
2008

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Recommended Citation

Benjamin Price, *Digest: Jones v. Lodge at Torrey Pines Partnership*, 12 CHAP. L. REV. 199 (2008).
Available at: <https://digitalcommons.chapman.edu/chapman-law-review/vol12/iss1/15>

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Digest: Jones v. Lodge at Torrey Pines Partnership

Benjamin Price

Opinion by Chin, J., with George, C.J., Baxter, J., and Corrigan, J.
Dissenting Opinion by Werdegar, J. Dissenting Opinion by Moreno, J.,
with Kennard, J. and Werdegar, J.

Issue

Are nonemployer individuals personally liable for their role in retaliation for which the employer is liable under the Fair Employment and Housing Act (FEHA) ¹?

Facts

Plaintiff Scott Jones sued his employer, The Lodge at Torrey Pines Partnership (the Lodge), and several others, including his supervisor, for various causes of action under the FEHA, including sexual orientation harassment in violation of California Government Code section 12940(j)(1), sexual orientation discrimination in violation of Section 12940(a), and retaliation in violation of Section 12940(h).² The trial court granted summary adjudication for defendant on the harassment cause of action.³ The discrimination claim against the Lodge and the retaliation claim against the Lodge and the supervisor went to the jury, which found for the plaintiff on both.⁴ However, the trial court granted the defendant's motion for judgment notwithstanding the verdict, concluding that non-employer individuals cannot be personally liable for retaliation under the FEHA.⁵ The court of appeal reversed and reinstated the jury verdict.⁶ The California Supreme Court granted review to determine "whether an individual may be held personally liable for retaliation under the FEHA."⁷

Analysis

The retaliation subdivision of the FEHA provides that it is an unlawful employment practice to discriminate against a person for opposing

¹ CAL. GOV'T CODE §§ 12900–12996 (West 2008).

² *Jones v. Lodge at Torrey Pines P'ship*, 177 P.3d 232, 234 (Cal. 2008).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

practices prohibited under the act.⁸ In *Reno v. Baird*, the Court held that, under the discrimination provision of the FEHA⁹, individual employees may not be held liable for unlawful discrimination.¹⁰ The plaintiff in *Jones*, however, argued that the different language in subdivision (h) warranted a different rule.¹¹ Subdivision (a) makes it an unlawful employment practice for “an employer” to discriminate, while subdivision (h) makes it unlawful for an “employer, labor organization, employment agency, or *person*” to retaliate.¹² The plaintiff argued that, because subdivision (h) contains the word “person,” while subdivision (a) does not, the plain language indicates that individual employees may be personally liable for retaliation.¹³

The Court found that more than one interpretation of subdivision (h) was possible.¹⁴ The statutory language, the Court said, was much less clear than subdivision (j), which explicitly makes an “employee” subject to personal liability for harassment.¹⁵ The FEHA undercuts the difference between subsections (a) and (h) by defining “employer” under both as “any person acting as an agent of an employer”¹⁶ In *Reno*, however, the Court said that this definition was intended only to ensure that employers would be liable for discrimination by their agents.¹⁷ Similarly, the Court here stated that the Legislature may not have intended the word “person” in subdivision (h) to make individuals personally liable for retaliation.¹⁸

The Court also relied on *Reno*’s rationale for distinguishing between harassment, for which individuals may be held personally liable, and discrimination, for which they may not.¹⁹ Harassment claims, the Court in *Reno* stated, arise from conduct that may be avoided because it is guided by personal motives, while discrimination claims arise from conduct that cannot be avoided because it is within the necessary scope of one’s job performance.²⁰ In addition, the FEHA exempts small employers from liability for discrimination, but not harassment.²¹ Therefore, the Court said, it would be “incongruous” to hold individual non-employers liable for discrimination.²² This result would also create a conflict of interest, the Court stated, because the employee would choose the course of action least likely to lead to a discrimination suit against her rather than choosing the

⁸ CAL. GOV’T CODE § 12940(h).

⁹ § 12940(a).

¹⁰ *Jones*, 177 P.3d at 235 (citing *Reno v. Baird*, 957 P.2d 1333 (1998)).

¹¹ *Id.*

¹² *Id.* (quoting CAL. GOV. CODE §§ 12940(a), (h)) (emphasis added).

