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## **Jones v. The Lodge at Torrey Pines Partnership**

S151022

Cite as 08 C.D.O.S. 2511

SCOTT JONES, Plaintiff and Appellant,

v.

THE LODGE AT TORREY PINES

PARTNERSHIP et al., Defendants and Respondents.

No. S151022

In the Supreme Court of California

Ct.App. 4/1 D046600

San Diego County Super. Ct. No. GIC811515

### **COUNSEL**

Toothacre & Toothacre, Scott H. Toothacre and Rod M. Toothacre for Plaintiff and Appellant.

Law Offices of Jeffrey K. Winikow and Jeffrey K. Winikow for California Employment Lawyers Association as Amicus Curiae on behalf of Plaintiff and Appellant.

Liebert Cassidy Whitmore, Melanie M. Poturica and David Urban for League of California Cities as Amicus Curiae on behalf of Defendants and Respondents.

Filed March 3, 2008

**counsel**

In *Reno v. Baird* (1998) 18 Cal.4th 640 (*Reno*), we held that, although an employer may be held liable for discrimination under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 *et seq.*),<sup>[FOOTNOTE 1]</sup> nonemployer individuals are not personally liable for that discrimination. In this case, we must decide whether the FEHA makes individuals personally liable for *retaliation*. We conclude that the same rule applies to actions for retaliation that applies to actions for discrimination: The employer, but not nonemployer individuals, may be held liable.

## I. Procedural History

Plaintiff Scott Jones sued his employer, The Lodge at Torrey Pines Partnership (The Lodge), and his supervisor at work, Jean Weiss, as well as others no longer involved in this litigation, for various causes of action, including sexual orientation harassment in violation of section 12940, subdivision (j)(1), sexual orientation discrimination in violation of subdivision (a), and retaliation in violation of subdivision (h). The trial court granted summary adjudication in defendants' favor regarding some of the causes of action, including the harassment cause of action. It found that plaintiff had failed to present admissible evidence of harassment by Weiss that was severe and pervasive enough to alter the conditions of his employment and create an abusive working environment.

Ultimately, two causes of action went to a jury trial: the claim for sexual orientation discrimination against The Lodge only, and the claim for retaliation against both The Lodge and Weiss. The jury returned a verdict for plaintiff on both causes of action. It awarded compensatory damages of \$1,395,000 against The Lodge and \$155,000 against Weiss, but found Weiss did not act with malice or oppression.

The trial court originally entered judgment on the verdict, but later it granted both defendants' motions for judgment notwithstanding the verdict and, alternatively, for a new trial. Among other things, it concluded that plaintiff had presented insufficient evidence that he had suffered an adverse employment action as to both causes of action. Concerning defendant Weiss, it also ruled that an individual cannot be liable for retaliation. It entered judgment in favor of both defendants.

Plaintiff appealed, and defendants cross-appealed. The Court of Appeal reversed the order granting the motions for judgment notwithstanding the verdict and for a new trial, and reinstated the original judgment on the verdict. Among other things, the court concluded there was sufficient evidence that plaintiff had suffered an adverse employment action. It also found that an individual can be held liable for retaliation under the FEHA.

We granted defendants' petition for review limited to the question whether an individual may be held personally liable for retaliation under the FEHA.

## II. Discussion

Section 12940, part of the FEHA, begins, "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon

applicable security regulations established by the United States or the State of California: ... " Several subdivisions follow, defining various unlawful employment practices. One unlawful employment practice is for an employer to engage in specified kinds of discrimination. (Subd. (a).) Another, the one involved in this case, is "[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." (Subd. (h).) This form of unlawful employment practice is often called simply "retaliation." (See, e.g., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 (*Yanowitz*).) Another unlawful employment practice is harassment. (Subd. (j).)[FOOTNOTE 2]

Plaintiff has sued his supervisor at work, as well as the employer itself, for retaliation. We must decide whether individuals may be held personally liable for retaliation. In *Reno, supra*, 18 Cal.4th 640, we held that, although the employer may be liable for unlawful discrimination, individuals working for the employer, including supervisors, are not personally liable for that discrimination. The question here is whether language differences between subdivisions (a) (concerning discrimination) and (h) (concerning retaliation) require a different rule as to retaliation. Subdivision (a) makes it an unlawful employment practice for "an employer" to discriminate. Subdivision (h) makes it an unlawful employment practice for "any employer, labor organization, employment agency, or person" to retaliate.

