

Decotiis v. Whittemore, 635 F.3d 22, 29 (1st Cir. 2011) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 559 (2007)). The Court accepts non-conclusory factual allegations in the complaint as true, Ocasio–Hernández v. Fortuño–Bursset, 640 F.3d 1, 12 (1st Cir. 2011), and “draw[s] all reasonable inferences in favor of the plaintiff[].” Gargano v. Liberty Int’l Underwriters, Inc., 572 F.3d 45, 48 (1st Cir. 2009). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 545 (internal quotation marks and citations omitted). However, considering a motion to dismiss “is neither the time nor the place to resolve the factual disputes between the parties. Whether [the plaintiff] can prove what he has alleged is not the issue. At this stage of the proceeding we must take the complaint’s factual allegations as true,” as long as they paint “a plausible picture.” Haley v. City of Boston, 657 F.3d 39, 52 (1st Cir. 2011).

III. Factual Allegations

The following facts are alleged in the operative complaint and are taken as true for the purposes of this motion.

Joyce began working for Upper Crust in late 2003 or early 2004 as a counter person at the Brookline location. Second Amended Complaint at ¶ 6. In 2007, Joyce became the Operations Manager, with oversight responsibilities for five stores within the Upper Crust chain. Id. at ¶ 7. In 2009, the United States Department of Labor (“DOL”) undertook an investigation of Upper Crust’s wage and hour practices. Id. at ¶ 8. Around August 2009, as a result of the DOL’s investigation, Upper Crust paid employees back wages. Id. at ¶ 9. Following these payments, however, Tobins told employees that this money belonged to Upper Crust and that the employees would have to pay

it back if they wanted to continue working for Upper Crust. Id. at ¶ 10. Employees who chose to pay back the money to keep their jobs were working in excess of 70 hours per week but were not being paid overtime; they were being paid a flat rate of \$455 per week. Id. at ¶ 11. Employees complained of this unfair treatment to Joyce and he brought the concerns regarding Upper Crust's wage and hour violations to Tobins' partner, Brendan Higgins, General Manager Barry Proctor and Chief Financial Officer David Marcus. Id. at ¶¶ 12-15. Marcus, Proctor and Higgins dismissed Joyce's complaints. Id. at 16. When Joyce believed nothing was going to be done to rectify the situation, Joyce contacted the DOL in January 2010, detailing what he felt were Upper Crust's unlawful or unethical wage and hour practices. Id.

After Joyce's internal complaints and his external complaint to the DOL, in March 2010, the owners met with Joyce and informed him that he was not doing his job and that he needed to work more and support his managers. Id. at ¶ 18. The complaint further alleges that his managers told Joyce that they made clear to the owners that he was "always there for them and was doing a good job." Id. In April 2010, Tobins called Joyce yelling at him about a leak at the Brookline store, despite the fact that the leak had been a problem for years and was not one over which Joyce had any control. Id. at ¶ 19. The following month, on May 18, 2010, Tobins called Joyce and accused him of being involved in a robbery the night before at the Commonwealth Avenue store and in doing so, berated him with a tirade of obscenities. Id. at ¶¶ 20-21.

Joyce resigned immediately following the accusation. Id. at ¶ 21. Upon receiving his final paycheck, Joyce believed the total amount of wages earned was short by several hundred dollars and contacted Tobins requesting the total amount he thought he had earned. Id. at ¶ 22. Tobins indicated that the deduction from Joyce's paycheck was to account for his use of the company cell phone for

personal telephone calls. Id. Joyce had always used the cell phone for business and personal telephone calls and had used the same cell phone to contact the DOL about the alleged work and hour violations at Upper Crust. Id. at ¶ 23. Joyce told Tobins that if he did not receive the total amount he believed was due, he would report it to the DOL. Id. at ¶ 24. In response, Tobins threatened Joyce stating, “Patrick if you go to the Department of Labor I will (expletive) kill you. I will tell your fiancé that you are cheating on her and I will ruin your life.” Id. at ¶ 25. Joyce did not receive the total amount to which he believed he was entitled and did not contact the DOL because he feared for his safety. Id. at ¶ 26.

