

# The California Supreme Court Trilogy Foretells That Supervisors are Not Liable for Retaliation

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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 horsehair. (Cicero, *Tusculan Disputations V*.) California’s litigious society provides a modern parallel 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 performance-based personnel decision to ask, “Will I be sued personally for this decision?”

Although Title VII immunizes supervisors from liability for such decisions. (*Miller v. Maxwell’s Int’l, Inc.* 991 F.2d 583, 587 (9th Cir. 1993) [no individual liability for Title VII retaliation]), California case law has been cloudy. 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 most types of claims. (See *Reno v. Baird*, 18 Cal. 4th 640, 645 (1998) [discrimination]; *Jacobs v. Universal Development Corp.*, 53 Cal. App. 4th 692, 703-704 (1997) [wrongful termination in violation of public policy]; *Le Bourgeois v. Fireplace Manufacturers, Inc.*, 68 Cal. App. 4th 1049, 1057 (1998) [constructive termination]; *Shoemaker v. Myers*, 52 Cal. 3d 1, 25 (1999) [breach of contract]; *Sheppard v. Freeman* 67 Cal.App.4th 339 (1998) [interference with prospective economic advantage].)

Yet the answer to one question is seemingly subject to debate: Can a supervisor be held individually liable for retaliation claims under California’s Fair Employment and Housing Act (FEHA)?

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## The Language of the Debate

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As mentioned, the California Supreme Court has consistently rejected the application of individual liability to employment claims. However, the state legislature’s language usage in FEHA’s retaliation provision is less than pristine. The retaliation provision is set forth in California Govern-

ment Code section 12940(h) and provides that it shall be an unlawful employment practice “[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.” (Cal. Gov. Code §12940(h)).

Employees have argued that the retaliation provision’s designation of “person” among those prohibited from engaging in retaliation reflects a legislative intent to impose individual liability. Only two reported California appellate court decisions specifically discussing FEHA’s retaliation provision have applied this analysis and upheld individual liability. (*Walrath v. Sprinkel*, 99 Cal. App. 4th 1237 (2002); *Page v. Superior Court*, 31 Cal. App. 4th 1206 (1995)).

However, several recent California Supreme Court decisions interpreting other FEHA provisions suggest the current retaliation provision does not authorize individual liability. (*Reno v. Baird* 18 Cal.App.4th 640 (1998) [analyzing individual liability for discrimination]; *Carrisales v. Dept. of Corrections* 21 Cal.4th 1132 (1999) [analyzing individual liability for harassment]). Of equal interest, the California Supreme Court recently

took pains to remind the California legislature that interpreting the laws remains a judicial function and that legislative efforts to impose individual liability changes the law and cannot apply retroactively. (*McClung v. Employment Dev. Dept.* 34 Cal. 4th 467 (2004)). Thus, there is little or no reason to expect that the California Supreme Court will allow individual liability for retaliation.

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### **Court Immunizes Supervisors for Personnel Decisions**

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In a landmark ruling, the California Supreme Court held that supervisors could not be sued for discrimination under FEHA, or for common law wrongful termination. (*Reno v. Baird*, 18 Cal. 4th 640 (1998).) In reaching this result, the Court distinguished “harassment” from “discrimination,” observing individual liability for harassment might be appropriate because it involves conduct outside “the scope of necessary job performance [and] presumably engaged in for personal gratification.” (*Reno, supra*, 18 Cal. 4th at 645-646). 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 can refrain from personally motivated conduct of a harassing nature, they cannot refrain from personnel management decisions, or prevent thin-skinned employees from claiming these personnel decisions were discriminatory.

*Reno’s* rejection of the imposition of personal liability on supervisors for discrimination or wrongful termination also rested on a fundamental

public interest—to avoid creating a conflict of interest between supervisors and employers each time a supervisor faced a tough 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. (*Reno, supra*, 18 Cal. 4th at 654-655). The court noted that 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. (*Id.*) 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, since employers who satisfy large judgments will have ample incentive to discipline misbehaving supervisors. (*Reno, supra*, 18 Cal. 4th at 662.)

In an often overlooked aspect of its ruling, the *Reno* court also immunized supervisors for common law wrongful termination claims, noting 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.” (*Reno, Id.* at 664).

