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Rethinking Individual Liability and “Adverse Employment Actions” After *Yanowitz v. L’Oreal, Inc.*

By Ronald W. Novotny

Editor’s Note: In September 2005, we published “Reassessing Individual Liability for Retaliation Under FEHA in Light of McClung v. Employment Development Department” by Michael S. Kalt. Mr. Novotny revisits this topic in light of Yanowitz v. L’Oreal, Inc., which the California Supreme Court decided after Mr. Kalt’s article had been finalized for publication.

Counsel representing management in employment matters have found much to criticize in last year’s decision by the state Supreme Court in *Yanowitz v. L’Oreal USA, Inc.*,¹ from the Court’s purported requirement that employers be almost telepathic in knowing of a discrimination complaint to the kinds of employment actions that can form the basis for a retaliation claim under the Fair Employment and Housing Act (FEHA). It is popular wisdom that the *Yanowitz* case was therefore a positive development for plaintiffs suing under the statute, and that its treatment of those issues may pose obstacles to obtaining summary judgment on retaliation claims. But the Court’s reasoning in that case can actually be used to argue one of the most difficult issues these cases pose to employers: obtaining the dismissal of individual defendants from retaliation claims.

Even before *Yanowitz*, three courts uniformly defined the elements of a retaliation claim under FEHA as requiring some of employment action that is taken by an employer, as opposed to another employee. In *Yanowitz*, the Court held that in order to establish a *prima facie* case of retaliation under FEHA, the plaintiff must show that (1) he or she engaged in a “protected activity,” (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and

the employer’s action.² The Court went on to state that once an employee establishes a *prima facie* case,

the employer is required to offer a legitimate non-retaliatory reason for the adverse employment action [citation omitted] . . . if the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation “drops out of the picture, and the burden shifts back to the employee to prove intentional retaliation.”³

As such, the *Yanowitz* decision provides an additional argument for exempting all employees from personal liability for retaliation.⁴

In *Yanowitz*, the Supreme Court additionally clarified the type of conduct required to establish an “adverse employment action” upon which a retaliation claim can be based. The Court specifically addressed the question of whether the “or otherwise discriminate” language in Cal. Gov’t Code § 12940(h) should be interpreted to refer to the same category of adverse employment measures or sanctions that are covered by § 12940(a)—which prohibits discrimination in the “terms, conditions or privileges of employment”—or a broader range of adverse employment actions that are “reasonably likely to deter employees from engaging in protected activities.”⁵ After reviewing the two statutory subsections together, the court concluded that the Legislature more likely intended to extend a comparable degree of protection to employees who were subject to unlawful discrimination and those who were retaliated against for opposing such discrimination, “rather than to interpret the

statutory schemes as affording a greater degree of protection against improper retaliation than is afforded against direct discrimination.”⁶ The Court then stated:

Accordingly, we conclude that the terms “otherwise discriminate” in section 12940(h) should be interpreted to refer to and encompass the same forms of adverse employment activity that are actionable under section 12940(a).⁷

Several years ago, the Court conclusively held that individual employees cannot be held liable under FEHA for those discriminatory acts which violate section 12940(a). In *Reno v. Baird*,⁸ the Court reviewed at length and approved the Court of Appeals’ decision in *Janken v. GM Hughes Electronics*,⁹ which concluded that “commonly necessary personnel management actions” such as “hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or non-assignment of supervisory functions, deciding who will and will not attend meetings, deciding who will be laid off, and the like” may not subject supervisors to personal liability under FEHA, even if they are alleged to be discriminatory in nature. The *Reno* court adopted this reasoning in holding that “Individuals who do not themselves qualify as employers may not be sued under the FEHA for alleged discriminatory acts.”¹⁰ Accordingly, if the factual allegations presented are within the realm of “properly-delegated personnel management authority,” individual supervisors cannot be personally liable for such conduct, and a claim of discrimination based

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on such conduct can only be made against their employer.

In arriving at the conclusion that such actions may not give rise to personal liability because they “arise out of the performance of necessary personnel management duties” and are “an inherent and unavoidable part of the supervisory function,” the Court carefully distinguished such actions from unlawful harassment.¹¹ The court accordingly drew a very clear line between “commonly necessary kinds of personnel management actions” and the kind of unlawful harassment for which individual employees may be held personally liable under § 12940(j), reasoning that the former kind of conduct was “avoidable” while the latter was not. When retaliatory actions are alleged to consist of personnel decisions that managers and human resources administrators must unavoidably make on a daily basis, they therefore fall squarely within the kind of decision that the *Reno* court held may be made without the fear of incurring personal liability.