Following a July 2010 article in the Boston Globe regarding alleged labor violations by Upper Crust, Tobins sent Joyce threatening text messages. Id. at ¶ 27. Following these threats, Joyce filed a formal complaint against Tobins with the Boston Police Department. Id. at ¶ 28. Joyce feared for his safety due to Tobins’ threats. Id. at ¶ 29. Tobins allegedly continues to make false allegations regarding Joyce to current and former employees and associates at Upper Crust. Id. at ¶ 30.

IV. Procedural History

On December 20, 2010, Joyce filed a complaint alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (Count I), Mass. Gen. L. c. 149, § 148A (Count II), Mass. Gen. L. c. 12, § 11I (Count III) and defamation (Count IV) against Tobins and Upper Crust. (D. 1). Upper Crust and Tobins moved to dismiss the complaint pursuant to Rule 12(b)(6), D. 6, and the Court held a hearing on the motion. The Court allowed Joyce to amend the complaint and denied without prejudice the motion to dismiss. (8/9/11 D. Entry). Joyce filed an amended complaint which added JJB as a Defendant, a claim for intentional infliction of emotional distress against Tobins (Count V) and factual allegations with respect to the existing Counts. D. 16. All Defendants moved

to dismiss the amended complaint pursuant to Rule 12(b)(1) and 12(b)(6), D. 21, 23, and JJB moved for sanctions. D. 25. Joyce then moved for leave to file a second amended complaint (“SAC”) to add factual allegations specific to JJB. (D. 26).

V. Discussion

A. Motion to Amend the First Amended Complaint to Add Allegations Against JJB

After JJB moved to dismiss the first amended complaint, Joyce sought leave to file a second amended complaint. The SAC adds only factual allegations regarding the connection between JJB and Upper Crust and does not add any further factual allegations to those contained in the first amended complaint which was the subject of the motion to dismiss. Pursuant to Rule 15(a)(2), leave to amend shall be freely given when “justice so requires.” Amendments should be liberally permitted in the absence of undue delay, bad faith or dilatory motive, futility, or undue prejudice to the opposing party. Foman v. Davis, 371 U.S. 178, 182 (1962); United States ex rel. Gagne v. City of Worcester, 565 F.3d 40, 48 (1st Cir. 2009). Neither JJB nor the other Defendants opposed the motion to amend and do not contend, and the Court does not find, that the motion is unduly prejudicial, sought in bad faith or with dilatory motive, or that it would be futile. For these reasons, Joyce’s motion to amend is granted, and the SAC is deemed filed and the operative statement of Joyce’s claims.

B. Tobins’ and Upper Crust’s Motion to Dismiss

Tobins and Upper Crust have moved to dismiss the counts against them on the grounds that they fail to state a claim upon which relief can be granted under Rule 12(b)(6).¹ The Court shall

¹Tobins and Upper Crust have also moved to dismiss under Rule 12(b)(1) on the grounds that this Court lacks subject matter jurisdiction. They, however, make only fleeting reference to

address each of those counts in turn.

1. Count I: Retaliation Claim Under 29 U.S.C. § 215(a)(3)

In Count I, Joyce alleges a retaliation claim under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, which sets forth substantive minimum wage, maximum hours and overtime pay standards. See 29 U.S.C. §§ 206-07; Kasten v. Saint-Gobain Performance Plastics Corp., ___ U.S. ___, 131 S.Ct. 1325, 1333 (2011). FLSA’s anti-retaliatory provision makes it “unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related” to the Act. 29 U.S.C. § 215(a)(3). To state a claim for retaliation under § 215(a)(3), Joyce must show that: “(1) [he] engaged in a statutorily protected activity, and (2) his employer thereafter subjected him to an adverse employment action (3) as a reprisal for having engaged in protected activity.” Claudio-Gotay v. Becton Dickinson Caribe, Ltd., 375 F.3d 99, 102 (1st Cir. 2004). The SAC alleges sufficient facts to state a plausible FLSA retaliation claim.