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### **Lower Courts Misread and Misapply Reno**

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In distinguishing between personnel-related decisions for discrimination

purposed and personally motivated harassment, *Reno* noted the discrimination provision subsection (a) referenced only “employers” and the harassment provision, section 12940(j) mentioned “employers” and “any other person.” (See, Cal. Gov. Code §12940(a) [prohibiting “employers” from discriminating against employees]; Cal. Gov. Code §12940(j) [prohibiting “employers...or any other person” from harassing an employee].) Critically, *Reno* specifically declined to decide whether the statutory enumeration of “person” in the harassment provision authorized individual liability, even for harassment, as that issue was not before the court. (*Reno, supra*, 18 Cal. 4th at 659 [“accordingly, we need not decide whether the reference to ‘person’ imputes personal liability on individuals not otherwise qualifying as employers”].)

Unfortunately, several courts seized subsequently upon the *Reno’s* discussion of this 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. (See, e.g., *Liberto-Blank 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).)

However, just one year after *Reno*, the California Supreme Court rejected this “person equals liability” argument.

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## Court Rules “Person” Does Not Authorize Individual Liability

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In *Carrisales v. Dept. of Corrections* 21 Cal.4th 1132 (1999), the California Supreme Court held that co-workers could not be individually liable for harassment, notwithstanding language in FEHA’s harassment provision prohibiting “any other person” from harassing employees. (*Id.*)

The court began its analysis by refusing to conclude the word “person” equals individual liability, observing such a broad standard would extend liability beyond the employment context to potentially include “everyone in the world.” *Carrisales, supra*, 21 Cal.4th at 1135). The court cautioned, “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.” (*Id.* at 1135). The court noted that the language “or any other person” was not intended to identify possible defendants, but rather to define what constitutes the “unlawful employment practice” referenced in section 12940 as a whole. (*Id.*) The court noted that, when read together, the introduction to section 12940 and the first sentence in subsection (j) merely provide that “it shall be an unlawful employment practice . . . [f]or an employer . . . or any other person . . . to harass an employee.” Thus, the court concluded that the first sentence of subsection (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. (*Id.*)

The court then observed that liability under FEHA turns upon the

phrase “unlawful *employment practice*,” but while employers have “employment practices,” individual employees do not. (*Id.*) Accordingly, the court concluded that unless there was express statutory language elsewhere in the harassment provision specifically imposing personal liability for harassment, co-workers could not be personally liable. Reviewing the then-operative version of subsection (j), the court noted there was no such language, and concluded that there was no personal liability for co-workers’ harassment. (*Id.*)

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*, especially given the parallel statutory framework in the retaliation and harassment provisions (i.e., both enumerating specific entities prohibited from engaging in specific “unlawful employment practices” prohibited by section 12940 generally).

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## The California Legislature Attempts to “Overrule” the Court

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In 2001, the California legislature responded to *Carrisales* by amending FEHA’s harassment provision to include a new subsection, subsection (j)(3), specifically authorizing individual liability. (Cal. Gov. Code §12940(j)(3) [“an employee...is personally liable for any harassment... perpetrated by the employee”].) The Legislature also included another subsection announcing that these amendments were “declaratory of existing law.” (Cal. Gov. Code, § 12940(j)(2).)

Employees interpreted these amendments as a legislative pronouncement “overruling” *Carrisales* and a 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.”

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## The California Supreme Court Gets the Final Word

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The California Supreme Court recently assessed the retroactivity of these amendments and, in rejecting retroactive application, made two critical determinations. (*McClung v. Employment Development Dept.* 34 Cal.4th 467 (2004)). First, *McClung* held that the post-*Carrisales* amendments authorizing individual liability for harassment “fundamentally changed” FEHA by imposing liability that did not otherwise exist. (*McClung, supra*, 34 Cal.4th at 476). As such, they could not apply retroactively. Second, *McClung* reaffirmed that *Carrisales* issued a “final and definitive interpretation” that individual liability under FEHA can exist only if there is express statutory language authorizing such liability, and the words “any other person” in the statute’s language for purposes of identifying “unlawful employment practices” will not support individual liability. (*McClung, supra*, 34 Cal.4th at 476; *Carrisales*, 21 Cal.4th at 1085).

