Personal Liability for Retaliation is Yet Another Burden for Supervisors

In 1998, the California Supreme Court ruled supervisors were not personally liable for damages resulting from wrongful termination or discrimination. The California Supreme Court recently granted review of Jones v. The Lodge at Torrey Pines where a supervisor was held personally liable for retaliation when an employee lost his job. Individual supervisors need to be aware their actions could put their personal assets at risk.

Discrimination vs. Retaliation

Discrimination and retaliation are related, but not identical, claims. Both discrimination and retaliation require an employee to suffer some “adverse employment action.” The most common action is termination, but less severe penalties can also be considered adverse employment actions.

The primary distinction between discrimination and retaliation is the reason for the adverse employment action. Discrimination occurs when an employee suffers an adverse employment action because of some protected classification, i.e., age, race, sex, etc.

Retaliation occurs when an employee suffers an adverse employment action as a result of a complaint about harassment or discrimination because of a protected classification. Retaliation is not only limited to the complaining employee but any other who aids or assists the complaining employee.

The Jones Case

The Jones case involved a manager at a hotel who was subjected to harassing conduct by his supervisor and another manager. When he complained about the inappropriate conduct, he was berated by the supervisor. A month later, he again complained about the conduct at the hotel and the restaurant. In response, another supervisor told him he needed to get permission to seek counseling and suggested he quit his job because “things like this get worse.” He went home for the day. When he returned the next day to work, he was disciplined for his absenteeism. For the next few weeks, the employee was blackballed and received several disciplinary memorandum and unsatisfactory job performance reviews. The employee then filed a complaint with the Department of Fair Employment and Housing. However, he continued to work at the restaurant.

After the restaurant received the letter, the hotel supervisor engaged in a course of conduct to force the employee to quit his job. This conduct continued for several months, and the employee ultimately resigned.

The employee then filed a lawsuit claiming discrimination against the hotel, and filed a retaliation claim against both the hotel and the supervisor. The jury awarded the employee
nearly $1.4 million in damages against the hotel and $155,000 against the manager.

**Basis for Liability of Supervisors**

Various courts in California have considered the issue of whether a supervisor can be personally liable for retaliation. Each case generally holds a supervisor can be liable for retaliation. The primary basis for these holdings is found in a separate section of the Fair Employment and Housing Act.

Under the Fair Employment and Housing Act, only “an employer” is prohibited from discriminating against an employee or applicant. Gov. Code § 12940, subd. (a)(1). However, retaliation applies to “any employer, labor organization, employment agency, or person …” Gov. Code § 12940, subd. (h) [Italics added].

If the California Legislature makes a distinction in a statute, courts must give deference to those distinctions. When the Supreme Court held a supervisor could not be liable for discrimination, it considered the language of the statute as limiting the right to “an employer” and not any other person. The same logic applies to a retaliation claim.

The language of the statute bars retaliation by a broader classification of potential people other than the employer.

**What Supervisors Should Do**

Fortunately, not every case of retaliation will subject a supervisor to personal liability. The supervisor’s liability is limited to retaliation for actions covered under the Fair Employment and Housing Act. Nevertheless, supervisors need to take care in protecting themselves and the company from a lawsuit.

Most employers have a policy in their employee handbooks prohibiting retaliation for employee complaints. Supervisors need to understand and appreciate a “no retaliation” policy means just that. An employee who complains about some unlawful employment practice must be treated as their position dictates.

In Jones, the supervisor undertook a pattern of conduct against a complaining employee such as excluding the employee from meetings and taking disciplinary action for minor infractions. When the employee offered an explanation, the supervisor ignored him. This pattern of openly hostile conduct justified the jury award.

It is difficult to separate a supervisor’s personal feelings when dealing with an employee who makes a complaint for some employment practice, especially if it is against the supervisor. These feelings may cause the supervisor to act out against the employee.

When presented with this situation, supervisors should recognize they may need assistance to properly deal with the employee. Employers should work with the supervisor and employee to address the employee’s complaint and still maintain a work environment free of retaliation. If the company has questions, they should seek legal representation to provide a solution to the conflict before it turns into a lawsuit.
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