a. Engaging in Protected Activity

The SAC adequately alleges that Joyce engaged in protected activity under 29 U.S.C. § 215(a)(3) when he orally complained of Upper Crust’s practices regarding alleged employee wage and hour violations to Tobins’ business partner, Brendan Higgins, General Manager Barry Proctor

subject matter jurisdiction in their papers, Def. Mem. at 5, n. 2, D. 22, suggesting that “29 U.S.C. § 215(a)(3) does not purport to confer any jurisdiction on this court.” Id. However, Joyce’s retaliation claim, arising under 29 U.S.C. § 215(a)(3), gives this Court subject matter jurisdiction under 28 U.S.C. § 1331. See Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 89 (1998) (noting that “[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is ‘so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy’”) (internal citation omitted). Accordingly, this Court also has supplemental jurisdiction over the remaining state law claims under 28 U.S.C. § 1367.

and Chief Financial Officer David Marcus. SAC at ¶¶ 14-15. Specifically, Joyce alleges he complained of Upper Crust's decision to force employees to pay back wages if they wanted to stay employed at Upper Crust and Upper Crust's refusal to pay those same employees overtime even though they were working more than 70 hours a week. Id. at ¶¶ 10-11. Internal complaints by employees notifying an employer of alleged FLSA violations, like those made by Joyce here, are sufficient to trigger the protections afforded under § 215(a)(3). See Valerio v. Putnam Assocs. Inc., 173 F.3d 35, 43-44 (1st Cir. 1999). Such complaints need not be in writing to be deemed "filed" under § 215(a)(3); "filed" complaints may be oral as well as written so long as the complaint is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." Kasten, 131 S. Ct. at 1335. Here, Joyce complained to senior management of Upper Crust's allegedly unlawful refusal to pay workers overtime and forcing them to pay back wages Upper Crust claims belonged to it. Accordingly, Joyce's alleged internal complaints were sufficient to constitute protected activity under FLSA.

Contrary to Defendants' assertion otherwise, Joyce is protected under FLSA's anti-retaliation provision despite his position as a managerial employee (as Operations Manager). An employee engages in protected activity when he or she "step[s] outside his or her role of representing the company and . . . file[s] . . . an action adverse to the employer, actively assist[s] other employees asserting FLSA rights, or otherwise engage[s] in activities that reasonably could be perceived as directed towards the assertion of rights protected by . . . FLSA." Claudio-Gotay, 375 F.3d at 102. "A requirement of 'stepping outside' a normal role is satisfied by a showing that the employee took some action against a . . . policy . . . and that the action was based on a reasonable belief that the

employer engaged in . . . conduct’ contrary to the FLSA.” Id. at 102 (quoting Equal Employment Opportunity Comm’n v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998)).

Here, the SAC alleges that Joyce complained to Tobins’ business partner, the general manager and the CFO concerning Upper Crust’s unfair wage and hour practices. Joyce does not allege, and Defendants do not argue, that Joyce was trying to protect Upper Crust by alerting them to unlawful practices under FLSA, as the First Circuit found in Claudio-Gotay. It is, therefore, plausible that Joyce complained to Tobins’ partner, general manager and CFO of Upper Crust because he had a reasonable belief that Upper Crust was engaged in illegal wage and hour practices under FLSA. Joyce’s action in bringing his complaints to the DOL in January 2010, when he was still employed at Upper Crust, to inform the government of Upper Crust’s alleged wage and hour violations, further supports the reasonable inference that Joyce “crossed the line from being an employee merely performing h[is] job . . . to an employee lodging a personal complaint.” McKenzie v. Renberg’s Inc., 94 F.3d 1478, 1486 (10th Cir. 1986). Thus, despite the fact that Joyce was a managerial employee, it is plausible that he engaged in protected activity for the purposes of § 215(a)(3). See e.g., HBE Corp., 135 F.3d at 554 (finding manager’s refusal to implement a discriminatory company policy sufficient to constitute protected activity under FLSA).

