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The California Supreme Court rules that individual nonemployers are not liable for retaliation, but leaves open the issue of individual liability for retaliation that is in response to a complaint of harassment.

California Edition

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The California Supreme Court Narrowly Rules That Individuals Are Not Liable for Retaliation in Some Circumstances

By James E. Hart

In a 4-3 decision, the California Supreme Court in *Jones v. The Lodge at Torrey Pines Partnership*, found that nonemployer individuals (e.g., supervisors) are not personally liable for claims of retaliation brought under California's Fair Employment and Housing Act (FEHA), at least when the retaliation is not in response to actionable harassment. The case resolves an unsettled question brought to prominence by the 1998 California Supreme Court opinion in *Reno v. Baird*, 18 Cal. 4th 640 (1998). In *Baird*, the court held that nonemployer individuals cannot be held personally liable for discrimination under the FEHA because discrimination arises "out of the performance of necessary personnel management duties" that are "an inherent and unavoidable part of the supervisory function." By contrast, nonemployer individuals can be held personally liable for harassment, which "consists of a type of conduct not necessary for performance of a supervisory job" and is "presumably engaged in for personal gratification" or due to "meanness or bigotry, or for other personal motives."

Since *Baird*, the open question has been whether this reasoning extends to retaliation claims. Like discrimination claims, retaliation claims require an adverse employment action (i.e., a change to the terms and conditions of employment) that inherently arises out of the performance of supervisory functions. If the reasoning of *Baird* were applied to retaliation claims, then no individual liability would result. The majority opinion in

Jones extends Baird's reasoning to retaliation claims.

Equally important are the rulings not made by the majority in *Jones*. The court declined to decide whether an individual who is personally liable for harassment might also be personally liable for retaliating against someone who opposes or reports the same harassment. Nor has the court expressly closed the door on individual liability where the adverse employment action of a retaliation claim takes the form of harassment. As a result, the issue of individual liability for retaliation claims has not been entirely resolved.

Factual Background

The case stems from plaintiff Scott Jones' employment at The Lodge at Torrey Pines Partnership (The Lodge). Jones worked in the position of "outlet manager" and was responsible for the hotel's restaurant, bar, catering, banquet events and the beverage cart service for the golf course. He claimed that his manager Jean Weiss and the kitchen manager continually used profanity, made sex-related comments around Jones and aimed "gay-bashing" jokes at him. Complaints by Jones and female employees went unheeded. Jones alleged that Weiss responded to his complaint by intimidation, continued offensive comments, excluding him from meetings and issuing Jones written warnings for tardiness and other work performance issues. Jones eventually resigned and sued The Lodge, Weiss, and others. He alleged

sexual orientation harassment and retaliation among his claims.

Following a trial, the jury returned a verdict for Jones against both The Lodge and Weiss. The trial court overturned the verdict, finding, in part, that as an individual, Weiss could not be liable for retaliation. On appeal, the court disagreed and reinstated the original verdict, ruling that an individual can be held liable for retaliation under the FEHA. The California Supreme Court agreed to review the question of whether an individual may be held personally liable for retaliation under the FEHA.

The Supreme Court's Analysis

The analysis of the four-member majority opinion concentrates on the precise language in California Government Code section 12940, subdivision (h) of the FEHA, which defines retaliation. The majority opinion first determined that the retaliation language is ambiguous, requiring the court to assign a meaning. The statutory retaliation language states that it is unlawful “[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.” The court found the term “person” as used in the statute had no plain meaning because it could refer to a “person” as an individual or a “person” as an agent or employee. To support its finding of ambiguity, the majority contrasted the retaliation provision with an explicit harassment provision, which provides that an employee “is personally liable for any harassment prohibited by this section that is perpetrated by the employee...”

Following the general line of reasoning set forth in *Baird*, the court ruled that the statute should not permit individual liability because retaliation, like discrimination, requires “adverse employment actions,” which arise out of the performance of necessary personnel management duties. The

court emphasized that the retaliation section explicitly references discrimination, providing further indication that personnel action is needed for retaliation. The court further noted that the term “person” is used elsewhere in the FEHA, without implicating individual liability. For example, the definitions of “employer” and “unlawful employment practice” include references to “persons.” Finally, the court observed that the legislative history did not support the interpretation of “person” as indicating individual liability.

The court also considered policy reasons that could impact the interpretation of the language, noting that the following policy concerns had earlier supported a finding in *Baird* that there should be no imposition of individual liability for discrimination:

- Imposing liability on individual supervisory employees would do little to enhance the ability of victims of discrimination to recover monetary damages given that the employer is generally the “primary target”;
- Individual liability can reasonably be expected to “severely impair the exercise of supervisory judgment” and cause supervisors to make decisions that are least likely to lead to discrimination claims. “If every personnel manager risked losing his or her home, retirement savings, hope of children’s college education, etc., whenever he or she made a personnel management decision, management of industrial enterprises and other economic organizations would be seriously affected”;
- Corporate decisions are often made collectively by a number of persons and it would be difficult to apportion individual blame if individual liability were permitted; and
- The FEHA only imposes liability on employers with at least 5 employees, and “[n]o reason appears” why the Legislature would exempt such small employers from discrimination, but not individuals.

The majority found that all of these reasons for not imposing individual liability for discrimination applied equally to retaliation. Indeed, the majority recognized that “some may apply even more forcefully to retaliation claims. If an employee gains a reputation as a complainer, supervisors might be particularly afraid to impose discipline on that employee or make other lawful personnel decisions out of fear the employee might claim the action was retaliation for the complaining.”

As a result, the court found that as a matter of statutory construction and policy considerations, liability for retaliation claims should be confined to the employer and not individuals as well.

The Dissenting Opinion

Justice Moreno, joined by two other justices, authored a dissenting opinion, which concluded that the statutory retaliation language plainly contemplated individual liability by prohibiting “any person” from retaliating. The dissent further argued that by providing individual liability for harassment, “it logically follows that, *at a minimum*, there must also be individual liability for any connecting retaliation of the harasser.” In terms of policy considerations, Judge Moreno believed that the majority’s opinion may incentivize a supervisor who has sexually harassed a subordinate to then retaliate if the subordinate complains.

Implications for Future Cases

The court failed to resolve a significant issue in its opinion. In footnote 4, the majority explicitly declined to consider whether a supervisor who is personally liable for harassment can also be personally liable for retaliating against someone who reports or opposes that harassment. For its part, the dissent spent considerable time on this very point. The majority stated, however, that the case did not present that situation, because a lower court had ruled in an earlier binding decision that there was no actionable harassment on the part of Weiss.

Neither the majority nor dissent explic-

itly acknowledged a similar issue – is there individual liability when the adverse employment action in a retaliation claim takes the form of harassment? In a separate case, *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005), the court in dicta suggested that if sufficiently severe and pervasive, workplace harassment may in and of itself constitute an adverse employment action. Another open question is whether individual liability will attach when, in response to protected activity, the supervisor or other employee responds with harassment that is sufficiently pervasive to change the terms and conditions of employment.

As a practical matter, the case is good news for employers for several reasons. It should allow the removal of many cases to federal court that otherwise could not be removed. A typical plaintiffs' counsel strategy is to name an individual defendant in order to prevent federal court "diversity" jurisdiction. This decision should limit use of this long-employed tactic. Moreover, of obvious benefit is the fact that individual supervisors will not be held personally liable for retaliation, and thus will not be chilled in making necessary personnel decisions concerning a previously complaining employee by the fear of being personally sued. While the court did not fully decide all of the individual liability issues that may arise in the future regarding alleged retaliatory acts, the opinion is good news for employers.

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