>18</sup> The parties apply the *Romano* iteration of the integrated-enterprise test to Johnson's state as well as federal claims. *See* Memorandum/SPI at 5 n.1; Opposition/SPI at 4.

<sup>19</sup> Although payroll checks to SPM employees are issued by "Spencer Press, Inc.," it is clear that they are issued by SPM doing (*continued on next page*)

on which the First Circuit in *Romano* found all four prongs of the integrated-enterprise test met. *See id.* at 667-68 (describing evidence as including, “most importantly, [that] U-Haul International sets human resources and personnel policies, establishes the wage scale, the pay day, and all fringe benefits, must approve pay in excess of the scale, limits shift premiums and the hours of part-timers, processes payroll, prohibits payroll advances, must approve any rehire, maintains duplicate personnel records, and invites employees of U-Haul of Maine to present complaints concerning discrimination, sexual harassment and leaves of absence to U-Haul International’s Human Resources Department.”).

No reasonable trier of fact could conclude from this evidence that SPI was Johnson’s employer on an integrated-enterprise theory.

Johnson next posits that there is a triable issue whether SPI could be found to be his employer on a corporate sham, or “alter ego,” theory, pursuant to which “courts will pierce the corporate veil of the parent company to impose liability when the parent neglects corporate formalities in a manner that would make the parent company liable for the subsidiary’s torts or breaches of contract.” Opposition/SPI at 7; *see also, e.g., Papa v. Katy Indus., Inc.*, 166 F.3d 937, 941 (7th Cir. 1999) (“The basic principle of affiliate liability is that an affiliate forfeits its limited liability only if it *acts* to forfeit it – as by failing to comply with statutory conditions of corporate status, or misleading creditors of its affiliate, or configuring the corporate group to defeat statutory jurisdiction, or commanding the affiliate to violate the right of one of the affiliate’s employees.”) (emphasis in original). Johnson analyzes both his federal and state claims through the lens of a twelve-factor test employed by the Law Court entailing consideration of:

- (1) common ownership;
- (2) pervasive control;
- (3) confused intermingling of business activity[,] assets, or management;
- (4) thin capitalization;
- (5) nonobservance of corporate formalities;
- (6) absence of corporate records;
- (7) no payment of dividends;
- (8) insolvency at the time of the litigated transaction;
- (9) siphoning away of corporate

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business as “Spencer Press, Inc.” rather than by SPI.

assets by the dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; [and] (12) use of the corporation in promoting fraud.

*Johnson v. Exclusive Props. Unltd.*, 720 A.2d 568, 571 (Me. 1998) (citation and internal quotation marks omitted); Opposition/SPI at 8-9. Assuming *arguendo* that this test applies in these circumstances, Johnson again adduces insufficient cognizable evidence to raise a triable issue whether SPI is a “sham.” The cognizable facts, viewed in the light most favorable to Johnson, establish the existence of factors 1 (common ownership), 7 (lack of dividend payment) and 11 (use of the corporation for transactions of the dominant shareholders, *i.e.*, use of SPI to guarantee the purchase of John Spenlinhauer’s pleasure boat). There is no evidence whatsoever of factors 4 (thin capitalization), 5 (nonobservance of corporate formalities), 6 (absence of corporate records), 8 (insolvency at the time of the litigated issue), 9 (siphoning away of corporate assets by the dominant shareholders), 10 (nonfunctioning of officers and directors) or 12 (use of the corporation in promoting fraud). With respect to the remaining factors:

1. Factor 2: While SPI and SPM share common ownership and common board membership, and there is some degree of interrelation of operations, it is not such as can fairly be characterized as showing “pervasive control” of SPI by SPM or vice versa.

2. Factor 3: Although SPI transferred assets to SPM without consideration and the companies file consolidated tax returns and joint financial statements, that alone is not tantamount to “confused intermingling” of assets, particularly given that an intercompany debt from SPM to SPI for the value of the transferred assets remains on the books.<sup>20</sup>

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<sup>20</sup> Johnson also argues that by virtue of use of the name “Spencer Press, Inc.,” SPM holds itself out as SPI or SPI’s agent, a circumstance under which the corporate veil can be pierced (and, therefore, a parent can be held liable under federal antidiscrimination law). See Opposition/SPI at 8-9. Given the undisputed evidence that (i) SPM is registered with the Maine Secretary of State to do business as “Spencer Press, Inc.” and (ii) SPI usually is required to guarantee SPM’s debts, one cannot reasonably infer that either SPI or SPM holds SPI out “as the real party with whom a creditor nominally of a subsidiary is dealing,” *Papa*, 166 F.3d at 941.

In sum, no reasonable trier of fact could conclude from the cognizable evidence that SPI was Johnson's employer on a corporate-sham theory. SPI accordingly is entitled to summary judgment as to all claims against it.

#### **IV. Motion/Disability**

##### **A. Factual Context**

The parties' statements of material facts submitted in support of and in opposition to the Motion/Disability, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision:

Johnson bases his ADA claim on an allegation of "a depression-related anxiety disorder." Defendants' Statement of Undisputed Material Facts re Lack of Legally Protected Disability ("Defendants' SMF/Disability") (Docket No. 17) (sealed) ¶ 1; Plaintiff's Opposition to Defendants' Statement of Facts re Disability ("Plaintiff's Opposing SMF/Disability") (Docket No. 36) ¶ 1.<sup>21</sup> He suffers from depression and anxiety and panic disorders. Plaintiff's Opposing SMF/Disability ¶ 1; Declaration of Rosemary Ananis in Support [sic] of Plaintiff's Opposition to Defendants' Motions for Summary Judgment ("Ananis Decl."), attached thereto, ¶ 3; Deposition of Anne Melvin ("Melvin Dep."), attached thereto, at 31-32.

Johnson was able to perform his work at SPM adequately. Defendants' SMF/Disability ¶ 2; Plaintiff's Opposing SMF/Disability ¶ 3. However, in June 1999 he had to be taken from SPM by ambulance to the hospital because of the way that his supervisor, Stephen Halasz, was screaming at him, despite Johnson's requests that Halasz desist from doing so.<sup>22</sup> Plaintiff's Opposing

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<sup>21</sup> I will refer to the plaintiff's separately numbered statement of additional facts, which begins on page 6 of the same document, as "Plaintiff's Additional SMF/Disability."

<sup>22</sup> The Defendants deny that Halasz screamed or yelled at Johnson or treated him unfairly, *see* Defendants' Final Reply Statement of Material Facts re Disability ("Defendants' Reply SMF/Disability") (Docket No. 47) ¶ 2; however, I accept Johnson's conflicting version of events for purposes of summary judgment.

SMF/Disability ¶ 3; Declaration of Albert Johnson in Support of Plaintiff's Opposition to Defendants' Motions for Partial Summary Judgment ("Johnson Decl."), attached thereto, ¶ 5.<sup>23</sup> In addition, Johnson's health-care provider required him to take a four-week leave of absence to accommodate his condition. Plaintiff's Opposing SMF/Disability ¶ 3; Deposition of Samuel DiCapua, D.O. ("DiCapua Dep."), attached thereto, at 56-57.