Plaintiff argues that section 12940's plain language specifically, the use of the word "person" in subdivision (h) to describe who may not retaliate compels the conclusion that all persons who engage in prohibited retaliation are personally liable, not just the employer. Accordingly, plaintiff argues, we must follow that plain meaning without engaging in other kinds of statutory interpretation. (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) The courts that have considered the same argument, including the Court of Appeal in this case, have so held. (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1236-1237; *Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237, 1240-1242; see also *Winarto v. Toshiba America Electronics Components* (9th Cir. 2001) 274 F.3d 1276, 1287-1288, and cases cited.) We disagree.

The statutory language is not plain. Subdivision (j), the subdivision prohibiting harassment, provides, "An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee ... ." (Subd. (j) (3).) This is clear language imposing personal liability on all employees for their own harassing actions. Subdivision (h) is far less clear. Its language does lend itself to plaintiff's interpretation, but, as we explain, that is not the only reasonable interpretation of the statutory language. "If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles, supra*, 34 Cal.4th at p. 737.)

The language difference between subdivisions (a) and (h) of section 12940 is not as great as initially appears. Although subdivision (a) does not itself use the word "person" to describe who engages in the prohibited discrimination, in two respects that subdivision arguably does govern discrimination by a "person." First, section 12926, subdivision (d), defines "[e]mployer" (the word used in § 12940, subd. (a)) as including "any *person* acting as an agent of an employer, directly or indirectly ... ." (Italics added.) Second, subdivision (i) of section 12940 makes it an unlawful employment practice "[f]or any *person* to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or attempt to do so." (Italics added.) The plaintiff in *Reno* argued that the use of the word "person" in these provisions meant that persons, as well as the employer itself, could be liable for discrimination. We rejected the argument. We said the person-as-agent language of section 12926, subdivision (d), *could* mean, as the plaintiff urged, that such persons can be held personally liable, but it could also have been " 'intended only to ensure that *employers* will be held liable if their supervisory employees take actions later found discriminatory, and that *employers* cannot avoid liability by arguing that a supervisor failed to follow instructions or deviated from the employer's policy.' " (*Reno, supra*, 18 Cal.4th at p. 647, quoting *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 66 (*Janken*).) For several reasons, we agreed with the *Janken* court that the latter construction was the correct one. (*Reno, supra*, at pp. 647-655.) We also concluded that the aiding and abetting language of former subdivision (g) (now subd. (i)) of section 12940 did not impose personal liability on nonemployers. (*Reno, supra*, at pp. 655-656.)

The question whether personal liability exists where the statutes prohibit discrimination by "any person acting as an agent of an employer" (§ 12926, subd. (d)) and by "any person" who aids and abets an unlawful employment practice (§ 12940, subd. (i)) which we resolved in *Reno, supra*, 18 Cal.4th 640 is similar to the question presented here whether personal liability exists where the statute prohibits retaliation by "any employer, labor organization, employment agency, or person ... ." (*Id.*, subd. (h).) We can and must analyze it similarly. In context, the Legislature may have used the word "person" in subdivision (h) for reasons unrelated to a desire to make individuals personally liable for retaliation. Subdivision (h) is a catchall provision aimed at prohibiting retaliation 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*." (Italics added.) The subdivision thus incorporates other unlawful employment practices defined in other parts of section 12940, and forbids retaliation against anyone opposing any such unlawful employment practice. Each of the entities to which subdivision (h) applies employer, labor organization, employment agency, or person is the subject of one or more other subdivisions of section 12940 defining specific unlawful employment practices. It is possible the Legislature merely wanted to use each of these terms in subdivision (h) to conform to the fact that other provisions use those terms, rather than to impose personal liability on individuals in addition to the employer itself. Accordingly, we must engage in statutory interpretation to resolve this ambiguity, as we did in *Reno* itself.