¹³ *Id.* (quoting CAL. GOV. CODE § 12940(h)).

¹⁴ *Id.*

¹⁵ *Id.* (quoting CAL. GOV. CODE § 12940(j)(3)).

¹⁶ *Id.* (quoting CAL. GOV. CODE § 12926(d)).

¹⁷ *Id.* at 235–36 (citing *Reno v. Baird*, 957 P.2d 1333 (1998)).

¹⁸ *Id.* at 236.

¹⁹ *Id.* (citing *Reno*, 957 P.2d at 1333).

²⁰ *Id.* at 236–37 (citing *Reno*, 957 P.2d at 1333).

²¹ *Id.* at 237.

²² *Id.* at 239.

best course of action for her employer.²³ Finally, the Court found that imposing liability on individuals would add little to enhance the prospect of the victim's recovery because assessing individual blame for discrimination is harder, when decisions are often made collectively, than assigning blame on the entity as a whole.²⁴ The Court concluded that all of these reasons for exemption to non-employer individuals for personal liability in discrimination claims apply equally to retaliation claims.²⁵

The Court also found the absence of legislative history behind the inclusion of the word "person" in subdivision (h) significant.²⁶ The Court explained that the Legislature intended the amendment, which added the word "person to subdivision (h), only as a "technical and conforming change" to the FEHA.²⁷ Further, the Court stated, this amendment encountered little opposition during the legislative process.²⁸ The Court reiterated the Court of Appeal's observation that "[i]t is difficult to imagine that legislation that would have [created individual liability for retaliation where none had existed] could properly be characterized as noncontroversial."²⁹ The Court also stated that it was "highly unlikely that the Legislature would make such a significant change in the [potential liability of individuals] without so much as a passing reference to what it was doing."³⁰

Holding

The Court held that, while employers continue to be subject to liability for retaliation under the FEHA, non-employer individuals may not be subject to personal liability for their role in that retaliation.³¹

Dissent

Justice Werdegard argued that the plain meaning of Section 12940(h) is to hold any person who retaliates liable for that action.³² The majority's opinion, he said, undermined the purpose of the FEHA.³³ Furthermore, he said, it is not for the Court to say "[w]hether personal liability in these circumstances is more or less efficacious in reducing or eliminating workplace discrimination"³⁴

²³ *Id.* at 238.

²⁴ *Id.*

²⁵ *Id.* at 238–39.

²⁶ *Id.* at 240.

²⁷ *Id.*

²⁸ *Id.* at 241.

²⁹ *Id.* (internal quotations omitted).

³⁰ *Id.*

³¹ *Id.* at 243.

³² *Id.* at 244.

³³ *Id.*

³⁴ *Id.*

Dissent

Justice Moreno argued that, because Section 12940(h) includes the word “person”, the meaning is clear and the inquiry should end.³⁵ Evaluating the wisdom of imposing personal liability on individuals who retaliate, he said, is for the legislature to decide, not the courts.³⁶ The majority’s decision, he said, allows an individual who commits harassment under Section 12940(j) to be subject to personal liability for that harassment, but not for retaliation intended to discourage attempts to report such harassment.³⁷ This, he said, creates an incentive for the person who committed the harassment to retaliate.³⁸ He said that the Legislature could not have intended such a “perverse and irrational result.”³⁹

Justice Moreno also argued that *Reno* was distinguishable because the retaliation subdivision significantly adds “person,” whereas the discrimination subdivision does not.⁴⁰ Furthermore, he said, in *Reno* the Court found that the term, “employer” in the discrimination subdivision incorporated respondeat superior principles.⁴¹ However, the retaliation subdivision uses both the terms, “employer” and “person.”⁴² It would be incorrect, he said, to argue that the word “person” also incorporates respondeat superior principles when the term, “employer” clearly does so.⁴³

Legal Significance

As a result of this decision, non-employer individuals in the workplace may stand confident that they will not be personally liable for their role in retaliation under the FEHA. Given the court’s recognition that retaliation claims are closer in similarity to discrimination claims under the FEHA, non-employer individuals will not be subjected to personal liability for claims arising from workplace retaliation.

However, employers remain subject to personal liability for claims of retaliation and both employers and non-employers may be subject to personal liability for claims of harassment under the FEHA.

³⁵ *Id.* at 244–45.

³⁶ *Id.* at 245.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 250.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*