Although, when Johnson applied for work at Hannaford, he was in the throes of depression and anxiety, he needed to find a way to support his family and maintain some level of insurance. Plaintiff's Opposing SMF/Disability ¶ 4; Continued Deposition of Albert Johnson taken on October 3, 2002 ("Johnson Dep. II"), attached thereto, at 75-76; Johnson Decl., attached thereto, ¶ 6.<sup>24</sup> When Johnson applied for employment at Hannaford, he discussed at length his disability and the circumstances surrounding the harassment he had undergone at SPM. Plaintiff's Opposing SMF/Disability ¶ 5; Johnson Decl., attached thereto, ¶ 6.<sup>25</sup>

Dr. Samuel DiCapua, Johnson's primary-care physician, testified that he first diagnosed Johnson with an anxiety disorder on June 15, 1999, but it was treated with medications. Defendants' SMF/Disability ¶¶ 13-14; DiCapua Dep., Tab 14 thereto, at 35-36, 57-58. Prior to that time the condition did not substantially limit any major life activity. Defendants' SMF/Disability ¶ 14; DiCapua Dep., Tab 14 thereto, at 55-56. Although Dr. DiCapua's first official diagnosis of an anxiety disorder was made on June 15, 1999, it was clear to him that Johnson's condition and its symptoms predated that diagnosis. Plaintiff's Opposing SMF/Disability ¶ 13; DiCapua Dep., attached thereto, at

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<sup>23</sup> Johnson's further statement that he "was not able to perform his job when [Halasz] harassed and screamed at him," Plaintiff's Opposing SMF/Disability ¶ 3, is disregarded inasmuch as it is neither admitted nor supported by the record citation given.

<sup>24</sup> Johnson's additional statements that (i) he "was forced to look for new employment after he was forced to quit his job at SPM due to the harassment and abuse he was experiencing," (ii) "[a]t the time, [he] was anxious about losing his job" and (iii) "he could not work in the hostile environment at SPM," Plaintiff's Opposing SMF/Disability ¶ 4, are disregarded inasmuch as they are neither admitted nor supported by the record citations given.

<sup>25</sup> The Defendants state that Johnson made no such reports to Hannaford, *see* Defendants' SMF/Disability ¶ 5; however, for purposes of summary judgment I accept Johnson's version of these facts.

13-14, 26.<sup>26</sup> Johnson's anxiety was building over a period of time prior to 1999. Plaintiff's Opposing SMF/Disability ¶ 14; DiCapua Dep., attached thereto, at 19, 24, 26.<sup>27</sup> Indeed, as early as 1993 he experienced bouts of depression. Plaintiff's Opposing SMF/Disability ¶ 14; Johnson Decl., attached thereto, ¶ 5.<sup>28</sup>

Dr. DiCapua testified that he kept Johnson out of work for four weeks commencing June 15, 1999. Defendants' SMF/Disability ¶ 15; DiCapua Dep., Tab 15 thereto, at 37, 57. Other than that four-week period, Johnson's anxiety disorder did not substantially limit any major life activity during his remaining employment with SPM. Defendants' SMF/Disability ¶ 15; DiCapua Dep., Tab 15 thereto, at 57-59. Johnson's depression and anxiety continued to increase, and, although he was able to work for a period of time following his employment at SPM, his disability substantially limits his ability to work and interact with others. Plaintiff's Opposing SMF/Disability ¶ 15; Ananis Decl., attached thereto, ¶ 5; Declaration of Anne Melvin in Support of Plaintiff's Opposition to Defendants' Motions for Summary Judgment ("Melvin Decl."), attached thereto, ¶ 3.<sup>29</sup> Johnson's impairment continues to the present date. Plaintiff's Additional SMF/Disability ¶ 1; Melvin Decl., attached thereto, ¶ 3.

Johnson's mental-health-care expert witnesses did not see Johnson until November 28, 2000 (Rosemary Ananis, LCSW) and December 7, 2001 (Anne Melvin, LCSW). Defendants'

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<sup>26</sup> Although Johnson styles paragraphs 13-15 of his opposing statement of material facts as denials of the Defendants' corresponding statements, *see* Plaintiff's Opposing SMF/Disability ¶¶ 13-15, his statements qualify, rather than controvert, the facts in issue.

<sup>27</sup> Johnson's further statements that his "depression" was building prior to 1999 and that his anxiety and depression "affected his ability to work" prior to that time, Plaintiff's Opposing SMF/Disability ¶ 14, are disregarded inasmuch as they are neither admitted nor supported by the citations given.

<sup>28</sup> Johnson's further statement that his depression "caused him to stay in bed for several days at a time," Plaintiff's Opposing SMF/Disability ¶ 14, is disregarded inasmuch as it is neither admitted nor supported by the citation given.

<sup>29</sup> Johnson's additional statements that his disability substantially limits "his major life activity" of interacting with others and his ability to work "in a broad category of jobs," Plaintiff's Opposing SMF/Disability ¶ 15, are disregarded inasmuch as they are neither admitted nor supported by the citations given.

SMF/Disability ¶ 16; Plaintiff's Opposing SMF/Disability ¶ 16.<sup>30</sup> During the period of time that Johnson treated with both, his mental impairment has substantially limited his major life activities of working or interacting with others. Plaintiff's Additional SMF/Disability ¶ 2; Ananis Decl., attached thereto, ¶¶ 4-5; Plaintiff's Additional SMF/Disability ¶ 3; Defendants' Reply SMF/Disability ¶ R3. Johnson's depression and panic and anxiety disorders are very easily triggered and prevent him from working in a broad class of jobs when compared with other individuals in the population. *Id.* In addition, his depression and panic and anxiety disorders continue to substantially limit his ability to interact with others, get out of bed and lead a normal social lifestyle. *Id.*

Johnson told Halasz that he suffered from depression and a panic and anxiety disorder. Plaintiff's Additional SMF/Disability ¶ 4; Johnson Decl., attached thereto, ¶ 14. In addition, Johnson frequently asked Halasz to accommodate his condition by refraining from screaming and yelling at him or treating him in an uncivil manner. Plaintiff's Additional SMF/Disability ¶ 4; Johnson Decl., attached thereto, ¶¶ 5, 14. Halasz refused these requests. *Id.* In April 2000, Halasz's supervisor, William Vecchio, and another employee were joking about Johnson's condition, specifically asking him if he had "a lot of stress going on in [his] life." Plaintiff's Additional SMF/Disability ¶ 4; Johnson Decl., attached thereto, ¶ 14. In addition, Halasz witnessed Johnson being removed from the workplace by ambulance as a result of an anxiety attack Johnson had suffered there. Plaintiff's Additional SMF/Disability ¶ 4; Deposition of Stephen E. Halasz ("Halasz Dep."), attached thereto, at 111-12. During Johnson's employment with SPM, Halasz knew that Johnson suffered from a mental impairment, and he observed Johnson having to take anxiety pills after working for only a couple of hours. Plaintiff's Additional SMF/Disability ¶ 4; Halasz Dep., attached thereto, at 108-10.<sup>31</sup>

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<sup>30</sup> The Defendants' reference to Anne Melvin as "Anne Melville," Defendants' SMF/Disability ¶ 16, evidently is a typographical error.

<sup>31</sup> The Defendants deny the statements made in this paragraph; *see* Defendants' Reply SMF/Disability ¶ R4; however, for purposes of this motion I view the cognizable evidence in the light most favorable to Johnson.

## B. Analysis

Johnson complains, *inter alia*, that he was subjected to disability discrimination and harassment in violation of the ADA and the MHRA (Count II of Complaint) and to unlawful retaliation in violation of Title VII, the ADA and the MHRA (Count III of Complaint). Complaint ¶¶ 27-36. The Defendants seek summary judgment as to Count II in its entirety, and that portion of Count III grounded in a claim of disability, on the basis that, as a matter of law, Johnson had no legally protected disability during the period of his employment with SPM. *See* Motion/Disability. I agree.

