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Resolving a Key Legal Issue, California Supreme Court Holds Individual Employees Not Liable for Retaliation Under the FEHA

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California's Fair Employment and Housing Act ("FEHA") prohibits employers from discriminating against or harassing their employees on the basis of protected categories. Likewise, the FEHA prohibits employers from retaliating against employees who have complained about discrimination or harassment or have otherwise exercised their rights under the FEHA. A decade ago, the California Supreme Court held in *Reno v. Baird*, 18 Cal. 4th 640 (1998), that individual employees may not be held personally liable for discrimination under the FEHA. Over the past several years, both state and federal courts have taken pains to distinguish *Reno* from cases involving retaliation and have held that individual employees may be held liable for retaliation. In a sharply divided opinion in *Jones v. Lodge at Torrey Pines*, S151022, March 3, 2008, the California Supreme Court reversed those decisions, holding that individual employees may not be held personally liable for retaliation under the FEHA.

The *Jones* case involved a plaintiff who brought a claim under the FEHA, alleging that he suffered sexual orientation discrimination and that his supervisor subjected him to sexual orientation harassment and retaliation after he took complaints about the supervisor's treatment to upper-level management. At the trial court, the jury found in favor of the plaintiff and awarded damages against both the employer and the plaintiff's supervisor. The Court of Appeal upheld the jury verdict on a number of grounds, including the retaliation claim.

The Supreme Court reversed the Court of Appeal's decision on

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the retaliation claim, noting that, although the statutory provision in the FEHA includes “persons” among the entities prohibited from retaliating against an employee, that language does not clearly impose individual liability for retaliation. Further, looking at the legislative history of the FEHA, the Court held there is no indication that the California Legislature intended to impose individual liability for retaliation.

In addition to analyzing the statutory language and legislative history of the FEHA, the Court based much of the opinion in *Jones* on the same policy considerations underlying its decision in *Reno*, including (1) individual liability would constrain supervisors’ ability to make personnel decisions because supervisors would be concerned about being held personally liable in a lawsuit; (2) because the FEHA exempts small employers from liability, it would be irreconcilable to impose such liability on individuals; and (3) management decisions are often made by a group of people and it would be impossible to establish each individual’s proportional liability.

In light of the *Jones* decision, California employers should take some relief in knowing their individual employees, such as managers and supervisors, may not be held personally liable for claims of retaliation under the FEHA. It is important to note, however, that the majority’s reasoning drew sharp dissents in the Court’s 4-3 opinion. Further, the Court acknowledged that its decision might result in legislative changes to the FEHA. We will be closely monitoring any legislative developments in this area. For now, however, the Court’s ruling is clear: no individual liability for retaliation under the FEHA.

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