b. Adverse Employment Action

The SAC’s factual allegations further support a reasonable inference that Defendants subjected Joyce to adverse employment action. For a retaliatory employment action to be adverse, “the employer must either (1) take something of consequence from the employee, say, by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities or (2) withhold from the employee an accouterment of the employment relationship, say, by failing to follow a

customary practice of considering her for a promotion after a particular period of service.” Blackie v. State of Me., 75 F.3d 716, 725-26 (1st Cir. 1996) (internal citations omitted).

Although Joyce resigned from his employment, the SAC alleges an adverse employment action, namely constructive discharge. To establish constructive discharge, Joyce must show that he suffered working conditions “so difficult or unpleasant that a reasonable person in [his] shoes would have felt compelled to resign.” Roman v. Potter, 604 F.3d 34, 42 (1st Cir. 2010) (quoting Marrero v. Goya of P.R., Inc., 304 F.3d 7, 28 (1st Cir. 2002) (further citation omitted)). The SAC alleges that, in retaliation for his complaints both internally and to the DOL about Defendants’ continued wage and hour violations, in March 2010, the owners told Joyce he was not performing well (despite managers indicating to Joyce that they had informed the owners that Joyce was performing well). The following month, in April 2010, Tobins called Joyce yelling about a leak that had always been a problem and over which Joyce had no control and then in May 2010, Tobins allegedly falsely accused Joyce of being involved in a robbery of an Upper Crust store and accosted him with a litany of obscenities. Accepting these facts as true, as the Court must on a motion to dismiss, it is plausible that Joyce suffered from a work environment so unpleasant that a reasonable person would have felt compelled to resign.

The Defendants’ argument that their “knowledge” of Joyce’s complaints to the DOL must be specifically pleaded to state a claim under § 215(a)(3) is incorrect. In considering a plaintiff’s retaliation claim, the key inquiry is whether he has pleaded the plausibility of a “causal connection . . . between the protected conduct and the adverse action.” Blackie, 75 F.3d at 723 (citation omitted). “A showing of adverse action soon after an employee engages in protected activity is evidence that there is a causal connection between the adverse action and the protected activity.” Cheng v.

IDEAssocs., Inc., 2000 WL 1029219, at *5 (D. Mass. July 6, 2000). This “causal connection creates an inference of retaliation.” Id. The factual allegations in the SAC detailed above are sufficient to support the reasonable inference that the actions of senior management including Tobins were in retaliation for Joyce’s complaints that Upper Crust’s failure to pay the employees overtime and requirement that they pay back wages was unlawful. Therefore, the SAC adequately alleges a causal connection between Joyce’s statutorily protected conduct and the adverse employment action.²

2. Count II: Mass. Gen. Laws c. 149, § 148A

Count II asserts a retaliation claim under the Massachusetts Wage Act, Mass. Gen. Laws c. 149, § 148A. The Wage Act requires “[e]very person having employees in his service” to pay “each such employee the wages earned” within a fixed period after the end of a pay period. Mass. Gen. Laws c. 149, § 148. “The purpose of the Wage Act is ‘to prevent the unreasonable detention of wages.’” Melia v. Zenhire, Inc., 462 Mass. 164, 170 (2012) (quoting Boston Police Patrolmen’s Ass’n v. Boston, 435 Mass. 718, 720 (2002) (further citation omitted)). The Wage Act’s anti-retaliation provision prohibits an employer from penalizing an employee “in any way as a result of any action on the part of an employee to seek his or her rights under the wages and hours provisions of this chapter” and provides that “[a]ny employer who discharges or in any other manner discriminates against any employee because such employee has made a complaint to the attorney general or any other person . . . shall have violated this section and shall be punished . . .” Mass. Gen. Laws c. 149, § 148A. The purpose of this provision is “to encourage enforcement of the wage laws by protecting