*Reno's* rationale for not holding individuals personally liable for discrimination applies equally to retaliation. In *Reno*, we noted that the FEHA prohibits harassment as well as discrimination but that it treated them differently. (*Reno, supra*, 18 Cal.4th at p. 644.) We

recognized that at least some individuals may be liable for harassment. [FOOTNOTE 3] But we concluded that the FEHA does not make individuals personally liable for discrimination. We found persuasive *Janken, supra*, 46 Cal.App.4th 55, which had " 'conclude[d] that the Legislature's differential treatment of harassment and discrimination is based on the fundamental distinction between harassment as a type of conduct not necessary to a supervisor's job performance, and business or personnel management decisions which might later be considered discriminatory as inherently necessary to performance of a supervisor's job.' " (*Reno, supra*, at p. 645, quoting *Janken, supra*, at pp. 62-63.)

"The [*Janken*] court noted that 'harassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job. [Citations.] [¶] Discrimination claims, by contrast, arise out of the performance of necessary personnel management duties. While harassment is not a type of conduct necessary to personnel management, making decisions is a type of conduct essential to personnel management. While it is possible to avoid making personnel decisions on a prohibited discriminatory basis, it is not possible either to avoid making personnel decisions or to prevent the claim that those decisions were discriminatory. [¶]... An individual supervisory employee cannot... refrain from engaging in the type of conduct which could later give rise to a discrimination claim. Making personnel decisions is an inherent and unavoidable part of the supervisory function. Without making personnel decisions, a supervisory employee simply cannot perform his or her job duties.' " (*Reno, supra*, 18 Cal.4th at pp. 645-646, quoting *Janken, supra*, 46 Cal.App.4th at pp. 63-64.)

"The *Janken* court also noted that the FEHA exempts small employers from liability for discrimination. 'Section 12926, subdivision (d) defines "employer" as including "any person regularly employing five or more persons." A person who regularly employs less than five other persons is not an "employer" for purposes of FEHA prohibitions on discrimination, and hence cannot be sued for discrimination. (*Jennings v. Marralle* (1994) 8 Cal.4th 121.) For purposes of harassment, however, "employer" is specially defined in section 12940, [former] subdivision (h)(3)(A) to include any person regularly employing *one* or more persons. Section 12940, [former] subdivision (h)(4) and (5) make clear that this special definition of "employer" as someone employing only *one* other person applies only to harassment claims, and that discrimination claims continue to be covered by the "five or more" definition in section 12926, subdivision (d). The Legislature thus made a clear distinction in California in the treatment of harassment claims versus the treatment of discrimination claims: small employers can be sued for harassment, but they cannot be sued for discrimination. [¶]... [¶]... The Legislature clearly intended to protect employers of less than five from the burdens of litigating discrimination claims. [Citation.]... [I]t is "inconceivable" that the Legislature simultaneously intended to subject individual nonemployers to the burdens of litigating such claims. To so construe the statute would be "incongruous" and would "upset the balance" struck by the Legislature.' (*Janken, supra*, 46 Cal.App.4th at pp. 71-72, original italics, fns. omitted.)" (*Reno, supra*, 18 Cal.4th at pp.

650-651.)

"The *Janken* court stated that 'imposing liability on individual supervisory employees would do little to enhance the ability of victims of discrimination to recover monetary damages, while it can reasonably be expected to severely impair the exercise of supervisory judgment. The minimal potential for benefit to an alleged victim juxtaposed with the potentially severe adverse effects of imposing personal liability on individual supervisory employees is an additional reason for our conclusion that this is not the result intended by the Legislature.

