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LEGAL ALERT



Legal Alert: California Supreme Court Finds that Individuals Cannot Be Held Liable for Retaliation

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The California Supreme Court recently held that individuals who are not employers cannot be held liable for retaliation under the California Fair Employment & Housing Act (“FEHA”) (Gov. Code § 12940(j)). See *Jones v. The Lodge at Torrey Pines Partnership* (3/3/08).

In this case, Jones complained that his supervisor, Weiss, and another manager created a hostile work environment and discriminated against him by telling sexual jokes and making sexually charged comments. After Jones complained, Weiss threatened to fire him, gave him a negative performance review, excluded him from weekly management meetings and issued him four performance warnings. Jones later attempted to resign, but was told his services were no longer needed.

Subsequently, Jones sued the Lodge, claiming the Lodge wrongfully terminated him in violation of public policy, harassed and discriminated against him because of his sexual orientation, retaliated against him for complaining about the harassment and discrimination, and intentionally inflicted emotional distress. Jones also sued Weiss and another supervisor, claiming they sexually harassed him, retaliated against him, and intentionally inflicted emotional distress. After several claims were dismissed, Jones’ sexual orientation discrimination and retaliation claims against the Lodge and his retaliation claim against Weiss were tried before a jury. The jury returned a verdict in favor of Jones; however, the trial court entered judgment in favor of the defendants. Notably, the trial court ruled that Weiss could not be held liable for retaliation. Jones appealed and the Court of Appeal unanimously reversed.

The Supreme Court reversed the judgment of the Court of Appeal, holding that although the employer may be held liable for retaliation under the FEHA, nonemployer individuals may not be held liable for their role in that retaliation. Jones argued that the plain meaning of the statute, which makes it an unlawful employment practice for “any employer, labor organization, employment agency, or person” to retaliate (Gov. Code § 12940(j)) compels the conclusion that individuals may be held personally liable for retaliation. The Court disagreed, reasoning that the term “person” as used in the statute is ambiguous, as it may have been used by the Legislature as a “catchall” term, rather than to impose personal liability on individuals in addition to the employer. Accordingly, the Court looked to the Legislative history of the statute and found that the addition of the term “person” was simply a technical and conforming change, not a substantive change that created individual

liability.

More importantly, the Court reasoned that liability for retaliation claims is more akin to liability for discrimination, rather than harassment, claims. The Court discussed the reasons for limiting liability for discrimination to the employer, such as: supervisors can avoid harassment but cannot avoid personnel decisions; it is incongruous to exempt small employers but to hold individual nonemployers liable; sound policy favors avoiding conflicts of interest and chilling 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 personnel decisions. The Court found that these reasons apply equally – and perhaps more forcefully – to retaliation claims. The Court held that nonemployer individuals cannot be held liable for retaliation under the FEHA.

Employers' Bottom Line:

In a footnote, the Court stated that it is not expressing an opinion as to whether retaliation for complaining of harassment, as opposed to discrimination, makes a supervisor liable. Nevertheless, this case is a victory for employers in that it clarifies the extent of individual liability for FEHA claims. Should you have any questions about this case or about any employment law matters, please contact the author of this Legal Alert, Jennifer A. Olson in Ford & Harrison's Los Angeles office at jolson@fordharrison.com or 213-237-2406.