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Reassessing Individual Liability for Retaliation under FEHA in Light of *McClung v. Employment Development Department*

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Cicero's "The Sword of Damocles," recounts the story of a peasant, Damocles, who declined to switch places with King Dionysius after learning the King discharged his duties with a sharp sword hovering over his head, suspended by a single horse hair.[1] California's litigious society provides a modern parallel to this timeless tale as supervisors worry whether the sword of litigation, individual liability and financial ruin will come down on them after making personnel decisions. Against the backdrop of high-profile seven-figure awards in employment cases, supervisors can be forgiven for pausing before each difficult personnel decision to ask "Will I be sued for this decision?"

California employment law on this point has been somewhat muddled. On the one hand, citing the economic benefits of having the employer alone bear the litigation costs of tough personnel decisions, even if improperly motivated, California courts have immunized supervisors from individual liability from some, but not all types of claims.[2]

Yet the answer to one question remained unclear: Can a supervisor be held individually liable for retaliation claims under the Fair Employment and Housing Act (FEHA)? The California Supreme Court has not ruled on this specific issue, but this article argues that the Supreme Court will likely find any such liability inappropriate.

THE CURRENT STATE OF THE LAW ON INDIVIDUAL LIABILITY

Because both discrimination and retaliation claims require essentially identical improperly motivated conduct (i.e., legally sufficient "adverse employment actions"), it seemed logical that supervisor immunity from "adverse employment actions" underlying discrimination claims would also apply to "adverse employment actions" supporting retaliation claims. From a practical standpoint, it makes little sense that a supervisor could terminate someone based on a protected classification without fear of legal liability, but face liability for the identical termination decision simply because the employee alleged a pre-termination complaint about unlawful activity.

Indeed, California courts have repeatedly determined that individual supervisors cannot be liable for wrongful termination in violation of public policy because the employer alone has the employment relationship with the

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[1] Cicero, *Tusculan Disputations V.*

[2] *See Reno v. Baird,* 18 Cal. 4th 640, 645 (1998) [no individual liability for discrimination and wrongful termination]; *Le Bourgeois v. Fireplace Manufactures, Inc.,* 68 Cal. App. 4th 1049, 1057 (1998) [constructive termination]; *Shoemaker v. Myers,* 52 Cal. 3d 1, 25 (1990) [breach of employment contract].

employee.[3] Since common law tortious discharge claims and retaliation claims under FEHA involve fundamentally indistinguishable conduct (i.e., termination for engaging in protected activity), it would seem sensible that individual immunity would extend to all such decisions, irrespective of the label applied. As the California Supreme Court observed, it would be "absurd to forbid a plaintiff to sue a supervisor under FEHA, and then allow essentially the same action under a different rubric."[4]

On the other hand, FEHA's retaliation provision, Government Code Section 12940 subdivision (h), identifies "person" as entities forbidden from retaliating, thus arguably reflecting a legislative intent to impose individual liability. Moreover, the only reported California appellate court decisions specifically discussing FEHA's retaliation provision have concluded the words "or person" authorize individual liability.[5]

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A RECENT DECISION PROVDES CLUES ON HOW THE CALIFORNIA SUPREME COURT MAY ULTIMATELY RULE ON INDIVIDUAL LIABILITY FOR RETALIATION

The California Supreme Court's recent decision in *McClung v. Employment Development Dep't.,* 34 Cal. 4th 467 (2004), analyzing the effect of recent legislative amendments authorizing individual liability for harassment, may provide substantial guidance on how the Court might view retaliation claims brought against individual supervisors. As discussed below, the *McClung* Court concluded the 2001 legislative amendments authorizing individual liability for harassment fundamentally changed FEHA by adding liability that did "not otherwise exist" and therefore could not apply retroactively.[6] More importantly, *McClung* did so by strongly reaffirming the Court's prior ruling and the analytical framework set forth in *Carrisales v. Dept. of Corrections,* 21 Cal. 4th 1132 (1999), in which is had determined that there was no individual liability under FEHA, despite the inclusion of the words "or any other person" in the harassment provision.

Given the quick legislative response to *Carrisales* (including a specific legislative pronouncement in California Government Code 12940 subdivision (j)(2) that the 2001 amendments were merely "declaratory of existing law"), many commentators and practitioners viewed *Carrisales* as having been wrongly decided and essentially "overruled" by the legislature. However, drawing upon fundamental constitutional and separation-of-powers principals, *McClung* squarely rejected any suggestion

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[3] *See e.g., Jacobs v. Universal Development Corp.,* 53 Cal. App. 4th 692, 703-704 (1997) [manager cannot be sued individually for allegedly wrongfully terminating employee who refused to participate in fraudulent rebate program].

