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No Individual Liability for Retaliation Under the FEHA

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The California Supreme Court continued a trend on Monday, March 3, 2008, when it held in Jones v. The Lodge at Torrey Pines that supervisors cannot be held individually liable for retaliation under California's Fair Employment and Housing Act (FEHA). The Court has consistently shielded individual supervisors from various other forms of employment related claims. For example, the Supreme Court ruled in Reynolds v. Bement, a 2005 decision, that individual corporate agents, including officers, directors, and shareholders, could not be personally liable for an employer's failure to pay wages to its employees. Similarly, in 2000, the Court held in Carrisales v. Department of Corrections that individual, non-supervisory employees could not be held liable for harassment.

Jones, Reno, and Individual Liability for Personnel Actions

The Jones decision itself is a logical extension of the Court's 1998 decision in Reno v. Baird, where the Court decided that individual employees could not be held liable for discrimination under the FEHA. Justice Chin wrote the majority opinion in Jones, relying heavily on the Court's rationale in Reno. A primary policy underlying Reno—permitting supervisors to manage without fear of personal liability—supported the finding that supervisors should not be personally liable for retaliation. As the Court pointed out, a supervisor facing personal liability for normal personnel actions (demotion, termination, failure to promote, compensation, discipline, etc.) will face a conflict of interest every time he or she considers whether to take adverse action against an employee. With harassment, on the other hand, a supervisor may avoid liability simply by refraining from engaging in conduct that may amount to "harassment."

Despite the Court's ruling in Reno, lower California courts and federal courts consistently have held that, unlike in discrimination cases, individuals may be liable for retaliatory decisions. The difference in the courts' treatment of individual liability for discrimination and retaliation, according to Justice Chin, was based on differences in language between the section of the FEHA barring "discrimination" and the section prohibiting "retaliation." Justice Chin concluded that the differences in the language between the two statutory sections did not evince a legislative intent to impose personal liability.

Strong Dissent Calls for Intervention by the Legislature

Although the Court's decisions regarding personal liability in employment law have been consistent, the Jones case was decided by a 4-3 majority. Justices Moreno, Kennard, and Werdegar dissented. The dissenters opined that the statutory language imposing liability for retaliation plainly included personal liability for supervisors. They pointed out that every state and federal court to have considered the issue had held that individuals could be liable for retaliation, even if there was no personal liability for discrimination. In separate opinions, Justices Moreno and Kennard essentially accused the majority of judicial activism by ignoring the plain language of the law at issue and implementing their own policy decisions, thereby usurping the Legislature's authority.

Justice Moreno concurred in the Reynolds v. Bement decision, but expressly asked the Legislature to overturn that decision and impose personal liability for wage and hour violations. The Legislature, so far, has failed to do so. Justice Moreno made the

same request of the Legislature in the Jones decision. This time, however, Justices Kennard and Werdegar joined him.

Whether the Legislature will become involved in this issue remains to be seen. So far, Reno remains good law. However, the fate of Jones is unclear. When the Court held in Carrisales that non-supervisors could not be held personally liable for harassment, the Legislature moved quickly to pass a law abrogating the decision and specifically imposing liability against individual employees for harassment.

If the Legislature considers overturning Jones, it should carefully evaluate the ramifications of exposing supervisors to liability for making routine workplace decisions. The Supreme Court decided in Yanowitz v. L'Oreal that "retaliation" is conduct identical to that which may constitute "discrimination." Thus, conduct alleged to be retaliatory may take a variety of forms. To be actionable, conduct simply must "materially" affect the victim's employment. The Court in Yanowitz mandated that retaliatory conduct may be viewed collectively, and over a period of time.

As such, supervisors naturally will think twice before making a variety of routine personnel decisions, such as job assignments, written disciplinary action, compensation decisions, promotions, demotions, and the like. Talented employees may decline managerial positions for fear of retaliation lawsuits. Liability for retaliation or discrimination simply is not the same as for harassment. A supervisor can avoid the types of conduct that falls under the category of harassment. But no supervisor can avoid making personnel decisions, which form

the basis for retaliation and discrimination claims.

Other Recent Decisions Shielding Individual Employees From Liability

Other court decisions in recent years have afforded individual supervisors protections from individual liability. In 1996, the California Court of Appeal held in Weinbaum v. Goldfarb, Whitman & Cohen that individual supervisors could not be liable for wrongful termination in violation of public policy because only “employers” can make termination decisions and supervisor are not “employers.” This ruling has been universally accepted. Supervisors cannot be liable for wrongful termination generally, either, for the same reason. Along the same lines, the “managerial privilege,” first recognized long ago, protects supervisors acting on behalf of their employers from claims of “conspiracy” to interfere with employment relationships.

In another 1996 California Court of Appeal decision, Fiol v. Doellstedt, the court held that supervisors cannot conspire with their employers to violate laws that non-employers are incapable of violating. Fiol made clear that a supervisor cannot be held liable for failure to take effective action in response to an employee’s alleged harassment of a subordinate. However, if a supervisor makes even the slightest effort to foster or participate in the harassment, the supervisor may be held liable under the express provisions of the FEHA which make it unlawful for any “person to aid, abet, incite, compel, or coerce the doing of any acts forbidden under this part, or to attempt to do so.”

Individual Employees Are Not Immune from Liability

Despite the trend of court decisions protecting supervisors’ personnel actions, individual employees can still be liable for various statutory violations that specifically provide for individual liability. For example, as mentioned above, the FEHA imposes individual liability for harassment. In a 1998 Court of Appeal decision, Sheppard v. Freeman, the court allowed a pilot terminated from Southwest Airlines to pursue claims against his coworkers for libel. The Court there reasoned that individuals may be held personally liable for any violation of a statute that imposes liability against individuals. Other examples of claims that may result in individual liability include fraud, assault, and battery.

The Workers’ Compensation Act (Act) generally precludes individual liability for most co-worker claims. But employees who engage in intentional conduct with a specific intent to injure a co-worker may be held personally liable because such conduct is outside the scope of the Act.

California employers also should be mindful of federal law, which may differ from state law on similar issues. For example, while California law does not hold supervisors personally liable for wage and hour violations, individuals can be liable for violations of the federal Fair Labor Standards Act (FLSA) for wage and hour violations because the relevant statute defines “employer” as any person who acts, directly or indirectly, in the interest of the employer. The federal district court for the Central District of California in Mercer v. Borden used the same definition of “employer” to extend liability to individual employees for

violations of the Family and Medical Leave Act (FMLA).

Small business owners should also be mindful of the realities of doing business when it comes to individual liability for employment actions. Owner/operators should maintain corporate formalities and avoid comingling personal and business funds. This is important because the law has designed a mechanism referred to as “piercing the corporate veil” to reach corporate agents who attempt to shield themselves from liability for corporate wrongdoings. The theory is that when the economic realities of the business demonstrate an individual has such direct and significant control over the wages of employees, that person can be considered an “alter ego” of the business and be personally liable. The Supreme Court in Reynolds recognized this common law “alter ego” theory exception, as well as other statutory exceptions to the general rule that individual employees cannot be liable for failure to pay wages.

Conclusion

Jones may bring a sigh of relief to supervisors named as individual defendants in retaliation lawsuits. However, the decision does little to allay employers’ concerns about liability for employment practices. The removal of personal liability for employment decisions means supervisors have no financial disincentive to avoid making decisions that later may be challenged as unlawful. More than ever, therefore, employers must be vigilant to train management regarding how to abide by sound equal employment opportunity policies and procedures. Employers must emphasize to supervisors that even if the law does not impose personal liability, the organization will hold them accountable.



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