Appellate Reports

Cal Supreme court rules on an employer's agent's liability in FEHA cases; also, products liability claims based on absence of a safety feature that would have prevented the accident

Raines v. U.S. Healthworks Medical Group

(2023) __ Cal.5th __ (Cal. Supreme Court)
Who needs to know about this case? Lawyers handling FEHA cases where an entity with more than five employees performs screening for an employer in a way that potentially violates the FEHA
Why this case is important: Holds that an employer's business entity agents can be held directly liable under the 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 case distinguishes earlier cases that hold that an employer's supervisory employees cannot be held personally liable under the FEHA for their acts of employment discrimination.

Plaintiffs filed a putative class action alleging that they received employment offers that were conditioned on successful completion of preemployment medical screenings to be conducted by defendant U.S. Healthworks Medical Group (USHW), who was acting as an agent of plaintiffs' prospective employers. Plaintiffs claim that as part of its medical screenings, USHW required job applicants to complete a written health history questionnaire that included numerous health-related questions having no bearing on the applicant's ability to perform job-related functions, a violation of section 12940, subd. (e)(1), which makes it "an unlawful employment practice" for "any employer" "to make any medical or psychological inquiry of an applicant."

Section 12926, subdivision (d) of the FEHA states that, for purposes of the FEHA, the term "'[e]mployer' *includes* any person regularly employing five or more persons, *or any person acting as an agent of an employer, directly or indirectly* . . . ." (Italics added.) The italicized language might be interpreted as merely incorporating the common law principle of respondeat superior, or some variant thereof, into the FEHA's statutory liability. Were the Court to adopt this interpretation of the statutory language, liability for a violation of the statute would reside with the employer, not with the employer's agent. Conversely, the italicized language could also be reasonably interpreted to mean that an employer's agents are subject to all the obligations and liabilities that the FEHA imposes on the employer itself.

In *Reno v. Baird* (1998) 18 Cal.4th 640, the Court held that the agent-inclusive language of section 12926, subdivision (d) does not impose liability on all agents, including individual employees of the same employer, and adopting that interpretation of section 12926, subdivision (d) would be inconsistent with the provision's express exemption for employers with fewer than five employees. In so concluding, the Court noted "the incongruity that would exist if small employers [with fewer than five employees] were exempt from liability while individual nonemployer supervisors were at risk of personal liability."

In *Reno*, the Court further explained that imposing personal liability on supervisory employees would severely damage the exercise of supervisory judgment because supervisors would fear that their routine workplace decisions might lead to personal financial ruin. But the *Reno* court declined to address the question presented in this case: whether section 12926, subdivision (d) permits direct liability for other types of agents, such as business entities acting as independent contractors.

The incongruity that the *Reno* court relied on is not present in a case like this one. Based on consideration of the legislative history of the FEHA, considerations of public policy, and the way that the federal courts have construed the federal anti-discrimination laws, which establish that an employer's agent can, under certain circumstances, appropriately bear direct liability, the Court concluded that the business entity could be held liable as an "employer" under the FEHA.

"Therefore, we conclude that legislative history, analogous federal court decisions, and legislative policy considerations all support the natural reading of section 12926, subdivision (d) advanced here, which permits business-entity agents to be held directly liable for FEHA violations in appropriate circumstances."

Camacho v. JLG Industries, Inc.

(2023) 93 Cal.App.5th 809 (Fourth Dist., Div. 3.)
Products liability; causation standard for claims based on absence of a safety feature that would have prevented the accident; effect of plaintiff's failure to use the provided safety feature.

JLG manufactured a small scissor lift with a small, raised platform. For fall protection from the front of the lift, the lift required the users to manually latch a chain across the lift opening. But 40% of the lifts sold by JLG the year it manufactured the lift, which were intended for export, replaced the chain with a self-closing gate with an integrated toe board. JLG sold an upgrade for the lift

to add the self-closing gate for $154. Camacho fell from the lift at a jobsite and suffered a catastrophic brain injury. He had failed to latch the chain before he fell.

At trial, Camacho claimed that the lift was defective because his fall would have been prevented had the lift been equipped with a self-closing gate. The defendant moved for directed verdict, arguing that Camacho could not establish causation unless he first showed that, had he latched the gate, he would nevertheless have fallen. The trial court agreed. Reversed in a 2-1 decision.