²Neither Bhatti v. Trustees of Boston Univ., 659 F.3d 64 (1st Cir. 2011) nor Scott v. Encore Images, Inc., 80 Mass. App. Ct. 661 (2011), cited by Defendants in their supplemental filings (D. 33 and 34, respectively), compel a different conclusion, since in addition to other distinguishing factors, those cases involved motions for summary judgment, not the plausibility of a retaliation claim at the motion to dismiss stage.

employees who complain about violations of the same.” Smith v. Winter Place LLC, 447 Mass. 363, 368 (2006).

However, Section 150 of Mass. Gen. Laws c. 149 requires an employee claiming a violation of Section 148A to file a complaint with the attorney general before filing a civil action alleging a violation of same. Mass. Gen. Laws c. 149, § 150; see Norceide v. Cambridge Health Alliance, 814 F. Supp. 2d 17, 27 (D. Mass. 2011) (noting that under Section 150, “an employee’s private right of action is conditioned on the filing of a complaint with the Massachusetts Attorney General”). Failure to satisfy this statutory precondition is grounds for dismissal. Norceide, 814 F. Supp. 2d at 27 (granting without prejudice motion to dismiss plaintiff’s state law claim for unpaid wages under Section 148), and cases cited. The second amended complaint fails to allege that Joyce complied with this procedural requirement under the statute. As such, the Defendants’ motion to dismiss the retaliation claim under Mass. Gen. Laws c. 149, § 148A asserted in Count II is granted without prejudice should Joyce seek leave to amend.

3. Count III: Mass. Gen. Laws c. 12, § 11I

Count III alleges that the Defendants used threats and intimidation “in an effort to deny [] Joyce his right to speak freely regarding Defendants’ legal and ethical violations [which] violates his Massachusetts civil rights” (SAC, Count III) under Mass. Gen. Laws c. 12, § 11I. The Massachusetts Civil Rights Act, Mass. Gen. Laws c. 12, § 11I, creates remedies for “[a]ny person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with [by any person, whether or not acting under color of law, by threats, intimidation or coercion].” Mass. Gen. Laws c. 12, § 11I.

To prevail, a plaintiff must demonstrate that “(1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or the Commonwealth, (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by ‘threats, intimidation or coercion.’” Meuser v. Fed. Express Corp., 564 F.3d 507, 516 (1st Cir. Mass. 2009) (quoting Bally v. Northeastern Univ., 403 Mass. 713, 717 (1989) (quoting Mass. Gen. Laws c. 12, § 11H)). A “threat” means the “intentional exertion of pressure to make another fearful or apprehensive of injury or harm” and “‘intimidation’ involves putting a person in fear for the purpose of compelling or deterring conduct.” Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 474 (1994).

The SAC alleges that upon receiving his final paycheck, Joyce noticed the total amount of wages was less than the amount he believed was due and that when Joyce contacted Tobins to request that he be paid these wages, Tobins responded that The Upper Crust had deducted these wages because Joyce had made personal calls on the company cell phone, which Joyce alleges had never been an issue since he had always used the cell phone for both personal and business calls. SAC at ¶ 22-23. When Joyce told Tobins that if he was not paid the wages due to him, he would report it to the DOL, Tobins threatened to kill him and ruin his life. Id. at ¶¶ 24, 25. The SAC further alleges that Joyce never received the wages due to him and that he did not report this to the DOL because he feared for his safety. Id. at ¶ 26.