In reaching its decision, the *Reno* court sided with the *Janken* court’s acknowledgment that imposing personal liability on supervisors for personnel management decisions would “severely impair the execution of supervisory judgment” by “subjecting them to the ever-present threat of a lawsuit each time they make a personnel decision.”¹² The court therefore could not have been clearer in its intent to exempt individuals from personal liability for the very kind of “adverse employment actions” which are now required to establish a retaliation claim. Because the Supreme Court has recently defined the scope of activity that may support a retaliation claim as the very same kind of activity which individuals cannot be liable for engaging in under the anti-discrimination provisions of the statute, it would be senseless to

conclude that individuals can be personally liable under the retaliation prong of FEHA for engaging in the exact same conduct. For example, it does not make sense that an individual supervisor cannot be subject to personal liability for terminating a female employee because of her sex, but can be personally liable for terminating her because she made a complaint of sex discrimination. In view of the fact that the act of terminating an employee is itself a “commonly necessary personnel management action” for which an individual cannot be held personally liable for under § 12940(a), the allegedly different motivation for that action should have no effect whatsoever as to whether the individual is personally liable under § 12940(h), *particularly now that the Supreme Court has held that a retaliation claim must be based on just such an action*.¹³ Because only employers can “discharge, expel or otherwise discriminate” against employees, and individuals cannot be held personally liable for such conduct, only employers are now capable of committing the unlawful *employment* practice specified in subsection (h) of the statute.¹⁴

Limiting FEHA’s retaliation provisions to employers is also entirely in accord with the regulations to the retaliation section of FEHA.¹⁵ Those regulations specifically state that it is unlawful for “an employer or other covered entity” to take various employment-related actions against individuals for engaging in activity that is protected by the statute.¹⁶ In addition, the California Approved Jury Instruction for retaliation claims under FEHA specifically states that a defendant must take an “adverse employment action” against the plaintiff, and that a retaliatory motive is established by showing that the plaintiff’s “employer was aware of the protected activities . . .”¹⁷ This result naturally follows from the fact that “adverse employment actions” may only be taken by employers, and not employees.

Precluding individual liability for retaliation is also consistent with the law which has developed for establishing the closely related tort of wrongful discharge.

The courts have repeatedly concluded that a claim for wrongful discharge in violation of public policy can only be asserted against one’s employer.¹⁸ Once again, it would seem illogical to conclude that individual employees who are not subject to liability in tort for discharging an employee in retaliation for engaging in legally protected activity, could be held liable under the retaliation provisions of FEHA for the exact same conduct.

Thus, although § 12940(h) prohibits “persons” from retaliating against employees, it is clear that the only “persons” who can carry out the adverse employment actions on which a retaliation claim can now be based are employers. Because individual supervisors are not employers, they therefore cannot be held legally responsible for the personnel management actions that only their employer may now take, notwithstanding the language contained in § 12940(h). [↗](#)

ENDNOTES

1. 36 Cal. 4th 1028 (2005).
2. *Id.* at 1042 (emphasis provided).
3. *Id.*
4. Moreover, these same elements of a *prima facie* case for retaliation were set forth in *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1453 (2002) and *Pinero v. Specialty Restaurants Corp.*, 130 Cal. App. 4th 635, 639 (2005).
5. The “deterrence” test was adopted by the Ninth Circuit Court of Appeals in *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). The issue of whether that test, as opposed to one which requires that an employment action result in a “significant change in employee status,” should be applied to federal Title VII claims is before U.S. Supreme Court in the case of *Burlington Northern Santa Fe Railway Co. v. White*, Case No. 05-259.
6. *Yanowitz*, 36 Cal. 4th at 1050 (emphasis added).
7. *Id.* at 1050-51.
8. 18 Cal. 4th 640, 662-3 (1998)
9. 46 Cal. App. 4th 55, 64-5 (1996)
10. *Reno*, 18 Cal. 4th at 663.
11. *Id.* at 646.
12. *Id.* at 652, 663.
13. Indeed, one district court has acknowledged that the law with respect to employee claims against supervisors for

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ing beyond the control of the SPB and not bound to apply its merit-based standards,” to review and reverse disciplinary actions.²⁷ Therefore, while an employee can decide not to exercise the right to appeal a disciplinary action at all, an employee cannot bypass review by the SPB in favor of an MOU-created board that lacks the constitutional authority to oversee the merit system and is not bound to apply merit-based standards.²⁸