" 'Many courts have noted the importance of maintaining the conditions in which impartial judgment can be exercised by officials performing duties in the public sector. [Citations.]... [¶] No one could reasonably doubt that effective and efficient management of industrial enterprises and other economic organizations is also important to the public welfare. The societal interest in effective private sector personnel management may be less direct, but only marginally (if at all) less compelling ... ." Yet it is manifest that 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. [Citation.] [¶]... [¶]

" 'Plaintiffs' theory would place a supervisory employee in a direct conflict of interest with his or her employer every time that supervisory employee was faced with a personnel decision.... [It] would coerce the supervisory employee not to make the optimum lawful decision for the employer. Instead, the supervisory employee would be pressed to make whatever decision was least likely to lead to a claim of discrimination against the supervisory employee personally, or likely to lead only to that discrimination claim which could most easily be defended. The employee would thus be placed in the position of choosing between loyalty to the employer's lawful interests at severe risk to his or her own interests and family, versus abandoning the employer's lawful interests and protecting his or her own personal interests. The insidious pressures of such a conflict present sobering implications for the effective management of our industrial enterprises and other organizations of public concern. We believe that if the Legislature intended to place all supervisory employees in California in such a conflict of interest, the Legislature would have done so by language much clearer than that used here.

" 'Moreover, imposing personal liability against individual supervisory employees adds little to an alleged victim's legitimate prospects for monetary recovery. The plaintiff-employee's primary target remains the employer. Adding individual supervisors personally as defendants adds mostly an in terrorem quality to the litigation, threatening individual supervisory employees with the spectre of financial ruin for themselves and their families and correspondingly enhancing a plaintiff's possibility of extracting a settlement on a basis other than the merits. Enhancing the prospects for obtaining a settlement on a basis other than the merits is hardly a worthy legislative objective ... ." " (*Reno, supra*, 18 Cal.4th at pp. 651-653, quoting *Janken, supra*, 46 Cal.App.4th at pp. 72-75.)

In *Reno*, we also explained that "[c]orporate decisions are often made collectively by a number of persons. Different individuals might have differing levels of awareness and participation in the decisions. When a collective decision is discriminatory, some participants might have acted innocently, others less so. Assessing individual blame might be difficult, in contrast to simply placing blame on the corporation, on whose behalf the individuals acted. Moreover, to make collective decisions possible, individuals often must rely on information or evaluations that others supply. Imposing individual liability for collective decisions might place the individuals in an adversarial position to each other (as well as to the corporation). Individuals might fear to act in reliance on input from others. Some might fear that a potentially controversial but, so far as they can know, correct and necessary collective decision might be misconstrued and give rise to a discrimination action. Out of caution, they might feel compelled to dissent from that decision, or attempt to disassociate themselves from it, merely to protect their pocketbooks. For these reasons, imposing liability on the corporate whole rather than each individual who participated in the corporate decision is sensible." (*Reno, supra*, 18 Cal.4th at p. 662.)

We also explained that "[w]e do not decide merely whether individuals should be held liable for their wrongdoing, but whether all supervisors should be subjected to the ever-present threat of a lawsuit each time they make a personnel decision. Litigation is expensive, for the innocent as well as the wrongdoer. By limiting the threat of lawsuits to the employer itself, the entity ultimately responsible for discriminatory actions, the Legislature has drawn a balance between the goals of eliminating discrimination in the workplace and minimizing the debilitating burden of litigation on individuals." (*Reno, supra*, 18 Cal.4th at p. 663.) "For these reasons, we conclude[d] that individuals who do not themselves qualify as employers may not be sued under the FEHA for alleged discriminatory acts." (*Ibid.*)

All of these reasons for not imposing individual liability for discrimination supervisors can avoid harassment but cannot avoid personnel decisions, it is incongruous to exempt small employers but to hold individual nonemployers liable, sound policy favors avoiding conflicts of interest and the chilling of effective management, corporate employment decisions are often collective, and it is bad policy to subject supervisors to the threat of a lawsuit every time they make a personnel decision apply equally to retaliation. Indeed, 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. The Legislature has given the same exemption to small employers against claims of retaliation that it gave small employers against claims of discrimination. (See § 12940, subd. (j)(4)(A) ["The definition of 'employer' in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision."].) No reason appears why it would want to make nonemployer individuals personally liable for retaliation but not for discrimination.[FOOTNOTE 4]

In *Yanowitz, supra*, 36 Cal.4th 1028, we considered what type of employment actions are sufficiently adverse to the employee to support a cause of action for retaliation. The relevant statutory language regarding discrimination is somewhat different than the

