A Timely Analysis of Legal Developments

ASAP®

November 2011

California Court of Appeal Declines to Hold Individual Supervisors Liable for Discrimination or Retaliation Under California Military and Veterans Code

By Helene Wasserman

In a case of first impression, the California Court of Appeal for the Second Appellate District ruled that there is no individual liability for discrimination or retaliation under California Military and Veterans Code section 394, which protects from discrimination employees who are called to active duty. *Haligowski v. Superior Court of Los Angeles County*, No. B231310 (Nov. 11, 2011).

While employed by Safway Services, the plaintiff was called to active duty with the Navy. When he returned from a six-month tour of duty in Iraq, he asked for his job back. His immediate supervisor and his regional manager informed the plaintiff that he was terminated from employment. The plaintiff sued the company, his supervisor, and his regional manager, alleging discrimination and retaliation under California Military and Veterans Code section 394. The plaintiff alleged that, because of his membership in the Navy, he was given negative evaluations after he informed his employer of his deployment, he was terminated because of his military service, and he was not reemployed upon his return. The individual defendants sought dismissal of the complaint as to them, asserting there can be no individual liability. The trial court rejected the individual defendants' arguments.

The appellate court reversed. The court compared the language of Military and Veterans Code section 394 to similar language contained in California's Fair Employment and Housing Act (FEHA) and the cases interpreting that language. Specifically, the court relied upon *Reno v. Baird*, 18 Cal. 4th 640 (1998), and *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55 (1996), both of which held that, despite the fact that FEHA contains language holding "any person acting as an agent of an employer" potentially liable under FEHA, individuals cannot be held liable for personnel-related decisions that are claimed to have been discriminatory. Similarly, in *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008), the court reached the same conclusion as to claims based upon work-related conduct claimed to be retaliation. Based on the analysis in these cases, the court in *Haligowski* reasoned that the FEHA rationale applies to similar language in section 394.

The plaintiff asserted that the FEHA analysis should not apply, in part, because the federal counterpart to Military and Veterans Code section 394, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) has been held to establish individual liability for discrimination (20 C.F.R. section 1002.5(d)(1)(i) (2011)). The court disagreed. While USERRA clearly details the congressional intent to hold supervisory personnel responsible for normal management conduct that violates USERRA, the California statute is ambiguous. Hence, the court may analogize to other California anti-discrimination statutes instead, like FEHA.

Relying upon the language of USERRA, the plaintiff also argued that the California law cannot be interpreted in a manner to provide lesser benefits than USERRA, under which the plaintiff could recover against individuals (although the plaintiff chose not to sue under USERRA). The court disagreed, noting that its interpretation of section 394 actually prevents employers from avoiding liability by claiming that individual managers and supervisors deviated from established employer practices.

Note to Employers

It is important to remember that employees who serve in the military are entitled to various job protections under state and federal laws. Not only are they entitled to take time off and be reinstated under certain circumstances, they and their families are entitled to certain leave protections associated with deployment and return from service. It is vital that employers train supervisors on leave entitlements and rights because, if supervisors run afoul of the law, the company could be liable.

Helene Wasserman is a Shareholder in Littler Mendelson's Los Angeles office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Wasserman at hwasserman@littler.com.