The ADA proscribes discrimination by a covered entity “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a).<sup>32</sup>

“Disability,” in turn, is defined as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2).

There is no question that, as of April 29, 2000, the day Johnson tendered his resignation to SPM, he suffered from an impairment. *See* Memorandum/Disability at 7. However, the cognizable evidence does not bear out that, as of that date, his impairment substantially limited the major life activities of working or interacting with others – the two limitations he claims. *See* Opposition/Disability at 7. There is no cognizable evidence whatsoever that on or prior to April 29, 2000 Johnson’s impairment limited his ability to interact with others. Nor, apart from the events in or about June 1999 (the panic attack and four-week leave of absence), is there any cognizable evidence

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<sup>32</sup> The parties agree that ADA analysis is dispositive of Johnson’s disability-related MHRA claims. Memorandum in Support of Defendants’ Motion for Partial Summary Judgment re Disability Discrimination Claims – Lack of Legally Protected Disability (“Memorandum/Disability”) (Docket No. 16) (sealed) at 8 & n.1; Plaintiff’s Opposition to Defendants’ Motion for Partial Summary (*continued on next page*)

that his impairment substantially limited his ability to work during the entire term of his employment with SPM.

In the face of this evidentiary difficulty, Johnson argues that “SPM’s attempt to limit the analysis to a limited time period should be rejected.” Opposition/Disability at 7. For this proposition he cites an EEOC regulation, 29 C.F.R. § 1630.1(j) [sic] and two First Circuit cases, *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999), and *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998). *See id.* at 7-8. He encourages the court to take a long view of his illnesses, noting that they existed at the time of his employment with SPM, persisted and eventually substantially undermined his ability to work and engage in social interaction. *See id.* I am not persuaded.

EEOC regulations provide, in relevant part:

- (1) The term substantially limits means:
  - (i) Unable to perform a major life activity that the average person in the general population can perform; or
  - (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
- (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
  - (i) The nature and severity of the impairment;
  - (ii) The duration or expected duration of the impairment; and
  - (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j).

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Judgment re Disability Discrimination Claims (“Opposition/Disability”) (Docket No. 35) at 4 n.2.

Johnson emphasizes that, per this regulation, an impairment's "expected duration" and "expected permanent or long term impact" bear on whether it substantially limits a major life activity. Opposition/Disability at 7. Nonetheless, the regulation can only sensibly be construed as referring to an impairment's expected duration and expected impact as of the time of the adverse employment action(s). Construing the evidence in the light most favorable to Johnson, one reasonably can infer, given Dr. DiCapua's June 1999 definitive diagnosis, that prior to Johnson's departure from SPM his mental impairment was expected to be long-term. However, there is no evidence that, as of April 29, 2000, it was expected to have a long-term impact on his ability to work or to interact with others. Indeed, the cognizable evidence points in the opposite direction: following the four-week hiatus in June 1999, Johnson managed to resume his SPM job and perform it adequately through April 2000, at which point he was able to obtain full-time work at Hannaford that continued through December 2000. *See Carroll v. Xerox Corp.*, 294 F.3d 231, 236, 241 (1st Cir. 2002) (plaintiff who was placed on three-month leave in 1995 but thereafter worked without limitation until voluntary retirement in 1998 failed to show significant limitation in major life activity of working).

Nor do the two First Circuit cases on which Johnson relies help him. Johnson notes, correctly, that the plaintiff in *Quint* was held permissibly to have relied on predictive methodology to establish substantial limitation. *See* Opposition/Disability at 7; *Quint*, 172 F.3d at 10. However, the predictions in question were assayed during the course of her employment or, at least, concerned her condition as of that time. *Quint*, 172 F.3d at 6-8.

Johnson also observes accurately that the plaintiff in *Criado* was held to have adduced sufficient evidence to establish that her depression substantially limited her capacity to work despite the fact that her physician placed her only on a monthlong leave of absence. *See* Opposition/Disability at 7-8; *Criado*, 145 F.3d at 440, 442. However, in *Criado* there was additional evidence (beyond the

taking of the temporary leave) that the plaintiff's condition palpably affected her ability to work, including evidence of difficulties dealing with co-workers and clients and sleep deprivation affecting her timeliness and ability to report to work. *Criado*, 145 F.3d at 442.

Moreover, to the extent the *Criado* court declined to factor in the plaintiff's physician's contemporaneous predictions of expected future improvement on the basis that the impact of ameliorative measures is irrelevant, *id.* at 442-43, that portion of the opinion no longer is good law. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) ("We conclude that respondent is correct that the approach adopted by the agency guidelines – that persons are to be evaluated in their hypothetical uncorrected state – is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act.").

In sum, no reasonable fact-finder could conclude, on the cognizable evidence, that Johnson's impairment substantially limited a major life activity during the term of his employment with SPM. His claims based on actual disability accordingly founder.

Johnson nonetheless seeks to stave off summary judgment as to a subset of claims based on perceived disability – *i.e.*, that the Defendants "regarded" him as disabled even if he was not. Opposition/Disability at 5-6. Johnson observes that the Defendants failed to press for summary judgment as to this subset of claims and, in any event, he adduces sufficient evidence to warrant trial on them. *Id.* In their reply brief, the Defendants join issue on the point. *See* Defendants' Final Reply Memorandum re Absence of a Legally Protected Disability ("Reply/Disability") (Docket No. 46) at 3-4. Although the proffer of an argument for the first time in a reply memorandum typically counsels its

disregard, *see, e.g., In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991) (court generally will not address an argument advanced for the first time in a reply memorandum), the Defendants in this instance fairly respond to a point put in play by Johnson, *see* Loc. R. 7(c) (reply memorandum “shall be strictly confined to replying to new matter raised in the objection or opposing memorandum.”). Accordingly, I address its merits.

As the Defendants observe:

There are two apparent ways in which individuals may fall within this statutory definition [of perceived disability]: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

Reply/Disability at 3 (quoting *Sutton*, 527 U.S. at 489). The cognizable evidence shows, at most, that Halasz and his supervisor, Vecchio, were aware of and mocked Johnson’s mental impairment. However, there is no evidence from which a trier of fact reasonably could infer that Halasz, Vecchio or anyone else at SPM regarded Johnson’s impairment as substantially limiting a major life activity. In fact, as the Defendants point out, Reply/Disability at 3-4, the cognizable evidence viewed in the light most favorable to Johnson tends to show the opposite – that SPM did not take Johnson’s impairment seriously, mocking it and refusing to accede to Johnson’s requests for accommodation. There accordingly is no triable issue as to Johnson’s subset of claims based on perceived disability.

For these reasons, the Defendants are entitled to summary judgment as to Count II and that portion of Count III related to disability.