[4] *Reno v. Baird,* 18 Cal. 4th 640, 664 (1998) [employee who cannot sue supervisor for discrimination cannot recast same claim under common-law wrongful termination theory].

[5] *Walrath v. Sprinkel,* 99 Cal. App. 4th 1237 (2002) [First District Court of Appeals upholds individually liability for retaliation under FEHA]; *Page v. Superior Court,* 31 Cal. App. 4th 1206 (1995) [Third District Court of Appeal observes individual liability for retaliation furthers FEHA's deterrence objectives].

[6] *McClung*, 34 Cal. 4th at 472.

that *Carrisales* had been "overruled," and reaffirmed that *Carrisales* sets forth the "final and conclusive" analytical model for assessing individual liability under FEHA. In this regard, *McClung* reaffirmed *Carrisales*' determination that the words "or any other person" do not authorize personal liability for harassment.

McClung's reaffirmation that *Carrisales* correctly and "conclusively" interpreted FEHA provides an opportunity to reassess individual liability for retaliation under FEHA. By extending *McClung* and applying *Carrisales,* supervisors can argue FEHA's current statutory language does *not* authorize individual liability, despite the words "or person" in the retaliation provision.

Moreover, as explained herein, this interpretation upholds the California Supreme Court's previous distinction between personnel-related decisions and personally-motivated harassment, and will not undercut FEHA's deterrence objectives. This interpretation will also eliminate the anomalous results discussed herein flowing from a contrary interpretation. Ultimately, then, *McClung* might well remove the "Sword of Damocles" for individual liability for retaliation suspended over the heads of California's supervisors.

To understand how such a result would be entirely consistent with prior California Supreme Court decisions and sound public policy, it is perhaps useful to retrace prior rulings addressing individual liability under FEHA:

RENO V. BAIRD, 18 CAL. 4TH 640 (1998)

The California Supreme Court's first effort to clarify individual liability occurred in its seminal decision, *Reno v. Baird,* 18 Cal. 4th 460 (1998). In *Reno,* a registered nurse sued her former supervisor for disability discrimination under FEHA and wrongful termination in violation of public policy, alleging that she had been terminated because of her cancer.[7] The California Supreme Court ultimately upheld the trail court's granting of summary judgment in the supervisor's favor on the grounds supervisors cannot be sued for either discrimination or wrongful termination. The Court observed that FEHA treats harassment and discrimination claims differently, with individual liability being appropriate under the former and not the latter, and that thus difference flowed primarily from the different conduct involved and sound public policy considerations.

The Court observed that individual liability for harassment may be appropriate because it involves conduct outside "the scope of necessary job performance [and] presumably engaged in for personal gratification."[8] The Court noted that, in contrast, discrimination claims arise from personnel management actions (i.e., hiring, firings, promotions, job assignments, etc.) necessary to running a business. The Court observed that while supervisors may refrain from personally motivated conduct of a harassing nature, it is impossible to refrain from personnel management decisions.[9] The Court also observed that supervisors cannot prevent thin-skinned employees from claiming unfavorable personnel decisions were discriminatory. In those situations where the decisions are improperly motivated, FEHA already provides the employee an adequate remedy: a suit against the employer for discrimination or wrongful termination.[10]

Reno's decision to not impose personal liability on supervisors for discrimination rested on a fundamental public interest-to avoid creating a conflict of interest between supervisors and employers each time a

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[7] *Reno*, 18 Cal. 4th at 640, 643.

[8] *Id.* at 645-646

[9] *Id.*

[10] *Id.*

supervisor faced a personnel decision. The Court observed that supervisors facing liability might not make the optimum lawful decision for the employer, but instead would be motivated to make the decision least likely to lead to a discrimination claim against the supervisor.[11] A rule creating such divided loyalties would have disastrous economic consequences without any material benefit to the employee/plaintiff since the "primary target remains the employer," who could be sued.[12] The Court also expressed concern that the "*in terrorem*" effect of litigation and potential financial ruin, rather than the case's merits, would drive settlement.

Lastly, the Court concluded that insulating supervisors from personal liability would not undercut FEHA's deterrence objectives. The Court predicted that employers would not condone discriminatory or illegal acts by supervisors employees since the employer would ultimately satisfy any judgment resulting from these illegal actions. The Court also predicated that supervisors themselves would not escape punishment since, "supervisors guilty of engaging in unlawful discrimination," are likely to suffer demotion or unemployment.[13]

In ruling that supervisors could not be sued for discrimination or wrongful termination, the Court's broad language suggests these policy considerations should limit supervisor liability in other contexts. The Court observed, "we do not decide merely whether individuals should be held liable for their wrongdoing, but whether all supervisors should be subject to a lawsuit each time they make a personnel decision."[14]

[11] *Id.* at 654-655

[12] *Id.*

[13] *Id.* At 662.

