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Calif. Supreme Court Excuses Managers From Retaliation Suits

**Ruling brings unusually sharp dissents, with one justice accusing majority
of engaging in 'analytical contortions'**

Mike McKee, The Recorder

To the relief of businesses statewide, the California Supreme Court on Monday refused to make individual employees -- such as supervisors and managers -- personally liable for acts of retaliation.

In a fractious 4-3 opinion, Justice Ming Chin ruled that the state's Fair Employment and Housing Act clearly holds employers accountable in such situations, but not employees. The decision mirrors a 1998 unanimous ruling by Chin regarding employee liability for discrimination.

"It is hard to conceive why the Legislature would impose individual liability for actions that are claimed to be retaliatory," Chin wrote in Monday's opinion, "but not for the same actions that are claimed to be discriminatory."

The ruling brought unusually sharp dissents from Justices Carlos Moreno, Kathryn Mickle Werdegar and Joyce Kennard.

Werdegar accused the majority of engaging in "a series of analytical contortions" in reaching a decision she felt "undermines the entire purpose" of FEHA.

Moreno, whose 28-page dissent was seven pages longer than the majority ruling, said the FEHA statute in question couldn't be clearer. Joined by Werdegar and Kennard, he noted that FEHA lists "person," along with employer, labor organization and employment agency, as legitimate liability targets for retaliation.

Moreno's dissent stopped just short of accusing the majority -- comprising Chin, Justices Marvin Baxter and Carol Corrigan and Chief Justice Ronald George -- of engaging in judicial activism.

"While the majority may harbor doubts about the wisdom of imposing personal liability on individuals who retaliate," he wrote, "such policy concerns are properly directed at, and resolved by, the Legislature, not this court."

The underlying suit got under way in May 2003, when Scott Jones sued The Lodge at Torrey Pines for allegedly retaliating against him for complaining about harassment by two fellow employees. Jones had worked at The Grill, the swanky La Jolla lodge's restaurant, since 1995, working his way up to outlet manager by 2000.

Soon thereafter, Jones claimed, new supervisor Jean Weiss and kitchen manager Jerry Steen began making gay-bashing jokes and off-color comments about him, as well as lewd remarks toward female employees. He said after he took his complaints to upper management, Weiss began leaving him out of important meetings and accusing him of poor job performance.

Jones resigned in January 2002, saying he was sick of the abuse.

When the case went to trial in San Diego County Superior Court, jurors hit the lodge with nearly \$1.4 million in compensatory damages and Weiss individually with \$155,000. However, trial court Judge Richard Strauss tossed the verdict, saying Jones hadn't proven an adverse employment action at the hands of the lodge. He also said Weiss couldn't be held individually liable for retaliation.

Early last year, San Diego's 4th District Court of Appeal reinstated the original judgment against both defendants.

In reversing on Monday, the Supreme Court held that individual liability for retaliation fails for all the same reasons the court found individuals not liable for discrimination in 1998's *Reno v. Baird*. Among those were concerns that corporate employment decisions are often made collectively and a view that it's bad policy to subject supervisors to the threat of a lawsuit every time they make personnel decisions.

Unlike Moreno, Scott Toothacre, a partner at San Diego's Toothacre & Toothacre who represented Jones, and Los Angeles solo practitioner Jeffrey Winikow, who represented the California Employment Lawyers Association as amicus curiae, didn't hesitate to accuse the majority of engaging in judicial activism.

"They usurped the Legislature's clear language and inserted their own policy," Toothacre said, "and making policy is the Legislature's job, and not the court's."

Regina Petty, a partner in San Diego's **Wilson Petty Kosmo & Turner** who represented the lodge, and Melanie Poturica, managing partner of L.A.'s Liebert Cassidy Whitmore who argued for the League of California Cities as amicus, called the ruling a big victory for individual employees, as well as employers.

"It is the best outcome that supervisors not be more concerned with their personal liability than they are with doing their jobs on a daily basis," Petty said.

Both she and Poturica have some worries that the state Legislature might heed Moreno's words and step in. As even Chin noted in a footnote in Monday's ruling, a year after the high court held in 1998 that individual employees weren't personally liable for harassment under the FEHA, legislators changed the law.

Monday's ruling is *Jones v. The Lodge at Torrey Pines Partnership*.