Nonemployer Individuals Cannot Be Held Liable for Retaliation Under the California Fair Employment and Housing Act

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OVERVIEW

On March 3, 2008, a divided California Supreme Court gave employers a significant victory in Jones v. The Lodge at Torrey Pines Partnership. The single issue before the Court concerned individual liability for retaliation under the California Fair Employment and Housing Act (“FEHA”), and both the majority and dissenting opinions relied heavily on statutory interpretation. The 4-3 majority concluded that individual employees cannot be held liable for retaliation under the FEHA, thereby extending the rule first established in Reno v. Baird, 18 Cal. 4th 640 (1998), that precluded individual liability for discrimination under the FEHA. This Client Alert discusses the Torrey Pines case and the implications for California employers.

I. THE DECISION IN TORREY PINES

A. Case Background

The Lodge at Torrey Pines is a hotel in La Jolla, California. Plaintiff Scott Jones worked for the Lodge as a restaurant manager. Jones claimed in the lawsuit that he was harassed and discriminated against because of his sexual orientation, and that he was later placed on a 30-day probation, excluded from meetings, issued written warnings, and ultimately forced to resign in retaliation for complaining about the alleged harassment and discrimination. He sued both the Lodge and its food and beverage director, Jean Weiss, for discrimination, harassment and retaliation, among other things.

Ultimately, the discrimination claim (against the Lodge) and the retaliation claim (against both the Lodge and Weiss individually) went to a jury trial. The jury found in favor of Jones and awarded compensatory damages against both the Lodge and Weiss. The trial judge later granted defendants’ motions for judgment notwithstanding the verdict and, alternatively, for a new trial. With respect to the individual Weiss, the trial court held that individuals cannot be liable for retaliation under the FEHA.

The California Court of Appeal reversed and held, among other things, that individuals can be liable for retaliation under the FEHA. The California Supreme Court granted review on the single issue of individual liability for retaliation under the FEHA.

B. The Reno Precedent and the Holding in Torrey Pines

The FEHA’s anti-retaliation provision makes it unlawful for “any employer, labor organization, employment agency, or person . . .” to retaliate against any person for opposing practices prohibited by the FEHA, or for filing a complaint or otherwise participating in proceedings under the FEHA. Cal. Gov’t Code § 12940(h). In Torrey Pines, the California Supreme Court interpreted this statutory language to encompass only employers and not to include individual employees — despite the inclusion of the word “person,” much to the dismay of the dissenting Justices.

The majority in Torrey Pines relied heavily on the Court’s precedent, Reno v. Baird, 18 Cal. 4th 640 (1998). In Reno, the Court reasoned that individual supervisors should not be liable for personnel management decisions and, accordingly, held that individual supervisors cannot be held individually liable for discrimination under the FEHA. Distinguishing claims for harassment, where supervisors can be held individually liable, the Court explained that harassment (which is outside “the scope of necessary job performance [and] presumably engaged in
for personal gratification”) is fundamentally different than discrimination (which involves personnel management actions – like hiring, firing, promotions, job assignments, etc. – that are necessary to running a business). Whereas a supervisor can refrain from engaging in harassing behavior, it is impossible to refrain from making personnel management decisions. Reno, 18 Cal. 4th at 645-46.

The majority in Torrey Pines reasoned that “[a]ll of these reasons for not imposing individual liability for discrimination . . . apply equally to retaliation,” and thus held 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.”

C. The Scope of Torrey Pines

Perhaps significantly, the majority in Torrey Pines expressly left open the possibility that “an individual who is personally liable for harassment might also be personally liable for retaliating against someone who opposes or reports that same harassment.” While the central holding of Torrey Pines would seem to answer the question, the case before the Court did not involve any live harassment claim against the individual defendant Weiss. It remains to be seen how lower courts will interpret this footnote.

II. WHAT TORREY PINES MEANS FOR CALIFORNIA EMPLOYERS

Torrey Pines is a welcome and important development for employers. While there is a distinct chance that the California Legislature will take action to overrule Torrey Pines, for now it is good law. Torrey Pines impacts employment litigation in at least two major respects.

First, the case clarifies that individual employees are not liable for retaliation under the FEHA. Courts had been split on the issue (with the vast majority allowing individual liability), and Torrey Pines puts the debate to rest. Torrey Pines thus provides a clear basis for dismissing retaliation claims against individual defendants, and the individual defendants themselves where retaliation is the only claim asserted. (Employers, of course, remain liable for retaliation conducted by their individual employees. As the Court in Torrey Pines pointed out, the Lodge in the case remained liable for nearly $1.4 million in damages.)

Second, Torrey Pines hamstrings plaintiffs’ common practice of naming individual defendants for purely tactical or emotional reasons. Out-of-state employers in particular will be better able to remove cases to federal court (and successfully oppose motions to remand) where the plaintiff has named a local individual defendant and asserted a retaliation claim against him or her in order to defeat diversity jurisdiction. If a nondiverse individual defendant is named in a FEHA retaliation claim, under Torrey Pines that individual will be considered a fraudulently joined, or sham, defendant whose presence in the action does not defeat diversity jurisdiction where the requirements otherwise are satisfied.

With respect to already-filed actions in which the existence of a nondiverse individual defendant precluded diversity jurisdiction, Torrey Pines creates (or clarifies) a basis for removal upon which employers should act immediately. Under federal law, a party may remove a case that initially was not removable “within thirty days after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” 28 U.S.C. § 1446 (b) (emphasis added). At this point, it is not clear whether a change or clarification in the law (such as the new decision in Torrey Pines) qualifies as an “other paper” under section 1446(b) that triggers the 30-day clock, or whether employers can wait for a dismissal order to trigger the 30-day clock. Employer thus are advised to assume that the Torrey Pines decision itself constituted an “other paper” that commenced the 30-day removal clock and to remove eligible cases immediately.

Torrey Pines does not address and does not modify the requirement that a party must remove an action on diversity grounds within one year after commencement of the action. 28 U.S.C. § 1446(b). Although some courts will extend this one-year rule on equitable grounds, and a change in the law arguably would qualify as sufficient grounds, most courts strictly construe this limitation.

In addition, courts (including the Ninth Circuit) apply a “voluntary/involuntary” rule to nonremovable cases that subsequently become removable. Under this rule, a case should remain in state court unless a voluntary act by the plaintiff renders it removeable. For the purposes of the voluntary/involuntary rule, the voluntary dismissal of a defendant is a voluntary act by the plaintiff. Moreover, notwithstanding the voluntary/involuntary rule, courts may disregard fraudulently joined defendants for the
purposes of assessing diversity. Thus, even the “involuntary” (court-ordered) dismissal of a sham defendant may be considered a “voluntary” act for the purposes of the rule.

Employers are advised to review existing and future litigation to evaluate and devise strategies for dismissing individual defendants from cases. Employers should consider both informal discussions with plaintiffs’ counsel in light of Torrey Pines, as well as formal motion practice, to dismiss individual defendants. Out-of-state employers should assess opportunities for removal immediately and also discuss the best strategies for securing the voluntary or court-ordered dismissal of fraudulently joined individual defendants.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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