IMPACT OF THE COURT'S DUAL DECISIONS

Together, the Supreme Court's decisions in *SPB v. CSEA* and *SPB v. DPA* provide significant guidance on the role of collective bargaining within California's constitutional merit-based civil service system. While recognizing the statutory right of state employees and employees to negotiate terms and conditions of employment, the decisions make it clear that collective bargaining cannot override the constitutional merit principle under which the state civil service must operate, nor circumvent the central constitutional role of the SPB in ensuring protection of the merit principle. Future collective bargaining negotiations between the State and employee representatives will need to ensure that any negotiated agreements remain consistent with both the constitutional merit principle and the SPB's constitutional role in overseeing the state civil service to ensure protection of that merit principle. ²⁹

ENDNOTES

1. 36 Cal. 4th 758 (2005).
2. 37 Cal. 4th 512 (2005).
3. See also *Seniority Can't Trump Merit - Preserving A Fair, Merit Based Selection Process For California's State Civil Service*,

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4. Cal. Const. art. VII, § 1(b).
5. Cal. Const. art. VII, § 3(a).
6. Cal. Gov't Code, §§ 19575, 19578.
7. Cal. Gov't Code, §§ 19582, 19583.
8. Cal. Gov't Code, § 19582; 2 Cal. Code Reg. §§ 52, 52.6.
9. Cal. Gov't Code, § 18681.
10. Cal. Code Civ. Proc. § 1094.5; *Boren v. State Personnel Board*, 37 Cal. 2d 634, 637 (1951).
11. *Skelly v. State Personnel Board*, 15 Cal. 3d 194, 217, fn. 31 (1975).
12. Cal. Gov't Code, § 19575.
13. Under some of the agreements, certain disciplinary actions, designated as “minor” could not be appealed at all to the SPB.
14. These labor organizations represented employees in State Bargaining Units 8 (firefighters), 11 (engineering and scientific technicians), 12 (craft and maintenance workers) and 13 (stationary engineers).
15. In the remaining case, the superior court dismissed the case based upon the claim that the SPB lacked standing to sue; this holding was overturned by the Court of Appeal and was not pursued further in the Supreme Court.
16. The Court of Appeal reaffirmed its decision after granting petitions for rehearing.
17. 37 Cal. 4th at 520 (citing *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 183-184 (1981)).
18. *Id.* at 526.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 527.
23. *Id.* at 526.
24. See *Pacific Legal Foundation v. Brown*, *supra*; *State Personnel Board v. Fair Employment and Housing Commission*, 39 Cal. 3d 422 (1985).
25. 37 Cal. 4th at 524.
26. *Id.* at 527.
27. *Id.*
28. *Id.*

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- retaliation is not settled because “like discrimination claims,” retaliation claims “are also founded on personnel decisions which are an inherent part of the supervisory function.” See *Plute v. Roadway Package System, Inc.*, 141 F. Supp. 2d 1005, 1011 (N.D. Cal. 2001).
14. Indeed, in the introduction to its analysis of § 12940(h), the *Yanowitz* court stated that § 12940(h) made it an unlawful employment practice for an “employer” to engage in the prohibited conduct. *Yanowitz*, 36 Cal. 4th at 1035
 15. Cal. Code Regs. tit. 2, § 7287.8.
 16. The courts generally give deference to the Fair Employment and Housing Commission's regulations, when they are reasonable and consistent with statutory language. *Robinson v. City Yucaipa*, 28 Cal. App. 4th 1506, 1516 (1994).
 17. See CACI 2505, and Sources & Authority thereto, citing *Fisher v. San Pedro Peninsula Hospita*, 214 Cal. App. 3d 590, 615 (1989).
 18. See *Gantt v. Century Insurance*, 1 Cal. 4th 1083, 1095 (1992) (employees are protected against employers' actions that contravene fundamental state policy); *Phillips v. Gemini Moving Specialists*, 63 Cal. App. 4th 563, 576 (1998) (applying cases which held that “It is the employer, and not third parties, who can be held liable to the discharged employee in his or her suit for wrongful discharge in violation of public policy); *Sistare-Meyer v. Young Men's Christian Association*, 58 Cal. App. 4th 10 (1997) (no claim for wrongful termination in violation of public policy exists outside the employment relationship); *Weinbaum v. Goldfarb, Whitman & Cohen*, 46 Cal. App. 4th 1310, 1317-18 (1996).