Taking these factual allegations as true, it is reasonable to infer that Tobins’ words placed Joyce in fear of physical harm to deter him from notifying the DOL, and constituted threats and intimidation and that Joyce was exercising a legal right under Massachusetts law sufficient to state a plausible Section 11I claim. The SAC alleges that Joyce was not paid the total wages to which he

believed he was entitled due to the deduction for personal cell phone use. It is reasonable to infer that Joyce's demand for his wages he claims he earned (apart from him informing Tobins he would contact the DOL if he was not paid the total amount due) constituted an assertion of a legal right (i.e., demanding payment of wages earned) protected under the Wage Act. Accordingly, the Defendants are not entitled to dismissal of Count III for violation of Mass. Gen. Laws c. 12, § 11I.

4. Count IV: Defamation

Count IV asserts a cause of action for defamation against the Defendants. To prevail on a defamation claim in Massachusetts, “a plaintiff must show that the defendant was at fault for the publication of a false statement of and concerning the plaintiff which was capable of damaging his or her reputation in the community and which either caused economic loss or is actionable without proof of economic loss.” Stanton v. Metro Corp., 438 F.3d 119, 124 (1st Cir. 2006). Generally, “publication” requires that “the defendant communicate the defamatory statement to a third party.” White v. Blue Cross & Blue Shield of Mass., Inc., 442 Mass. 64, 66 (2004). “Four types of statements are actionable without proof of economic loss: statements that constitute libel; statements that charge the plaintiff with a crime; statements that allege that the plaintiff has certain diseases; and statements that may prejudice the plaintiff's profession or business.” Ravnikar v. Bogojavlensky, 438 Mass. 627, 630 (2003); see Phelan v. May Dep't Stores, Co., 443 Mass. 52, 56 (2004) (stating that “the imputation of a crime is defamatory per se, requiring no proof of special damages”).

In this case, the SAC alleges sufficient facts to state a plausible defamation claim against Tobins. The SAC alleges that Tobins defamed him by “accusing him of having ‘a hand’ in [the] robbery,” (alleged false statement accusing Joyce of a crime), SAC at ¶ 20, and “publishing this accusation and other falsehoods to other partners and managers with reckless disregard” (published

to third-parties) which “has placed [] Joyce in a position whereby reasonable people could view him with contempt, disgrace and or ridicule” and alleges that “this conduct has caused [him] emotional distress and other damages.” *Id.* at ¶ 30, Count IV. Therefore, Count IV survives the Defendants’ motion to dismiss.³

5. Count V: Intentional Infliction of Emotional Distress

In Count V, Joyce alleges that Tobins intentionally inflicted emotional distress upon him. Under Massachusetts law, the tort of intentional infliction of emotional distress includes four elements: “(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community; (3) that the actions of the defendant were the cause of the plaintiff’s distress; and (4) that the emotional distress sustained by the plaintiff was severe and of a nature that no reasonable man could be expected to endure it.” *Agis v. Howard Johnson, Co.*, 371 Mass. 140, 144-45 (1976) (internal quotation marks and citations omitted) (declining to dismiss a claim for intentional infliction of emotional distress where plaintiff’s manager gathered all waitresses, informed them that he would begin firing them in alphabetical order until the perpetrator of a theft was discovered and then fired plaintiff). “Liability cannot be predicated on mere insults, indignities, threats, annoyances, petty oppressions or other trivialities[,] nor even is it enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that

³Contrary to the Defendants’ argument otherwise, defamation claims brought in federal court are subject to the pleading requirements of Rule 8, not the heightened pleading requirements of Rule 9. See, e.g., *Davidson v. Cao*, 211 F. Supp. 2d 264, 276 (D. Mass. 2002), and cases cited.

his conduct has been characterized by malice or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.” Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997) (internal quotation marks and citation omitted). However, a defendant’s “extreme and outrageous conduct may be found in the totality of the circumstances, and does not have to be alleged in a single incident.” Gouin v. Gouin, 249 F. Supp. 2d 62, 73 (D. Mass. 2003).