## **V. Motion/Pay**

### **A. Factual Context**

The parties' statements of material facts submitted in support of and in opposition to the Motion/Pay, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision:

On April 29, 2000 Johnson was earning \$7.91 an hour at SPM. Defendants' SMF/Pay ¶ 3; Plaintiff's Opposing SMF/Pay ¶ 3. Commencing May 3, 2000 he earned \$9.00 per hour for a forty-hour week at Hannaford. *Id.* ¶ 7. He continued to earn \$9.00 per hour through December 8, 2000, the last day of his employment with Hannaford. *Id.* ¶ 9. A summary of economic loss prepared by Johnson's expert economic witness, Allan McCausland, Ph.D., demonstrates that Johnson has a net back-pay employment earnings loss for the year 2000 of \$2,229.46. Plaintiff's Opposing SMF/Pay ¶ 10; Summary of Economic Loss to Albert Johnson ("McCausland Summary"), Exh. B to Declaration of Allan McCausland, Ph.D., in Support of Plaintiff's Opposition to Defendants' Motions for Partial Summary Judgment ("McCausland Decl."), attached to Plaintiff's Opposing SMF/Pay, at 2.<sup>33</sup> Hannaford's insurance plan required a higher co-pay and did not provide the same level of health and psychiatric benefits or coverage as SPM's plan. Plaintiff's Opposing SMF/Pay ¶ 8; Johnson Decl., attached thereto, ¶ 7.<sup>34</sup>

Johnson was fired from Hannaford for violating its company work rules by taking and consuming food products on the job without payment. Defendants' SMF/Pay ¶ 11; Plaintiff's Opposing SMF/Pay ¶ 11. These work rules were known to Johnson. *Id.* In lieu of civil proceedings or criminal prosecution, Johnson entered into a restoration agreement with Hannaford after his

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<sup>33</sup> The figure \$2,029.46 set forth in the plaintiff's statement of material facts evidently is a typographical error; the underlying material cited sets forth the figure of \$2,229.46. Although the Defendants initially stated that Johnson "had no back pay losses from April 29, 2000 through December 8, 2000," Defendants' SMF/Pay ¶ 10, in reply to Johnson's opposition they characterize total back pay for the period through December 8, 2000 as limited to \$707, *see* Defendants' Final Reply Statement of Material Facts on Back Pay/Front Pay ("Defendants' Reply SMF/Pay") (Docket No. 45) ¶¶ R7-R8; Defendants' Final Reply Memorandum on Back Pay/Front Pay Partial Summary Judgment ("Reply/Pay") (Docket No. 44) at 6-7.

<sup>34</sup> The Defendants assert that "employer-paid health and retirement benefits were substantially similar at SPM and Hannaford," Defendants' SMF/Pay ¶ 8; however, the statement is both conclusory and effectively controverted by Johnson, whose version of the (*continued on next page*)

termination. Defendants' SMF/Pay ¶ 12; Johnson Dep. II, Tab 11 thereto, at 65-66; Johnson Dep. Exh. 17, Tab 11 thereto.<sup>35</sup> Johnson made no work search or attempt to find employment after his termination from Hannaford. Defendants' SMF/Pay ¶ 13; Plaintiff's Opposing SMF/Pay ¶ 13. He deemed himself disabled from any work. *Id.* ¶ 14.

Johnson suffered years of demeaning treatment, ridicule, harassment and discrimination at the hands of his supervisor in the Housekeeping Department of SPM. Plaintiff's Additional SMF/Pay ¶ 1; Johnson Decl., attached thereto, ¶ 2. The treatment Johnson received at SPM at the very least exacerbated his depression and severe panic and anxiety disorder. Plaintiff's Additional SMF/Pay ¶ 3; Johnson Decl., attached thereto, ¶ 5.<sup>36</sup>

According to Johnson's therapist, Rosemary Ananis, Johnson's disability was a direct causal factor in his termination from Hannaford. Plaintiff's Additional SMF/Pay ¶ 6; Ananis Decl., attached thereto, ¶ 3.<sup>37</sup> In Ananis' opinion, at the time of his termination from Hannaford Johnson was not

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facts I accept for purposes of this motion.

<sup>35</sup> In a statement that is more in the nature of a qualification than a denial, Johnson denies that "there is any record support for the allegation that Hannaford would have, or has, actually brought civil or criminal proceedings." Plaintiff's Opposing SMF/Pay ¶ 12.

<sup>36</sup> The Defendants protest that Johnson's personal views and impressions concerning the nature and causes of his medical problems do not constitute competent, admissible evidence. Reply/Pay at 6-7. While a lay witness is not competent to offer a self-diagnosis of the cause or nature of his mental impairment, *see, e.g., Ferris v. Pennsylvania Fed'n Bhd. of Maint. of Way Employees*, 153 F. Supp.2d 736, 746 (E.D. Pa. 2001), such a witness is competent to offer an opinion that certain events caused emotional injury or distress, *see, e.g., id.; Chladek v. Milligan*, No. 97-0355, 1998 WL 334699, at \*3 (E.D. Pa. June 23, 1998); *see also, e.g., United States v. Vega-Figueroa*, 234 F.3d 744, 755 (1st Cir. 2000) ("[T]he modern trend favors the admission of [lay] opinion testimony provided it is well founded on personal knowledge and susceptible to cross-examination."). Johnson's testimony that SPM's alleged treatment "exacerbated" his condition could be placed on either side of this dividing line. Resolving any doubts in favor of Johnson as non-movant on summary judgment, I rule it admissible.

<sup>37</sup> The Defendants seek exclusion of Ananis' opinion that Johnson's termination from Hannaford was linked to his disability on the ground that it exceeds the boundaries of expert testimony fixed in a discovery conference held August 12, 2002 and contradicts earlier deposition testimony. Reply/Pay at 3-6. I deny this request. In the wake of the August 12 discovery conference Johnson provided two supplemental expert witness disclosures, one dated August 19, 2002 and one dated September 16, 2002, each of which stated that Ananis would "testify that Plaintiff's disability contributed to his loss of employment at Shop 'N' Save." *See* Tabs 8-9 to Defendants' Reply SMF/Pay. The Defendants lodged no contemporaneous protest, and Ananis was deposed regarding this opinion. *See* Reply/Pay at 5 (describing deposition testimony). The Defendants identify no prejudice resulting from its inclusion at this point in the proceedings. *See id.* at 3-6. Under these circumstances, I decline to exclude it. *See White v. Meador*, 215 F. Supp.2d 215, 221 (D. Me. 2002) ("Counsel may not simply sit by until the case has been scheduled for trial and then seek to have an opponent's experts excluded when the basis for that exclusion could have been addressed and remedied months earlier.") As to the second ground for exclusion, there is no direct contradiction between Ananis' deposition testimony that Johnson's mental impairment "might" or "could" have caused his misconduct at Hannaford and her later declaration that it did cause that misconduct. *See, e.g., Colantuoni v. Alfred (continued on next page)*

thinking clearly due to his depression and anxiety disorder; was unable to make appropriate decisions; and suffered from impaired judgment. *Id.* In addition, in Ananis' opinion, Johnson's actions were the product of compulsive behavior brought about by the stress he was experiencing. *Id.*<sup>38</sup>

## B. Analysis

Johnson's complaint seeks relief in the form, *inter alia*, of back pay and reinstatement and/or front pay. Complaint at 9. The Defendants press for summary judgment (i) as to any claim of back pay through December 8, 2000 (the day Johnson was dismissed from Hannaford) on the ground that Johnson made more money at Hannaford than at SPM and suffered no back-pay losses during that period, and (ii) as to any claim for back pay or front pay accruing after December 8, 2000 on the ground that Johnson failed to mitigate his damages by virtue of being fired for cause by Hannaford and subsequently refraining from seeking other work. *See generally* Memorandum in Support of Motion for Partial Summary Judgment on Plaintiff's Damage Claims for Back Pay and Front Pay ("Memorandum/Pay") (Docket No. 18) (sealed).<sup>39</sup>

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*Calcagni & Sons*, 44 F.3d 1, 4-5 (1st Cir.1994) ("When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed."); *compare* Deposition of Rosemary Ananis, LCSW ("Ananis Dep."), Tab 13 to Defendants' Reply SMF/Pay, at 36, *with* Ananis Decl., attached to Plaintiff's Opposing SMF/Pay, ¶ 3.