[14] *Id.* at 663 (emphasis added).

POST-*RENO* APPELLATE COURT DECISIONS

Notably, while distinguishing between personnel-related decisions and personally-motivated harassment, *Reno* also observed that the discrimination provision referenced only "employers" and the harassment provision mentioned both "employers" and "any other person." But *Reno* specifically declined to decided whether the statutory enumeration of "person" authorized individual liability, even for harassment as that issue was not before the Court.[15]

However, post-*Reno*, most courts seized upon the *Reno* Court's discussion of the difference in statutory language and interpreted *Reno* as having barred FEHA *discrimination* claims against supervisors, but authorizing suit against supervisors under any FEHA provisions containing the words "or person," including harassment and retaliation.[16] However, the California Supreme Court struck down this narrow application the following year in *Carrisales.*

CARRISALES V. DEPT. OF CORRECTIONS, 21 CAL. 4TH 1132 (1999)

In *Carrisales*, a female prison employee sued her employer and co-worker for sexual harassment under FEHA. The California Supreme Court held that co-workers could not be individually liable, notwithstanding prefatory language in section 12940, subdivision (j) prohibiting "any other person" form harassing employees.[17]

[15] *Id.* at 659 ("accordingly, we need not decide whether the reference to 'person' imputes personal liability on individuals not otherwise qualifying as employers").

[16] *See, e.g., Liberto-Blanck v. City of Arroyo Grande,* 33 F. Supp. 2d 1241, 1244 (C.D. Cal 1999); *Soo v. United Parcel Service, Inc.,* 73 F. Supp. 2d 1126, 1129 (N.D. Cal. 1999).

[17] *Carrisales v. Dept. of Corrections*, 21 Cal. 4th 1132 (1999)

The Court began its analysis by refusing to decide this fundamental issue solely on the basis of the words, "or any other person," in the prefatory sentence of subdivision (j). The Court observed, "We must not view isolated language out of context, but instead interpret the statute as a whole, so as to make sense of the entire statutory scheme."[18] The Court noted that the prefatory language in subdivision (j) was not intended to identify possible defendants, but rather to define what constitutes the "unlawful employment practice" referenced in section 12940 as a whole.[19] The Court noted that, when read together, the introduction to section 12940 and the first sentence in subdivision (j) merely provide that "it shall be an employment practice . . . [f]or an employer . . . or any other person . . . to harass an employee." Thus, the Court concluded that the first sentence of subdivision (j) was more properly read as defining what constitutes an "unlawful employment practice," which, in turn, determined whether FEHA even applied and whether it had been violated.[20]

According to *Carrisales,* liability under FEHA turns upon the phrase "unlawful *employment practice*."[21] The Court then narrowly defined "employment practices," observing that while employers might have such "employment practices," individual employee do not.[22] Accordingly, the Court concluded that unless there was language elsewhere in subdivision (j) specifically imposing personal liability on co-workers for harassment, then individual co-workers could not be personally liable. Reviewing the then-operative version of subdivision (j), the Court noted there was no such language, and concluded that there was no personal liability for co-workers who commit harassment.[23]

Although *Carrisales* only specifically addressed co-worker rather than supervisor liability and did so under the harassment, not the retaliation provision, the analysis did not appear limited to the specific claims presented in *Carrisales.*

THE LEGISLATURE'S RESPONSE TO *CARRISALES*

Of course, in 2001, the California legislature responded to *Carrisales* by amending FEHA to include subdivision (j)(3) to the harassment provision, thereby specifically providing for individual liability for harassment. The legislature also included subdivision (j)(2) announcing that these amendments were "declaratory of existing law."[24]

Many practitioners interpreted these amendments, particularly the accompanying legislative declaration in subdivision (j)(2), as a legislative pronouncement overruling *Carrisales* and in effect, a legislative determination that *Carrisales* had incorrectly interpreted FEHA. At that point, the pendulum appeared to have swung away from no individual liability under FEHA, to at least individual liability for harassment, and potentially liability under any FEHA provision using the word "person" to identify those prohibited from engaging in "unlawful employment practices."