In doing so, *McClung* confirmed that the rumors of *Carrisales*’ demise

were greatly exaggerated, and quashed any suggestion *Carrisales* had wrongly interpreted FEHA and been “overruled” by the legislature. To the contrary, the California Supreme Court reaffirmed 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. (*McClung, supra*, 34 Cal. 4th at 470). 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. *McClung, supra*, 34 Cal. 4th at 470 [italics 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. (*McClung, supra*, 34 Cal. 4th at 473 (emphasis added).) The court further noted that the legislature may amend FEHA by adding subsection (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.” (*McClung, id.*) Under *Carrisales*’ and *McClung*’s analysis, the words “or person” in the retaliation provision do not authorize individual liability, but simply help define an “unlawful employment practice” creating employer liability. Moreover, as *McClung* made clear, the legislature would have to make corresponding amendments to the retaliation provision to include another provision 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. (*McClung, id.* at 472).

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### **Carrisales and McClung Have Invalidated Contrary Lower Court Opinions**

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As mentioned at the outset, the only relevant reported California appellate court decisions have held FEHA imposes individual liability for retaliation. (*Walrath v. Sprinkel*, 99 Cal. App. 4th 1237 (2002); *Page v. Superior Court*, 31 Cal. App. 4th 1206 (1995).) Although neither case has been expressly overruled, it is doubtful whether either case remains good law in light of *Carrisales* and *McClung*.

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. (See e.g., *Page, supra*, 31 Cal. App. 4th at 1212; *Walrath, supra*, 99 Cal. App. 4th at 1241). However, *Carrisales* rejected this statutory interpretation.

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.” (*McClung, supra*, 34 Cal. 4th at 474.) 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. (*McClung, supra*, 34 Cal. 4th at 474 [observing that *Carrisales*’ interpretation invalidated two prior administrative decisions construing FEHA differently].)

Further, *Page* suggested supervisor liability is necessary to further FEHA’s deterrence objectives. (*Page, supra*, 31 Cal. App. 4th at 1213). However, both *Reno* and *Carrisales* stated that eliminating individual liability for discrimination and harassment would not undercut these goals. (*Reno, supra*, 18 Cal. 4th at 654; *Carrisales, supra*, 21 Cal. 4th at 1139.) The same is equally true for retaliation.

The more recent *Walrath* decision is further open to criticism because it overlooks some very important legal developments. For instance, *Walrath* completely ignores both the California Supreme Court decision in *Carrisales* and the obvious differences in statutory language between the retaliation provision and the harassment provision following the 2001 legislative

amendments adding subsection (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. (*Walrath, supra*, 99 Cal. App. 4th at 1241.) However, none of the three cases cited by *Walrath* specifically discuss individual liability. (See, e.g., *Stevenson v. Superior Ct.*, 16 Cal. 4th 880 (1997) [addresses only 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].)

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, it should be deemed to have misinterpreted FEHA in light of *Carrisales* and *McClung*.

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### **Imposing Individual Liability for Retaliation Leads to Illogical and Anomalous Results**

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An interpretation that the word “person” equals personal liability would also 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. (Gov. Code, §12926(d).) 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. Federal courts construing California law have rejected such anomalous results. (*Taylor v. Beth Eden Baptist Church*, 294 F. Supp. 2d 1074, 1085 (N.D. Cal. 2003) [dismissing retaliation claim against pastor]; cf., *Miller, supra*, 991 F.2d at 587 [Ninth Circuit holds that term “agent” in Title VII does not authorize individual liability; Congress specifically intended to protect smaller employers (i.e., fewer than 15 employees) and “it is inconceivable that Congress intended to allow civil liability to run against individual employees”].)

Similarly, if “person” equated individual liability, then supervisors could be liable under 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. (Gov. Code, § 12940(i) [it shall be an unlawful employment practice “for any person to aid [or] abet”]; *Reno, supra*, 18 Cal. 4th at 645 [individuals cannot be liable for discrimination].) 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 ‘aid-

ing and abetting’ language.” (*Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 77-79 (1996)).

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### **Conclusion**

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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 Court’s prior precedents coupled with concurring federal authorities strongly suggest that individual liability for employment claims is shrinking. Thus, retaliation will ultimately join the list of barred employment claims against supervisors.