<sup>38</sup> Johnson further states that he "believes that it would be possible for him to do work similar to the work he performed at Spencer Press, if he would receive the reasonable accommodation of equitable and fair treatment from his supervisor, an accommodation which he repeatedly requested but was denied at SPM." Plaintiff's Additional SMF/Pay ¶ 7. The Defendants protest that Johnson is not competent to contradict his own physicians' opinion as to his continuing disability and that this is in any event a conclusory statement. Defendants' Reply SMF/Pay ¶ R17; Reply/Pay at 6-7. I agree. Johnson is not competent to opine whether he could resume work with "reasonable accommodation" – an opinion that is not "rationally based on [his] perception" as required by Federal Rule of Evidence 701 and is in any event both conclusory and speculative, *see Lawton v. State Mut. Life Assurance Co. of Am.*, 101 F.3d 218, 223 (1st Cir. 1996) (non-movant on summary judgment has an "obligation to offer the court more than steamy rhetoric and bare conclusions").

<sup>39</sup> Back pay compensates a plaintiff for pre-judgment damages. *See, e.g., Quint*, 172 F.3d at 15-16 ("A prevailing ADA claimant is presumptively entitled to all back pay which would have accrued from the termination date to the entry of judgment, provided it is made to appear that reasonable diligence was exercised in the effort to secure other suitable employment.") (citations and internal punctuation omitted). "[F]ront pay is available as an alternative [to immediate reinstatement, in circumstances where such reinstatement is not feasible] to compensate the plaintiff from the conclusion of trial through the point at which the plaintiff can either return to the employer or obtain comparable employment elsewhere." *Selgas v. American Airlines, Inc.*, 104 F.3d 9, 12 (1st Cir. 1997).

The Defendants' bid for summary judgment as to the period during which Johnson was employed by Hannaford must be denied. Johnson adduces cognizable evidence that (despite the wage differential) he suffered losses in 2000, and the Defendants in their reply acknowledge that he suffered at least a small back-pay loss for the period through December 8, 2000. *See* Reply/Pay at 2. Moreover, the evidence viewed in the light most favorable to Johnson raises a genuine issue whether he suffered a loss in benefits at Hannaford. Hence, there is a triable issue as to this period of time.

For different reasons, the Defendants' attempt to exclude any back pay/front pay award for the post-Hannaford period founders. Even assuming *arguendo* that Johnson was fired for misconduct for which SPM bears no responsibility, such a termination merely tolls payment of back pay or front pay until a plaintiff is re-employed. *See* Memorandum/Pay at 3; *see also, e.g., Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir.), *amended on petition for reh'g on other grounds*, 97 F.3d 833 (6th Cir. 1996) (“[A]n employee’s discharge for cause due to his wilful violation of company rules will toll backpay.”). Yet Johnson in this case never was re-employed, and he claims (and adduces cognizable evidence that) this was partly a result of SPM’s conduct. If this in fact were the case, SPM could not be relieved of liability for front pay/back pay based on Johnson’s lack of effort to seek work. *See, e.g., Salitros v. Chrysler Corp.*, 306 F.3d 562, 572 (8th Cir. 2002) (“[A]n employer who has discriminated need not reimburse the plaintiff for salary loss attributable to the plaintiff and *unrelated to the employment discrimination.*”) (citation and internal quotation marks omitted) (emphasis in original); *Maturo v. National Graphics, Inc.*, 722 F. Supp. 916, 928 (D. Conn. 1989) (plaintiff’s inability to handle stress inherent in job directly related to, and proximately caused by, defendant employer’s harassment; hence, her decision to quit not a failure to undertake reasonable mitigation).<sup>40</sup>

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<sup>40</sup> I do not reach Johnson’s argument that, as concerns a defendant’s burden to show a failure to mitigate, Maine law is more stringent (*continued on next page*)

The Defendants' request for a ruling as a matter of law, at this stage of the proceedings, that Johnson is unable to recover back pay or front pay accordingly should be denied.

## **VI. Motion/Count III**

### **A. Factual Context**

The parties' statements of material facts submitted in support of and in opposition to the Motion/Count III, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision:

Johnson contends that on February 7, 2001 SPM retaliated against him when an SPM employee threatened to beat him up if he continued to pursue discrimination charges. Statement of Undisputed Material Facts in Support of Defendants' Partial Summary Judgment Motion on Count III of Plaintiff's Complaint ("Defendants' SMF/Count III") (Docket No. 21) ¶ 8; Plaintiff's Opposition to Defendants' Statement of Facts re Partial Summary Judgment Motion on Count III of Plaintiff's Complaint ("Plaintiff's Opposing SMF/Count III") (Docket No. 34) ¶ 8. That employee was Halasz, supervisor of the Housekeeping Department. Plaintiff's Opposing SMF/Count III ¶ 8; Sullivan Dep., attached thereto, at 24; Johnson Decl., attached thereto, ¶ 15. In particular, according to Johnson, Halasz went to Johnson's house in February 2001 and told Johnson he should drop his charges of discrimination against SPM and, if he did not, Halasz would beat him up. Plaintiff's Opposing SMF/Count III ¶ 8; Johnson Decl., attached thereto, ¶ 15. He also told Johnson that if Johnson took any notes of their conversation, he would come and "take care of" Johnson. *Id.*<sup>41</sup>

On February 7, 2001 Johnson was not employed by SPM or any other employer. Defendants' SMF/Count III ¶ 10; Plaintiff's Opposing SMF/Count III ¶ 10. Following his termination from

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than its federal counterpart. *See* Opposition/Pay at 12-13.

<sup>41</sup> The Defendants deny that the alleged retaliatory conduct took place. *See* Defendants' Reply to Plaintiff's Additional Statement of Material Facts ("Defendants' Reply SMF/Count III") (Docket No. 58) ¶¶ 8-11. However, for purposes of summary judgment, I (*continued on next page*)

Hannaford, and at all times thereafter, Johnson never engaged in the process of searching for work or applying for employment with any other employers. *Id.* ¶ 11.<sup>42</sup> Johnson suffers from depression and an anxiety disorder. Plaintiff’s Opposing SMF/Count III ¶ 7; Ananis Decl., attached thereto, ¶ 3. Halasz’s threatening manner further exacerbated Johnson’s anxiety, increased his fear of violence from Halasz and negatively affected his ability to find or look for employment. Plaintiff’s Opposing SMF/Count III ¶ 10; Johnson Decl., attached thereto, ¶ 15.<sup>43</sup>

### **B. Analysis**

In Count III of his complaint, Johnson asserts a cause of action for retaliation in violation of Title VII, the ADA and the MHRA stemming from Halasz’s alleged conduct on February 7, 2001. *See* Complaint ¶¶ 30-36. The Defendants move for dismissal of Count III for failure to state a claim or, alternatively, for summary judgment, on the basis that Johnson neither alleges in his complaint nor adduces cognizable evidence that the purported retaliation constituted an “adverse employment action.” *See* Memorandum in Support of Defendants’ Motion To Dismiss or Motion for Summary Judgment on Count III of Plaintiff’s Complaint (“Memorandum/Count III”) (Docket No. 20) at 2.

