

# CLIENT ALERTS

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## California Supreme Court Holds Individual Managers Cannot Be Held Liable for Retaliation

In *Jones v. The Lodge at Torrey Pines Partnership*, S151022 (March 4, 2008), the California Supreme Court resolved an issue that has been contested for many years, holding that individual managers are not personally liable for retaliation under the Fair Employment and Housing Act, Cal. Gov. Code, § 12900 et seq. ("FEHA").

A decade earlier, in *Reno v. Baird* (1998) 18 Cal.4th 640, the California Supreme Court held that individual managers are not personally liable for discrimination. However, *Reno* did not address the issue of liability of individual managers for retaliation claims. Relying upon this silence, both lower state courts and the Ninth Circuit Court of Appeals has held individual employees liable for retaliation under the FEHA.

In *Jones*, the California Supreme Court reversed the earlier court decisions, and extended *Reno* to prohibit lawsuits alleging retaliation in violation of the FEHA against individuals.

This Alert provides a summary of the Court's decision.

### Case Overview

In *Jones*, the California Supreme Court reviewed the question of whether an individual manager may be held personally liable for retaliation under the FEHA.

The plaintiff employee, Scott Jones, sued his employer and his supervisor, Jean Weiss, for sexual orientation harassment and retaliation in violation of the FEHA. Jones, a restaurant manager at the Lodge, had complained that Weiss and a kitchen manager created a hostile work environment and discriminated against him due to his sexual orientation. He contended that when he complained, Weiss threatened to fire him; issued him a series of written warnings about his work; excluded him from weekly manager meetings; and when he attempted to resign, was told his services were no longer needed.

The trial court granted the Lodge's motion for summary judgment on the harassment claim. At trial, the jury found in favor of Jones on both

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the discrimination claim against the Lodge and the retaliation claim against the Lodge and Weiss, returning a judgment for compensatory damages of \$1,395,000 against the Lodge and \$155,000 against Weiss.

The trial court granted defendants' motions for judgment notwithstanding the verdict ("JNOV") and a new trial. The court found that there was insufficient evidence of an adverse employment action for purposes of establishing sexual orientation discrimination or retaliation because none of the alleged retaliatory acts had a tangible detrimental effect on plaintiff's employment. Plaintiff appealed and defendants cross-appealed. The Court of Appeal reversed the trial court's grant of JNOV and a new trial, reinstating the original judgment.

On further appeal by defendants, the California Supreme Court accepted review of the case only as to the limited question of whether an individual could be held personally liable for retaliation under the FEHA.

The Supreme Court reversed the Court of Appeal, concluding that, while employers can be liable for retaliation, individual non-employers are not liable for their participation in the retaliation under the FEHA.

Jones argued that the plain language used in the FEHA (Government Code § 12940 (h)) used the word "person," which compelled the conclusion that all persons who engaged in prohibited retaliation were personally liable, not just the employer. The Court disagreed with Jones, finding that the statutory language in Government Code § 12940 (j), which states that "an employee of an entity subject to this subdivision is personally liable for any harassment..." is clear with regard to imposing personal liability for harassment on all employees, while noting that the language of Government Code § 12940 (h) is far less clear.

Relying on its rationale in *Reno* in concluding that individuals are not personally liable for retaliation, the Court found that the reasons for not imposing individual liability for discrimination were equally applicable to retaliation claims: (1) the FEHA treats discrimination and harassment differently because harassment is not the sort of conduct necessary to a supervisor's job performance or for business and personnel decisions; (2) the FEHA exempts small employers from liability from discrimination claims and it would be incongruous to impose such liability on individuals; (3) imposition of personal liability for discrimination claims would put an individual supervisor in direct conflict with the employer whenever a personnel decision was made; (4) the imposition of personal liability would do little to an alleged victim's legitimate prospects for monetary recovery; and (5) management decisions are often made collectively and it would be impossible to ascertain the individual supervisor's proportional liability.

In a footnote, the Court limited its holding to the specific facts of the case, leaving open and unresolved as to whether an individual who is personally liable for harassment might also be personally liable for retaliating against someone who opposes or reports that same harassment.

## **What This Means for Employers**

*Jones* is an important development for employers with operations in California, and for managers who had heretofore risked personal exposure in making employment decisions.

While individual managers often are not necessary for plaintiffs to recover all of the damages they might seek, and while they normally are not in a position to pay any damages that might be awarded in any event, plaintiffs and their counsel have frequently included retaliation claims against individual managers for purely strategic reasons. Among other things, including such claims against an individual can destroy diversity,

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preventing an employer from removing a lawsuit. Not incidentally, including claims against an individual can be used to attempt to drive up defense costs and force a more favorable settlement. While individual managers can still be sued for harassment and other matters, the general preclusion of retaliation claims against them may well lead to more cases being removed to federal court and to lower defense costs. For the managers themselves, *Jones* should provide more comfort in making basic managerial and personnel decisions without the threat of being sued.

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If you have any questions regarding the California Supreme Court's decision in *Jones v. The Lodge at Torrey Pines Partnership*, please contact Michael Kun at (310) 557-9501 or [mkun@ebglaw.com](mailto:mkun@ebglaw.com), or Kathryn McGuigan at (310) 557-9570, [kmcguigan@ebglaw.com](mailto:kmcguigan@ebglaw.com).

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