

# Court Ruling Gives Guidance On Workplace Retaliation

Up until recently, individual supervisors could be personally liable for "retaliation" — that is, taking adverse action against an employee for engaging in "protected activity," such as firing an employee who opposed discrimination in the workplace. This prior rule was at odds with other court rulings which held individual supervisors could not be personally liable for "discrimination" — taking adverse action against an employee based on the employee's membership in a protected class (e.g., race, sex, religion).

Our California Supreme Court recently had the opportunity to review and resolve these conflicting rulings. The court ruled that discrimination under the Fair Employment and Housing Act arises "out of the performance of necessary personnel management duties" that are "an inherent and unavoidable part of the supervisory function." The Court noted that, like discrimination, retaliation requires an "adverse action" that arises out of supervisory functions.

Thus, in a recent 4-3 decision, the California Supreme Court in *Jones v. The Lodge at Torrey Pines Partnership* aligned the holdings and held that nonemployer individuals (e.g., supervisors) may not be personally liable for claims of retaliation brought under FEHA.

Facts of *Jones v. The Lodge at Torrey Pines Partnership*

Plaintiff Scott Jones worked for The Lodge at Torrey Pines Partnership as an "outlet manager," responsible for the hotel's restaurant, bar, catering, banquet events and the beverage cart service for the golf course. Jones claimed his supervisor, Jean Weiss, and another manager created a hostile work environment and discriminated against him by telling "gay-bashing" jokes and making sexually charged comments around him. After Jones complained, Weiss threatened to fire him, gave him negative performance reviews, excluded him from weekly management meetings and issued him repeated written performance warnings. Jones attempted to resign, but eventually was told his services were no longer needed.

Jones sued, claiming that 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 individually, claiming he 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 for Jones against both Lodge and Weiss. The trial court overturned the verdict, ruling, in part, that as an individual, Weiss could not be liable for retaliation. On appeal, the court disagreed and reinstated the jury verdict, finding an individual may be held liable for retaliation under FEHA. The California Supreme Court agreed to review the issue of individual liability for supervisors based on allegations of retaliation in violation of FEHA.

## Supreme Court's Decision

The Supreme Court reversed the judgment of the court of appeal, holding that, although the employer may be liable for retaliation under FEHA, nonemployer individuals may not. The Court's analysis focused first on the language in the statute itself. The four-member majority determined the language was ambiguous, thus opening the door to the Court's inter-

pretation.

The statutory language states 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." Jones argued the plain language of the statute compels the conclusion that individuals may be held personally liable for retaliation. The Court disagreed, holding "the term person as used in the statute had no plain meaning because the Leg-

islature may have used the word 'person' for reasons unrelated to a desire to make individuals personally liable for retaliation." The Court further noted the term "person" is used elsewhere in FEHA without implicating personal liability.

The Court reasoned liability for retaliation is more similar to liability for discrimination than harassment claims (for which there is personal liability). Following the reasoning set forth in a prior Supreme Court decision, the Court ruled the statute does 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 then discussed policy reasons for limiting liability for retaliation to employers, noting:

- 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;

- 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

- FEHA only imposes liability on employers with at least 5 employees, and "[n]o reason appears" why the Legislature would exempt such small employers, but not individuals.

The Court found these reasons for not imposing individual liability for discrimination apply equally - or, in some cases, "more forcefully" - to retaliation claims. In sum, the Court held nonemployer individuals may not be held personally liable for retaliation under FEHA.

## Unanswered Questions

The Court in *Jones* explicitly declined to address 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. The Court stated the facts in *Jones* did not present that situation because a lower court had ruled in an earlier decision that there was no actionable harassment on the part of Jones' supervisor. The *Jones* court also did not entirely close the door on individual liability where the adverse action of a retaliation claim is in the form of harassment.

Accordingly, the issue of individual liability for some retaliation claims remains unfinished.

## Practical Effect

All in all, this case is a victory for individual employees, as well as employers. It offers guidance as to the extent of liability for supervisors for FEHA claims. Retaliation cases can often be the most difficult to defend. Jones limits the potential liability for such claims.



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