"A product ... is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor. (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 142.) To overcome JLG's directed-verdict motion, Camacho only needed to make a prima facie showing that the scissor lift as designed with a chain was a substantial factor in causing his injuries. That is, Camacho only needed to make a prima facie showing that the alternative design with the self-closing gate would have prevented his fall. Under a risk-benefit test, it was then JLG's burden to prove the benefits of the chain outweighed its risks.

The majority held that Camacho made a prima facie showing of causation. Based largely on the photographs, it appears the scissor lift as designed with the chain was a substantial factor in causing Camacho's injuries. That is, the jury could have reasonably inferred that had a self-closing gate been in place, Camacho's fall would have been prevented.

At trial, plaintiff 's experts testified that a passive system (e.g., a self-closing gate) is much safer than an active system (e.g., a manual chain with a latch) because "as humans we make mistakes, all of us do, and as a result, we can't count on every single human to do every single behavior right 100 percent of the time." The absence of a toe board at the entrance of the scissor lift also posed a safety risk because the toe board allows users to get a "kinesthetic sense" of where the edge of the platform is without having to look. Moreover, the top-level guardrail of the scissor lift provided a false sense of security to users. This is because users may perceive that it provides adequate fall protection without using the chain.

The majority relied heavily on *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 120, which reversed a nonsuit against a plaintiff who was injured while riding a bus that made a sharp turn, where the seat had a hand rest at waist level, but no handrails or poles at shoulder level. So, when plaintiff reached for something to steady herself, there was nothing to grab. The Court held that, in a case where the defect alleged is the absence of a particular safety device, the plaintiff satisfies her burden to make a prima facie case of causation by showing that the missing safety device would have prevented the accident, shifting the burden to the defendant to show that the risks posed by the alternative design would outweigh its benefits. The majority held, "Camacho likewise established a prima facie case showing the absence of a particular safety device in a scissor lift (a self-closing gate with a toe board) likely would have prevented his injuries, as opposed to the alternative design (a manual chain with no toe board) that did not prevent his injuries."

The majority rejected JLG's contention that, because Camacho did not use the chain that was provided, "a design defect in the chain design could not have caused Camacho's injury." The Court explained that Camacho's claim was not that the chain – itself – was somehow defective or defectively designed. Rather, his claim was that the design of the lift was defective because it was highly foreseeable that users would not latch the chain, and that is the design defect that caused his injuries.

The dissent would have affirmed, finding that, because Camacho failed to latch the gate, he could not establish causation.

Does the Americans with Disabilities Act (ADA) and Unruh Act permit a claim against an entity whose website is not compatible with screen-reading software? *Martin v. THI E-Commerce, LLC* (2023) __ Cal.App.5th __ (Fourth District, Div. 3)

In a 2-1 decision, the court affirmed a judgment for the defendants on demurrer, based on a finding that websites are not places of public accommodation under the ADA and the ADA applies only to physical places. All three members of the panel agreed that the complaint failed to state a claim for intentional discrimination. The dissent would have reversed, finding that the ADA applies to websites, which are a "place" on the internet where information is available about a particular subject.

Scope of recreational immunity as applied to diving off a concrete "groin" adjacent to a beach and swimming area. *Carr v. City of Newport Beach* (2023) __ Cal.App.5th __ (Fourth Dist., Div. 3.)

Plaintiff Brian Carr dove off a concrete groin that was built to control erosion. The groin was essentially a long platform that extended from the beach to the portion of the water designated as a "swimming area." There was no "no diving" sign posted by the groin. Carr struck his head on the bottom and fractured his neck, suffering paralysis. The trial court granted summary judgment for the City, based on Government Code section 831.7, for "recreational immunity." In a 2-1 decision, the Court of Appeal affirmed.

Government Code section 831.7 "furnishes governmental immunity for injury sustained by 'any person who participates in a hazardous recreational activity . . . .' [Citation.] As defined by that section, 'hazardous recreational activity' includes '[a]ny form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given."

Carr asserted that this immunity applies only to places or structures where diving is prohibited and reasonable warning thereof has been given. The majority rejected this view, noting that the statute is written in the disjunctive, and through the use of a comma the Legislature "differentiated between diving from places that are not diving boards or diving platforms and places or structures that are." Thus, diving into water amounts to a hazardous recreational activity if it occurs in either of two ways: (1) from any location other than a diving board or diving platform; or (2) from any place or any structure where diving is prohibited and reasonable warning thereof has been given.

Here, the groin from which Carr dove is not a "diving board" or "diving platform." Hence, the statute immunized the City for claims arising from Carr's diving from the groin.

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