

Partner Could Sue Partnership for Retaliation under FEHA, California Appeals Court Rules

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A physician-partner in a medical practice could assert a retaliation claim under the California Fair Employment and Housing Act, the California Court of Appeal has held, reversing a judgment in favor of a medical partnership. *Fitzsimons v. California Emergency Physicians Med. Group*, No. A131604 (Cal. App. Dist. 1 Div. 3 May 16, 2012). The physician-partner reported alleged harassment of female employees within the practice while she served as the practice's medical director. The Court ruled that, because the FEHA protects "any person" from retaliation, the physician could assert a claim for retaliation, even though, as a partner, she could not sue the practice for employment discrimination.

Background

Mary Fitzsimons was emergency room physician and partner with California Emergency Physicians Medical Group ("CEP"). Fitzsimons also served as one of CEP's regional directors and was a member of its Board of Directors. As regional director, Fitzsimons reported to her supervisors that "certain officers and agents of CEP" had sexually harassed female employees of CEP's management and billing subsidiaries. Thereafter, CEP removed Fitzsimons from her regional director position, although she continued to work as a physician and to serve on the Board. Fitzsimons subsequently sued CEP for retaliation under the FEHA.

Before trial, the trial court ruled that if Fitzsimons was a partner in CEP, she has no standing to assert a claim for retaliation under FEHA; it ordered the jury to first decide the question of Fitzsimons's status. The jury found that she was a partner, and the trial court entered judgment in favor CEP. Fitzsimons appealed.

Applicable Law

Under the FEHA, it is unlawful for an 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 the FEHA. Cal. Gov't Code § 12940(h). The FEHA prohibits sexual harassment. Cal. Gov't Code § 12940(j). It defines "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." Cal. Gov't Code § 12925(d).

Retaliation Claim Stands

Fitzsimons argued the trial court erred in concluding that a partner does not have standing to assert a claim for retaliation under the FEHA against his or her partnership. The court of appeal agreed that the FEHA would support a claim for retaliation by a partner against his or her partnership for opposing sexual harassment of an employee.

Although the FEHA prohibits employment discrimination and harassment, and retaliation for complaining about such conduct, the Court explained, the basis for liability is the existence of an employment relationship between the one who engages in discriminatory behavior and the individual claiming discrimination or harassment.

However, if there is no employment relationship, FEHA's prohibition against discrimination does not apply. Thus, because Fitzsimons did not have an employment relationship with CEP, she was not protected against discrimination or harassment under the FEHA.

However, the Court found that the FEHA's plain language prohibits partnerships from retaliating against any person, including a partner, who opposes or reports the sexual harassment of an employee. It noted that, although CEP was not Fitzsimons's employer, it employed the alleged victims of the harassment she reported. If proven, such harassment would be an unlawful practice for which CEP could be held liable under the FEHA. Likewise, the FEHA proscribes retaliation against any person who opposes any unlawful practice, such as harassment. Interpreting the word "person" to include partners, such as Fitzsimons, "gives the word its normal meaning," the Court stated. The Court emphasized it did not imply Fitzsimons could assert a harassment or discrimination claim against CEP. Rather, the broad language of the retaliation provision, covering any person, protected Fitzsimons from retaliation for opposing the partnership-employer's harassment against employees.

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A partner may sue her partnership under the FEHA, not for employment discrimination or harassment, but for retaliation for reporting alleged harassment of the partnership's employees. California partnerships should consider adopting clear retaliation prevention policies, training all individuals within the partnership regarding those policies, and consulting employment counsel before taking any adverse action against any individual who may have raised a complaint or concern about alleged harassment or discrimination.

Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments.

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