To maintain a retaliation suit, a plaintiff must demonstrate the taking of an “adverse employment action.” *See, e.g., Gu v. Boston Police Dep’t*, 312 F.3d 6, 13-14 (1st Cir. 2002) (“To sustain a claim of retaliation, plaintiffs must product [sic] evidence on three points: (1) they engaged in protected conduct under Title VII; (2) they experienced an adverse employment action; and (3) a causal connection exists between the protected conduct and the adverse action.”); *see also, e.g.,*

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accept Johnson’s version of this event as true.

<sup>42</sup> The Defendants mistakenly label paragraph 11 of their statement of material facts as a second paragraph 10. *See* Reply Memorandum in Support of Defendants’ Motion To Dismiss or Motion for Summary Judgment on Count III of Plaintiff’s Complaint (“Reply/Count III”) (Docket No. 50) at 2 n.4. To avoid confusion, I refer to it as paragraph 11.

<sup>43</sup> The Defendants challenge Johnson’s competence to opine as to his medical condition. *See* Defendants’ Reply SMF/Count III ¶ 11; Reply/Count III at 7. The testimony in question essentially establishes that a certain event caused Johnson to suffer emotional harm, interfering with his ability to find employment. For reasons stated above in the context of the Motion/Pay, Johnson is competent to offer such testimony.

*Nelson v. Upsala Coll.*, 51 F.3d 383, 387 (3d Cir. 1995) (“[C]ases dealing with unlawful retaliation under Title VII typically involve circumstances in which the defendant’s conduct has impaired or might impair the plaintiff in employment situations.”).<sup>44</sup>

Obviously, an employer retaliating against a former employer (such as Johnson in this case) no longer is in a position to affect the now-ended employment relationship; therefore, the focus logically becomes whether the employer has harmed its ex-employee’s current job or future job opportunities. *See, e.g., Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996). Such would be the case, for example, with a retaliatory tainted employment reference or retaliatory criminal prosecution. *See, e.g., id.* (“[R]etaliatory prosecution can have an adverse impact on future employment opportunities and therefore can be an adverse employment action.”).

By this measure, the complaint as a whole, and the cognizable evidence, suffice to withstand the motion for dismissal or summary judgment. “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending [the] plaintiff every reasonable inference in his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). In his complaint, Johnson alleges that (i) he suffered from depression and anxiety that substantially limited his ability to work and (ii) his former supervisor threatened him with violence in retaliation for the filing of a discrimination claim. *See* Complaint ¶¶ 14, 32. Although the Complaint does not allege that this event adversely affected Johnson’s employment prospects, it does

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<sup>44</sup> Neither party suggests that, for purposes of retaliation analysis, Maine and federal law diverge. *See generally* Memorandum/Count III; Plaintiff’s Opposition to Defendants’ Motion To Dismiss or Motion for Partial Summary Judgment on Count III of the Complaint (“Opposition/Count III”) (Docket No. 33).

not “appear[] to a certainty” that he would be unable to recover under any set of facts.<sup>45</sup> One can imagine that a plaintiff in these circumstances could prove that his former supervisor’s conduct exacerbated his condition such as to render it more difficult for him to work. Indeed, Johnson adduces cognizable evidence that such was the case.<sup>46</sup>

For these reasons, the Defendants’ motion to dismiss Count III for failure to state a claim or, in the alternative, for summary judgment with respect to that count, should be denied.<sup>47</sup>

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<sup>45</sup> Further, Johnson need not have expressly pled the suffering of an adverse employment action to withstand a motion to dismiss. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (employment-discrimination complaint need include “only a short and plain statement of the claim showing that the pleader is entitled to relief,” a standard that “relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”) (citations and internal quotation marks omitted); *Coffey v. Cushman & Wakefield, Inc.*, No. 01 CIV.9447 JGK, 2002 WL 1610913, at \*5 (S.D.N.Y. July 22, 2002) (applying *Swierkiewicz*; noting that complaint described actions taken by defendant that “may have deprived [the plaintiff] of employment opportunities”).

<sup>46</sup> The Defendants also argue, *inter alia*, that even if Johnson’s evidence of the exacerbation of his condition is cognizable, Halasz’s alleged retaliatory conduct (which occurred in February 2001) could not have impaired Johnson’s employment opportunities inasmuch as he never attempted to find work after his discharge from Hannaford in December 2000. *See Reply/Count III at 7; Memorandum/Count III at 6.* Drawing all reasonable inferences in Johnson’s favor, as I must on summary judgment, I conclude that a trier of fact crediting Johnson’s version of events could find that Halasz’s alleged conduct in February 2001 contributed in some measure to his inability to seek work from that point forward, in which case it would constitute an “adverse employment action.”

<sup>47</sup> I have previously recommended in connection with the Motion/Disability that summary judgment be granted as to that portion of Count III grounded in claims of disability.

## VII. Motion/Punitives

### A. Factual Context

The parties' statements of material facts submitted in support of and in opposition to the Motion/Punitives, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision:

The person whom Johnson accuses exclusively of engaging in illegal harassment based on Johnson's disability or religion is Halasz. Defendants' Statement of Undisputed Material Facts re Partial Summary Judgment – Punitive Damages (“Defendants’ SMF/Punitives”) (Docket No. 23) ¶ 2; Plaintiff's Opposition to Defendants' Statement of Facts re Partial Summary Judgment – Punitive Damages (“Plaintiff's Opposing SMF/Punitives”) (Docket No. 32) ¶ 2.

Halasz was supervisor of the Housekeeping Department. Plaintiff's Opposing SMF/Punitives ¶ 2; Sullivan Dep., attached thereto, at 24; Sullivan Dep. Exh. 3., attached thereto.<sup>48</sup> Johnson complained to the Human Resources Department about Halasz's treatment of him but was told that if he did not like it he should look for another job and that it was okay for Halasz to yell at him because Halasz was Johnson's boss. Plaintiff's Opposing SMF/Punitives ¶ 2; Deposition of Albert Johnson taken on August 29, 2002 (“Johnson Dep. I”), attached thereto, at 115-16. On another occasion, Johnson was told by the Human Resources director that if she pursued his complaints, she would lose her job. Plaintiff's Opposing SMF/Punitives ¶ 2; Johnson Dep. I, attached thereto, at 116-17.<sup>49</sup>

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<sup>48</sup> The Defendants describe Halasz as “part of the Housekeeping Department” and “Lead Custodian.” See Defendants' SMF/Punitives ¶¶ 2-3; however, for purposes of summary judgment I view the cognizable record in the light most favorable to Johnson.