***MCCLUNG V. EMPLOYMENT DEVELOPMENT DEPT.*, 34 CAL. 4TH 467 (2004)**

However, in November 2004, the California Supreme Court unabashedly announced in *McClung v. Employment Development Department,* 34 Cal. 4th 467 (2004), that the rumors of *Carrisales*'

[18] *Id.* at 1135.

[19] *Id.*

[20] *Id.*

[21] *Id*. at 1085 (emphasis in original).

[22] *Id.*

[23] *Id.*

[24] Cal. Gov't. Code, § 12940(j)(2).

demise were greatly exaggerated. In *McClung*, an employee sued her employer and a co-worker for sexual harassment under FEHA.[25] The trial court granted the individual defendant supervisor's summary judgment motion, but the Court of Appeal reversed. The Court of Appeal noted that although the trial court had initially correctly concluded *Carrisales* precluded individual liability, the legislature had subsequently amended FEHA by adding subdivision (j)(3) authorizing individual liability. The appellate court held that this amendment overruled *Carrisales* and merely "clarified" what the law always was and, thus, the amendment applied retroactively.

The California Supreme Court reversed, and rejected any suggestion that *Carrisales* had been invalidated, and reminded the appellate court that fundamental constitutional principles precluded the legislature from "overruling" the judiciary. The Court observed that while the legislature *enacts* laws, it is the province of the judicial department to say what the law is.[26] The Court explained:

> [s]ubject to constitutional constraints, [the legislature] may *change* the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute, as we did in *Carrisales* [internal citations omitted], the Legislature may amend the statute to say something different. But if it does so, it *changes* the law; it does not merely state what the law always was. Any statement to the contrary is beyond the Legislature's power.[27]

[25] *McClung*, 34 Cal. 4th at 470-471.
[26] *Id.* at 470.
[27] *Id.* at 470 (emphasis in original).

Applying these principles, the Court held that *Carrisales* had "interpreted the FEHA *finally and conclusively"* and that the words "or any other person" do not impose personal liability for harassment.[28] The Court further noted that the legislature may amend FEHA by adding subdivision (j)(3) regarding individual liability, but this amendment "changed" the law. In short, the 2001 amendments were not simply a restatement or clarification of existing law, but were, in fact, new law.

Thus, the California Legislature did not "overrule" *Carrisales*, and *Carrisales*' "final and conclusive determination" on how to interpret FEHA for purposes of individual liability remains in effect and is "binding on lower state courts."[29] Under *Carrisales*' and *McClung*'s analysis, the words "or person" in the retaliation provision do *not* authorize individual liability. The Legislature would have to amend the retaliation provision to include another provision (akin to subdivision (j)(3)) to specifically provide for individual liability before any such liability will exist. But any such amendment would fundamentally "change" the law "to impose liability that did not otherwise exist," and, therefore would not apply retroactively.

CARRISLAES AND *MCCLUNG* HAVE INVALIDATED CONTRARY LOWER COURT OPINIONS

As mentioned as the outset, the only reported California appellate court decisions have concluded that individual liability for retaliation *is* appropriate under FEHA.[30] Although neither case has been expressly overruled, it is doubtful whether either case remains good law in light of *Carrisales* and *McClung*.

[28] *Id.* at 473 (emphasis added).
[29] *Id.*
[30] *Walrath v. Sprinkel,* 99 Cal. App. 4th 1237 (2002); *Page v. Superior Court,* 31 Cal. App. 4th 1206 (1995).

In determining that individual liability exists, both *Walrath* and *Page* rely heavily upon the retaliation provision's inclusion of the words "or person," which these courts interpreted as legislative authorization for individual liability.[31] However, the California Supreme Court expressly rejected this identical argument in *Carrisales*.

Moreover, as *McClung* states, "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."[32] Unlike laws, judicial decisions apply retroactively and thus, *Carrisales*' and *McClung*'s "final and conclusive" interpretation that the words "or any other person" do not authorize individual liability effectively invalidate all prior decisions applying a different analysis.[33]

Further, the *Page* decision opined that supervisor liability would further FEHA's goals of deterring harassment and retaliation.[34] However, both *Reno* and *Carrisales* opine that eliminating individual liability for discrimination and harassment would not undercut these goals.[35]

The more recent *Walrath* decision is further open to criticism because it overlooks some very important legal developments. For instance, *Walrath* completely ignores the California Supreme Court decision in *Carrisales* three years earlier, and ignores the obvious differences in statutory language between the retaliation provision and the harassment provision following the 2001 legislative amendments adding subdivision (j)(3) to the harassment provision.

