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California Supreme Court Concludes Third Party Agents May Be Directly Liable for Discrimination under FEHA

By Megan Shaked

This week the California Supreme Court in *Raines v. U.S. Healthworks Medical Group* decided that an employer's business entity agents can be held directly liable under the California Fair Employment and Housing Act (FEHA) for employment discrimination in "appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer."

The Underlying Class Action For Unlawful Medical Inquiries

The FEHA prohibits employers from making any medical or psychological inquiry of an applicant, except under certain circumstances. The plaintiffs in the underlying class action alleged that they received job offers conditioned on successful completion of preemployment medical screenings to be conducted by an agent of their prospective employer. They further asserted that the agent required job applicants to complete a written health history questionnaire unrelated to the applicant's ability to perform the job. Questions covered topics such as pregnancy and menstruation, history of specific health conditions, medications taken, prior job-related injuries and illnesses, and history of tobacco or alcohol use.

One of the named plaintiffs answered all the questions, except one asking for the date of her last menstrual period. Her job offer was revoked. A second named plaintiff answered all the questions and was ultimately hired for the position for which he received the conditional offer.

The District Court Finds That the Agent of an Employer Cannot Be Liable Under FEHA

The U.S. District Court dismissed the plaintiff's FHEA claim on the basis that the FEHA does not impose liability on the agents of a plaintiff's employer. The plaintiffs appealed to the Ninth Circuit, which then asked the California Supreme Court to answer the question: "Does California's Fair Employment and Housing Act, which defines 'employer' to include 'any person acting as an agent of an employer,' Cal. Gov't Code § 12926(d), permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination?"

The California Supreme Court Disagrees, Finding the Agent of an Employer May be Liable under FEHA

In answering the question, the California Supreme Court clarified what it means to be an "employer" under the FEHA. Under the FEHA an "employer" includes "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." The Court acknowledged, but distinguished, previous decisions finding that *individuals* who do not themselves qualify as employers may not be sued under the FEHA for alleged discrimination (*Reno v. Baird* (1998)) and that *supervisory employees* may not be liable under the FEHA for their retaliatory acts (*Jones v. Lodge at Torrey Pines* (2008)).

When turning to the question of whether the FEHA permits liability for any *other types of agents*, the California Supreme Court considered the plain meaning of the statute, its legislative history, federal cases interpreting federal antidiscrimination laws, and public policy. The Court ultimately concluded that under the FEHA, a business-entity agent of an employer could be held directly liable for its FEHA-related activities in "appropriate situations." The Court declined to identify the specific circumstances under which a business-entity agent would be subject to liability under the FEHA.

However, in considering public policy, the Court noted that "[i]f a business entity contracts with an employer to provide services that will affect that employer's employees, and if, in providing those services, the business-entity agent violates FEHA's antidiscrimination policies, causing injury to the employer's employees, it is consistent with sound public policy to treat the business entity as an employer of the injured employees for purposes of applying the FEHA."

The Court further reasoned that "when, as is often the case, the business-entity agent has expertise in its field and has contracted with multiple employers to provide its expert service, this interpretation extends FEHA liability to the entity that is in the best position to implement industry-wide policies that will avoid FEHA violations."

This case certainly raises interesting questions for third parties who may be providing employment functions on behalf of their client employers.

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