<sup>49</sup> The Defendants assert that (i) Johnson's allegations that he complained frequently about his treatment by Halasz are conclusory, (ii) Johnson remembered no “specifics” apart from those in his notes and (iii) his notes involve only eight instances of complaints to Human Resources (which, as described by the Defendants, do not bear on Halasz's treatment of Johnson). See Defendants' Final Reply Statement of Material Facts re Issue of Entitlement to Punitive Damages (“Defendants' Reply SMF/Punitives”) (Docket No. 49). Johnson's evidence regarding his complaints is not so conclusory as to merit its disregard; he does set forth specific ways in which Human Resources allegedly responded. The Defendants provide no evidence (other than their say-so) that the notes upon which they rely constitute the entire universe of Johnson's notes concerning the subject of his complaints to Human Resources. Moreover, their characterization of the substance of those notes is not entirely fair inasmuch as certain notes (such as those of September 9 and 11, *(continued on next page)*)

The Housekeeping Department is responsible for basic janitorial services and cleaning the plant, which includes the pressroom and other work areas as well as the bathrooms, lockers and office quarters. Defendants' SMF/Punitives ¶ 5; Plaintiff's Opposing SMF/Punitives ¶ 5. The department also has other duties such as snow removal and grounds maintenance. *Id.* Halasz actively performs labor and manual tasks assigned to the Housekeeping Department. Defendants' SMF/Punitives ¶ 6; Affidavit of William Vecchio ("Vecchio Aff."), Tab 3 thereto, ¶ 6.<sup>50</sup> He is an hourly worker and does not receive a salary. *Id.* He is paid overtime differential for overtime work. *Id.*

Halasz (i) supervised employees in the department, (ii) made sure they were doing their jobs, (iii) evaluated them and conducted their performance evaluations, (iv) assigned duties to them, (v) assigned their working hours, (vi) assigned overtime if needed, (vii) performed disciplinary oversight, including conducting disciplinary conferences and issuing written disciplinary memoranda, (viii) interviewed applicants and made recommendations regarding hiring, and (ix) made recommendations regarding wage increases and employee terminations. Plaintiff's Opposing SMF/Punitives ¶ 6; Halasz Dep., attached thereto, at 29-32, 43. In addition, Halasz has received management training from SPM, along with all of the company's other supervisors. Plaintiff's Opposing SMF/Punitives ¶ 6; Halasz Dep., attached thereto, at 32-33. Further, SPM has in the past evaluated Halasz using a form titled "Exempt Employee." Plaintiff's Opposing SMF/Punitives ¶ 6; Exh. 3 to Vecchio Aff., Tab 3 to Defendants' SMF/Punitives. In addition, SPM evaluated Halasz on a form that rated his ability to teach safety issues, train and perform administrative duties, specifically

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1992) do reflect that Johnson complained about Halasz's treatment of him. *See* Johnson notes dated Sept. 9, 1992 and Sept. 11, 1992, Tab 2 to Defendants' Reply SMF/Punitives.

<sup>50</sup> Johnson denies the statements made in paragraph 6 of the Defendants' initial statement of facts. *See* Plaintiff's Opposing SMF/Punitives ¶ 6. However, his denials are more in the nature of qualifications and do not effectively controvert the statements in issue.

rating him on his “Supervisory Skills.” Plaintiff’s Opposing SMF/Punitives ¶ 6; Halasz Dep., attached thereto, at 48-49; Halasz Dep. Exh. 1, attached thereto.

Halasz does not have the authority to hire new employees. Defendants’ SMF/Punitives ¶ 7; Vecchio Aff., Tab 3 thereto, ¶ 7. He does interview potential new hires for the Housekeeping Department, but the decision to hire them rests with Vecchio. *Id.*<sup>51</sup> Halasz does not have the power to fire existing workers. *Id.* That responsibility lies with Vecchio in conjunction with Human Resources and other management. *Id.* Halasz does not have the power to grant raises. *Id.* Again, that authority lies with Vecchio or management committees. *Id.*<sup>52</sup> Halasz does not have authority to establish policies or set budgets. Defendants’ SMF/Punitives ¶ 8; Vecchio Aff., Tab 3 thereto, ¶ 8.<sup>53</sup> Halasz sometimes works outside the Housekeeping Department as a painter in the plant, and during that period work assignments in the department are done by someone else on the shift. Defendants’ SMF/Punitives ¶ 10; Plaintiff’s Opposing SMF/Punitives ¶ 10.

Since 1991 SPM has had a continuing policy against discrimination and harassment. Defendants’ SMF/Punitives ¶ 11; Vecchio Aff., Tab 3 thereto, ¶ 11. Attached as exhibits 4 and 5 to the Vecchio Affidavit are copies of that policy as currently found in the Personnel Policies and Procedures Manual used by all management, which existed in substantially similar form during Johnson’s employment. Defendants’ SMF/Punitives ¶ 11; Vecchio Aff., Tab 3 thereto, ¶ 11; Exhs. 4-5 to Vecchio Aff.

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<sup>51</sup> Vecchio, who has been SPM’s director of printing since May 2000, was its plant manager from 1991 through April 2000. *See* Vecchio Aff., Tab 3 to Defendants’ SMF/Punitives, ¶ 1.

<sup>52</sup> To the extent Johnson denies the statements contained in paragraph 7 of the Defendants’ statement of facts, *see* Plaintiff’s Opposing SMF/Punitives ¶ 7, his denials are more in the nature of qualifications inasmuch as they do not directly controvert the points made. Johnson’s statement that Vecchio “admits that he provided Halasz with deference on Halasz’s decision when it came to personnel evaluations and merit increases,” *id.*, is disregarded inasmuch as neither admitted nor fairly supported by the citation given.

<sup>53</sup> The Defendants’ further assertions that Halasz does not have authority to make management decisions or perform management functions for SPM, *see* Defendants’ SMF/Punitives ¶ 8, are effectively controverted by Johnson. For purposes of summary judgment, I view the cognizable record in the light most favorable to Johnson.

While SPM issued a sexual-harassment policy, the policies attached to the Vecchio Affidavit do not mention harassment on the basis of religion or disability. Plaintiff's Opposing SMF/Punitives ¶ 11; Exhs. 4-5 to Vecchio Aff., Tab 3 to Defendants' SMF/Punitives. According to SPM's own Rule 30(b)(6) designee and Human Resources manager, apart from its sexual-harassment policy, SPM does not have a separate policy regarding illegal discrimination in the workplace. Plaintiff's Opposing SMF/Punitives ¶ 11; Rule 30(b)(6) Deposition of Spencer Press, Inc. through its designee Deborah Clark ("Clark Dep."), attached thereto, at 6, 19. Moreover, SPM's Human Resources manager is not aware whether SPM has a policy regarding reasonable accommodation for disabled employees. Plaintiff's Opposing SMF/Punitives ¶ 11; Clark Dep., attached thereto, at 23-24. In addition, SPM never informed Halasz about his responsibility as a supervisor in keeping discrimination and harassment out of the workplace. Plaintiff's Opposing SMF/Punitives ¶ 11; Halasz Dep., attached thereto, at 117-18.<sup>54</sup>

During Johnson's employment, SPM employees, once a year, in January, were given with their paychecks a handout re-emphasizing SPM's policies against harassment. Defendants' SMF/Punitives ¶ 12; Plaintiff's Opposing SMF/Punitives ¶ 12. The handouts refer only to SPM's sexual-harassment policy; they do not mention harassment or discrimination on the basis of religion, disability or any other protected category. Plaintiff's Opposing SMF/Punitives ¶ 12; Exhs. 6-7 to Vecchio Aff., Tab 3 to Defendants' SMF/Punitives. Halasz made jokes about Johnson's religion, viewed Playboy magazines in the workplace and kept pictures of nude women on his computer and did not feel that this conduct was inappropriate until after he received harassment training. Plaintiff's Opposing SMF/Punitives ¶ 12; Halasz Dep., attached thereto, at 50-52, 91.

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<sup>54</sup> Johnson's further statement that "SPM failed to provide any discrimination or harassment training whatsoever to its supervisors . . . until December 2000," Plaintiff's Opposing SMF/Punitives ¶ 11, is neither admitted nor fairly supported by the citations given, which reference only sexual-harassment training.

