

# Management Alert



## California Partnerships Beware: A Partner Can Sue for Retaliation Under the FEHA

The California Fair Employment and Housing Act (“FEHA”) generally prohibits a partnership from discriminating against its employees, while not protecting the firm’s partners from discrimination. But the Court of Appeal has now held that a partner can bring a claim for retaliation under the FEHA. In *Fitzsimons v. California Emergency Physicians Medical Group*, the court held that a physician general partner in a medical partnership could sue for retaliation under the FEHA.

### The Facts

The Plaintiff, Mary Fitzsimons, was an emergency physician and partner in California Emergency Physicians Medical Group (“CEP”). She served on CEP’s Board of Directors and as a Regional Director at four hospitals. After she told her supervisors at CEP about sexual harassment experienced by female CEP employees, CEP terminated her appointment as Regional Director.

### The Trial Court Decision

Fitzsimons sued CEP for retaliation in violation of the FEHA. CEP argued that the FEHA does not forbid retaliation by a partnership against a partner, because a partner is not an employee, and FEHA liability generally depends on an employment relationship. CEP relied on a 2008 decision, *Jones v. The Lodge at Torrey Pines Partnership*, in which the California Supreme Court held that the FEHA imposes retaliation liability only on the employer, not on a non-employer individual. The trial court agreed.

Accordingly, the trial court ruled that if Fitzsimons was a bona fide partner in CEP, then she lacked standing to sue her partnership for retaliation. When the jury, in the first stage of a bifurcated trial, found that Fitzsimons was a CEP partner, the trial court entered judgment against her.

### The Court of Appeal Holding

On appeal, Fitzsimons argued that the FEHA forbids partnerships to retaliate against any person, including a partner, who opposes sexual harassment of a partnership employee. The Court of Appeal agreed, holding that a partner has standing to assert a FEHA retaliation claim against her partnership. The court held that the trial court had read *Torrey Pines* too broadly in interpreting the statute.

The relevant language in the FEHA forbids any “person” to retaliate against “any person” for opposing practices that the FEHA forbids. Cal. Gov’t Code § 12940(h). The Court of Appeal explained that the term “person” appears twice in this clause, the first instance prohibiting a *person* from retaliating, and the second protecting a *person* who has opposed a FEHA violation. *Torrey Pines*, the Court of Appeal explained, simply held that the first reference to “person” does not include non-

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employer individuals; *Torrey Pines* did not hold that the second reference to “person” was so limited.

The Court of Appeal thus held that the FEHA prohibits partnerships from retaliating against any person, including a partner, who opposes or reports the sexual harassment of an employee of the partnership. However, the court cautioned that its holding does not imply that the partner could sue the partnership for harassment or discrimination directed at the partner herself.

The Court of Appeal rejected CEP’s arguments that the legislative history of the FEHA compelled a different result. The court also rebuffed CEP’s reliance on Title VII case law, which holds that a partner cannot sue a partnership for retaliation as the partner is not a Title VII “employee.” State and federal law outcomes differ here, the court explained, because the FEHA has broader language, extending retaliation protection to any “person,” and not just to employees and applicants.

## What *Fitzsimons* Means For Employers

Under California law, in contrast to federal law, California partnerships face potential liability for retaliation against partners who report discrimination or harassment against partnership employees. Viewing *Fitzsimons* as a cautionary tale, California partnerships should review their anti-retaliation policies and provide training on such policies, as needed.

By: *Andrew M. McNaught* and *Rupa Shah*

*Andrew M. McNaught* is a partner in Seyfarth’s San Francisco office and *Rupa Shah* is an associate in the firm’s San Francisco office. If you would like further information, please contact your Seyfarth attorney, Andrew M. McNaught at [amcnaught@seyfarth.com](mailto:amcnaught@seyfarth.com) or Rupa Shah at [rshah@seyfarth.com](mailto:rshah@seyfarth.com).



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