



## California Supreme Court Invalidates FEHA Retaliation Claims Against Individuals

Managers and supervisors in California can breathe a little easier thanks to the California Supreme Court. On March 3, 2008, the Court held in a 4-3 ruling in *Jones v. The Lodge at Torrey Pines Partnership* that only employers, and *not* individuals, can be liable for retaliation under California's Fair Employment and Housing Act (FEHA). In so ruling, the Court ensured that individuals receive the same immunity from retaliation claims as they have received from discrimination claims under FEHA for the last 10 years.

The plaintiff brought two causes of action to trial: sexual orientation discrimination and retaliation, with the former asserted against his employer and the latter against his employer and his supervisor. The trial court ruled that an individual cannot be liable for retaliation under the FEHA. The Court of Appeal reversed, coming to the opposite conclusion. The California Supreme Court granted defendants' petition for review, which was limited to the question whether an individual may be held personally liable for retaliation under the FEHA.

In *Reno v. Baird*, 18 Cal. 4th 640 (1998), the Supreme Court held that individuals working for the employer, including supervisors, could not be held personally liable for discrimination. The question in *Jones* was whether

language differences between Government Code section 12940 subdivisions (a) (concerning discrimination) and (h) (concerning retaliation) require a different rule for retaliation.

Subdivision (a) makes it an unlawful employment practice for "an employer" to discriminate, while subdivision (h) makes it an unlawful employment practice for "any employer, labor organization, employment agency, or person" to retaliate. Jones argued that individuals may be liable for retaliation since "person" appears in subdivision (h). The Supreme Court disagreed, finding that the statutory language was not so plain, and that subdivisions (a) and (h) were not as different as Jones asserted. Although subdivision (a) does not use the word "person," but rather uses "employer," the definition of "employer" includes "any person acting as an agent of an employer" [Gov't Code §12926(d)]. The Court also pointed out that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or attempt to do so" [Gov't Code §12940(i)]. Because the Court rejected the notion that the use of the word "person" meant that persons as well as the employer itself could be liable for discrimination in *Reno*, it also had to reject the same argument in *Jones*.

Because the questions in *Reno* and *Jones* were similar, the Court analyzed them similarly. First, the Court determined that *Reno*'s rationale for not holding individuals personally liable for discrimination applied equally well to retaliation. The Court cited the same reasons supporting its decision in *Reno*: supervisors can avoid harassment but cannot avoid personnel decisions; it is incongruous to exempt small employers from retaliation, but to hold individual nonemployers liable; sound public policy favors avoiding conflicts of interest and the chilling of effective management; corporate employment decisions are often collective; and it is bad policy to subject supervisors to the threat of a lawsuit every time they make a personnel decision.

Second, the Court cited the absence of legislative history behind the inclusion of the word "person" in section 12940(h) as support for its conclusion that the subdivision does not impose personal liability on nonemployer individuals for retaliation.

Finally, the Court relied on the lack of any legislative discussion as to the addition of the word "person" to subdivision (h), along with the Legislature's own statement that "[t]he bill would, in addition, make various *technical and conforming* changes to the act" rather than substantive changes.

In a vigorous dissent that was considerably longer than the majority's opinion, Justice Moreno stated that the use of "person" in section 12940(h) made it abundantly clear that the Legislature intended retaliation to be

treated differently from discrimination, and thus intended individual liability for retaliation. Justice Moreno also contended that, to the extent the majority was dissatisfied from a policy perspective with the concept of individuals being liable for retaliation, it was up to the Legislature, not the courts, to address the matter.

A question not answered in *Jones*, however, is whether an individual supervisor who engages in harassment (for which personal liability remains) may also be sued for retaliation arising from that harassment.

This case certainly is good news for managers and supervisors in California, who will no longer be concerned about potential personal financial liability merely for making a personnel decision that an employee later claims was retaliatory. The decision also will prevent plaintiffs from asserting retaliation claims against individuals to defeat diversity jurisdiction. As a result, employers will be better able to remove certain cases to federal court.

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