Secondly, *Walrath* premises its imposition of individual liability upon three appellate court decisions which it claims authorizes wrongful termination claims against supervisors.[36] However, none of the three cases cited by *Walrath* specifically discuss whether supervisors can properly be sued for wrongful termination.[37]

Finally, *Walrath* also permits a common law wrongful discharge claim against a supervisor and, in doing so, completely ignored the fact that *Reno* (and its progeny) expressly prohibit wrongful termination claims against supervisors on grounds it would be "absurd" to permit such claims. For all these reasons, *Walrath* appears to have misinterpreted individual liability post-*Reno*. In any event, is should be deemed to have misinterpreted FEHA in light of *Carrisales* and *McClung*.

IMPOSING INDIVIDUAL LIABILITY FOR RETALIATION LEADS TO ILLOGICAL AND ANOMALOUS RESULTS

The simplistic interpretation that the words "or person" establish liability for retaliation leads to anomalous results and violate well-established rules of statutory construction.

For instance, this interpretation ignores the balance of the first sentence of California Government Code Section 12940 subdivision (h), which imposes liability only against entities who "discharge, expel, or otherwise discriminate" against persons who

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[31] *See e.g., Page,* 31 Cal. App. 4th at 1212; *Walrath,* 99 Cal. App. 4th at 1241.

[32] *McClung*, 34 Cal. 4th at 474.

[33] *Id.* (observing that *Carrisales*' interpretation invalidated two prior administration decision construing FEHA differently).

[34] *Page*, 31 Cal. App. 4th at 1241.

[35] *Reno*, 18 Cal. 4th at 654; *Carrisales*, 21 Cal. 4th at 1139.

[36] *Walrath*, 99 Cal. App. 4th at 1213.

[37] *See, e.g. Stevenson v. Superior Ct.,* 16 Cal. 4th 880 (1997) (addresses only the wrongful termination claim against employer); *Blom v. N.G.K. Spark Plugs*, 3 Cal. App. 4th 382 (1992) (same); *Carmichael v. Alfano Temporary Personnel,* 233 Cal. App. 3d 1126 (1991) (addresses only statute of limitations issues).

oppose a prohibited practice. The first two items, "discharges" and "expulsions," are clearly management-related actions taken on behalf of the employer who enjoys the employment relationship with the employee. As mentioned, California courts have repeatedly held there is no individual liability for such "discharges" or "expulsions" regardless of the manner achieved or label applied.[38]

Second, when interpreting the catch-all phrase "or otherwise discriminate," one must be mindful of *Reno*'s express prohibition of individual liability for discriminatory acts. Furthermore, the statutory construction rule of *ejusdem generis*, provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to the objects enumerated by the preceding specific words."[39] Accordingly, the phrase "otherwise discriminate" must be read in reference to the preceding words "to discharge, expel," both of which undeniably are personnel-related actions for which there is no individual liability.

An interpretation that the word "person" equals personal liability would lead to numerous incongruous results repeatedly rejected by California courts. For instance, "employer" in the retaliation provision excludes both religious organizations and employers with fewer than five employees.[40] If "person" means individual liability, then supervisors for religious organizations or small employers would face liability for retaliation even though the employer itself is exempt. California courts have rejected such anomalous results, including in the retaliation context.[41]

Similarly, if "person" equated individual liability, then supervisors could be liable under California Government Code Section 12940(i) for "aiding and abetting" unlawful employment matters such as discrimination, even though they could not be directly liable for the discrimination.[42] California courts have rejected this argument as well, noting that "the Legislature did not intend to impose personal liability upon individual supervisory employees by the roundabout method of 'aiding and abetting' language."[43]

CONCLUSION

How the California Supreme Court will ultimately rule on the viability of retaliation claims against individual supervisors under FEHA remains to be seen. However, the *McClung* decision provides a strong indication that such claims may very well be rejected.

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[38] *See, e.g., Reno,* 18 Cal. 4th at 643 (no individual liability for wrongful termination); *Le Bourgeios,* 68 Cal. App. 4th at 1057 (constructive discharge).

[39] *In re Johnny O.*, 107 Cal. App. 4th 888, 894 (2003).

[40] Cal. Gov't Code, §12926(d).

[41] (*Taylor v. Beth Eden Bapist Church,* 294 F. Supp. 2d 1074, 1085 (N.D. Cal. 2003)[dismissing retaliation claim against pastor]; *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 72 (1996).)

[42] Cal Gov't Code, § 12940(i) (it shall be an unlawful employment practice "for any person to aid [or] abet"); *Reno*, 18 Cal. 4th at 645 (individuals cannot be liable for discrimination).

[43] *Janken,* 46 Cal. App. 4th at 77-79.