During Johnson's employment, new employees were given a company Employee Handbook. Defendants' SMF/Punitive ¶ 13; Plaintiff's Opposing SMF/Punitive ¶ 13. These were also available to existing employees. *Id.* The company posted posters in the plant on its bulletin boards stating its anti-discrimination and anti-harassment policies. *Id.* ¶ 14. From at least the early to the mid-1990s, the company was presenting SPM's anti-harassment and anti-discrimination policies to new hires in its new-hire orientation. *Id.* ¶ 15. The content of the training segment since at least 1995 for new hires consisted of a video on harassment and discrimination followed by a presentation, question-and-answer period and handout of written materials on SPM's anti-harassment and anti-discrimination policies. *Id.* ¶ 16. New hires also were informed they could bring complaints to the supervisor or Human Resources. *Id.* The anti-harassment training segment given to new hires was also being given to existing employees at least by April 1, 2000. Defendants' SMF/Punitive ¶ 17; Affidavit of Janet Parker, Tab 4 thereto, ¶ 6. SPM has responded to harassment complaints by means including terminating and disciplining employees. Defendants' SMF/Punitive ¶ 18; Deposition of William Vecchio, Tab 6 thereto, at 66-71.<sup>55</sup>

## B. Analysis

Johnson's complaint seeks relief in the form, *inter alia*, of punitive damages. Complaint at 9. The Defendants press for summary judgment as to any such relief on grounds that (i) Halasz was too low-level an employee to impute his conduct to SPM for purposes of punitive damages and (ii) even if he was not, SPM undertook good-faith efforts to comply with Title VII. Memorandum in Support of Defendants' Motion for Partial Summary Judgment on the Issue of Punitive Damages

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<sup>55</sup> I omit SPM's parenthetical phrase, "When incidents have arisen in the past," Defendants' SMF/Punitive ¶ 18, inasmuch as Johnson effectively controverts that SPM has responded to all such incidents, *see* Plaintiff's Opposing SMF/Punitive ¶ 18.

(“Memorandum/Punitives”) (Docket No. 22) at 1-2. However, Johnson succeeds in demonstrating the existence of triable issues as to both points.<sup>56</sup>

An employee’s conduct subjects an employer to liability for Title VII punitive damages when, *inter alia*, “an employee serving in a ‘managerial capacity’ committed the wrong while ‘acting in the scope of employment.’” *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 543 (1999) (citations omitted). As the Supreme Court observed:

Unfortunately, no good definition of what constitutes a “managerial capacity” has been found, and determining whether an employee meets this description requires a fact-intensive inquiry. In making this determination, the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished. Suffice it to say here that the examples provided in the Restatement of Torts suggest that an employee must be “important,” but perhaps need not be the employer’s “top management, officers, or directors,” to be acting “in a managerial capacity.”

*Id.* (citations and internal quotation marks omitted).<sup>57</sup>

A gray, rather than black-and-white, image of Halasz’s “capacity” emerges from the cognizable evidence presented in this case. On the one hand, Halasz had no authority to hire or fire employees or set policy or budgets, sometimes undertook manual labor himself, was paid by the hour and even was eligible for overtime. On the other hand, Halasz directly supervised the Housekeeping Department’s employees, making sure they did their jobs, assigning their tasks and setting their work schedules, conducting performance evaluations and taking disciplinary actions and voicing his opinions in matters of wage increases, hiring and termination. He attended at least one management-level training session.

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<sup>56</sup> Accordingly, I need not consider Johnson’s alternative argument that punitive damages could be assessed on an additional theory (not initially addressed by the Defendants): that they recklessly employed an unfit agent (Halasz). *See* Plaintiff’s Opposition to Defendants’ Motion for Partial Summary Judgment on Punitive Damages (“Opposition/Punitives”) (Docket No. 31) at 5-7.

<sup>57</sup> Neither party suggests that the standard for imposition of punitive damages differs in the MHRA context. *See* generally Memorandum/Punitives; Opposition/Punitives at 5 n.1.

From all of this, a reasonable trier of fact could conclude that Halasz, though not “top management,” was “important” in the sense contemplated by *Kolstad*. In fact, he seemingly loomed large in the lives of SPM’s Housekeeping Department employees, either controlling, or having a say in, all key aspects of their working conditions. While an inquiry of this sort necessarily is fact-intensive, it is instructive that this court previously has deemed a front-line-type supervisor “managerial” for purposes of assessment of punitive damages in an employment-discrimination case. *See Bishop v. Bell Atlantic Corp.*, 143 F. Supp.2d 59, 67 (D. Me. 2001) (alleged perpetrator’s own testimony that he, another “first-line” supervisor, a “second-line supervisor” and others represented defendant company’s “management” at plaintiff’s MHRC hearings established that he was manager for punitive-damages purposes). In short, there is a triable issue whether SPM afforded Halasz sufficient supervisory authority and discretion that he should be considered to have acted in a “managerial capacity” for purposes of assessment of punitive damages.

In *Kolstad*, the Supreme Court further held, in relevant part, that “in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s good-faith efforts to comply with Title VII.” *Kolstad*, 527 U.S. at 545 (citation and internal quotation marks omitted). The First Circuit has characterized this as an affirmative defense that an employer must prove, stating:

We hold that a written non-discrimination policy is one indication of an employer’s efforts to comply with Title VII. But a written statement, without more, is insufficient to insulate an employer from punitive damages liability. A defendant must also show that efforts have been made to implement its anti-discrimination policy, through education of its employees and active enforcement of its mandate.

*Romano*, 233 F.3d at 670 (citations omitted).

Johnson adduces sufficient evidence to raise a genuine issue whether SPM undertook good-faith efforts to comply with Title VII. Although SPM had in place, and sent annual written reminders

of, anti-discrimination policies, the policies and the reminders focused on sexual harassment, not harassment on the basis of other prohibited factors such as disability and religion. SPM did not begin providing video or in-person training on the subject of harassment to existing employees until April 1, 2000, shortly before Johnson tendered his resignation.

While SPM did respond to harassment complaints, disciplining and even terminating employees as a result, Johnson adduces evidence that it did not respond to his own complaints about Halasz. More damaging for the Defendants, Johnson adduces evidence that Halasz (i) never was apprised of his responsibility as a supervisor to prevent workplace discrimination and harassment and (ii) himself engaged in conduct that he did not realize was inappropriate until he received training, including joking about Halasz's religion, viewing Playboy magazines in the workplace and keeping pictures of nude women on his computer.

Viewing the evidence in the light most favorable to Johnson, there is a triable issue whether the Defendants engaged in a good-faith effort to comply with Title VII such that they can on that basis escape any potential liability for punitive damages. The Defendants' bid for summary judgment as to punitive damages accordingly should be denied.

### **VIII. Conclusion**

For the foregoing reasons, I recommend that the Motion/SPI and the Motion/Disability be **GRANTED** and that the Motion/Pay, the Motion/Count III and the Motion/Punitive be **DENIED**. If this recommended decision is adopted, remaining for trial against one defendant (SPM) only will be Count I (religious discrimination and harassment in violation of Title VII and the MHRA) and Count III (alleging unlawful retaliation in violation of Title VII and the MHRA) to the extent not grounded in claims of disability.

### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 24th day of January, 2003.

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David M. Cohen  
United States Magistrate Judge

TRLIST STNDRD

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 02-CV-73

JOHNSON v. SPENCER PRESS OF ME, et al  
Assigned to: JUDGE D. BROCK HORNBY  
Demand: \$0,000  
Lead Docket: None  
Dkt# in other court: None

Filed: 04/04/02  
Jury demand: Plaintiff  
Nature of Suit: 442  
Jurisdiction: Federal Question

Cause: 28:1331 Fed. Question: Employment Discrimination

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