Although the standard for proving an intentional infliction of emotional distress claim is high, see Anderson v. Boston Sch. Comm., 105 F.3d 762, 766-67 (1st Cir. 1997) (discussing standard and affirming a directed verdict for defendant on such a claim), taking all of the allegations in the SAC as true, Joyce alleges a series of incidents that taken together, supports a reasonable inference that Tobins knew or should have known that his conduct would have caused him severe emotional distress. The SAC alleges that Tobins called Joyce and he accused Joyce of a robbery at one of the Upper Crust stores and berated him with obscenities, after which Joyce resigned, and that when Joyce called Tobins to address the discrepancy in the amount of his final paycheck and told him that he would contact the DOL of the alleged work and hour violations at Upper Crust, Tobins threatened to kill Joyce and ruin his life if he did so. SAC at ¶¶19-25. The SAC further alleges that Tobins sent Joyce threatening text messages after the July 2010 Boston Globe article concerning the alleged labor violations at Upper Crust. Id. at ¶ 27. The SAC also alleges that as a result of Tobins’ threats, Joyce feared for his safety, did not contact the DOL and filed a formal complaint with the Boston Police Department. Id. at ¶¶ 26-28. From these factual allegations, all of the necessary elements—that Tobins intended his actions to cause emotional distress or knew or should have known that they would, that the alleged harassing and threatening conduct was extreme and outrageous, that his conduct was the cause of Joyce’s emotional distress and that the resulting distress was severe—are

alleged and state a plausible claim. See, e.g., Gouin, 249 F. Supp. 2d at 73-74 (denying a motion to dismiss where plaintiff alleged a number of incidents in which she alleges defendant knew or should have known that his conduct would have caused her emotional distress and sufficiently alleged that the conduct was extreme, that the conduct was the cause of her distress and that such distress was severe). Moreover, “[b]ecause reasonable [people] could differ on these issues, we believe that ‘it is for the jury, subject to the control of the court,’ to determine whether there should be liability” on this claim. Agis, 371 Mass. at 145-46 (internal citation omitted); see Boyle v. Wenk, 378 Mass. 592, 597-98 (1979). Accordingly, the Court denies the motion to dismiss the intentional infliction of emotional distress claim asserted in Count V.

C. JJB’s Motion to Dismiss

JJB moved to dismiss on the same grounds as those advanced by Upper Crust and Tobins in their motion to dismiss and on the basis that the first amended complaint alleged no factual allegations against JJB other than that it is a Massachusetts corporation doing business with Upper Crust. JJB Mem. at 1, D. 24. Having allowed the motion to amend, the SAC is now the operative complaint and it alleges sufficient facts to state a claim against JJB. The SAC alleges that JJB’s “operations are closely intertwined with The Upper Crust,” that JJB is “owned by the same three individuals who own The Upper Crust,” that it issued paychecks to Joyce and other Upper Crust employees and that JJB is named as Joyce’s employer with the Department of Labor and Workforce Development. SAC at ¶ 4. From these factual allegations, it is reasonable to infer that JJB and Upper Crust are so integrated with one another that JJB is liable for the conduct as a joint employer or under other similar theories of liability for the conduct alleged in the complaint. See, e.g., Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998) (noting that “FLSA contemplates several

simultaneous employers, each responsible for compliance with the Act”). Thus, the SAC cannot be dismissed in its entirety for failure to state a claim against JJB; Counts I, III and IV against JJB shall stand and Count II shall be dismissed as to JJB for the reasons articulated in the discussion above regarding Upper Crust and Tobins’ motion to dismiss. Moreover, in light of the Court’s rulings above, JJB’s one-paragraph motion for sanctions under Fed. R. Civ. P. 11 on the ground that the amended complaint states no legal claim against it, is denied.

VI. Conclusion

For the foregoing reasons, Joyce’s motion for leave to amend the complaint is GRANTED. The Defendants’ motion to dismiss is GRANTED as to Count II and DENIED as to Counts I, III, IV and V. JJB’s motion for sanctions is DENIED.

So ordered.

/s/ Denise J. Casper
United States District Judge