

INDIVIDUAL LIABILITY**Shareholder not liable for discrimination as alter ego**

by Robin E. Weideman

California's Fair Employment and Housing Act (FEHA) prohibits discrimination against applicants and employees on the basis of protected characteristics. Generally speaking, only an employer may be held liable for discriminatory actions such as failure to hire, termination, and demotion.

Individual employees, regardless of whether they're managers or supervisors, generally may not be held liable for discrimination (as opposed to harassment, for which there is individual liability). In some instances, an employee may try to sue an individual employee, usually an owner, on a theory that the employee is the "alter ego" of the corporation and therefore should be liable for the acts of the corporation. As the following case demonstrates, the alter-ego theory isn't easily established.

Only an employer may be sued for discrimination

Former employees of Auburn Honda alleged the car dealership ended their employment because of their age and replaced them with substantially younger employees. One of the former employees additionally alleged that Auburn Honda terminated his employment in retaliation for requesting a leave of absence under the California Family Rights Act (CFRA) to care for a terminally ill parent. The twist in the case is that the former employees sued the dealership's owner and sole shareholder, Jay Cooper, for the alleged discrimination.

Trial court throws out claims

Cooper asked the trial court to dismiss the former employees' claims on the grounds that there is no individual liability for discrimination under the FEHA or CFRA. The former employees opposed the request, arguing that he could be held liable as the alter ego of the corporation. Their evidence in support of the alter-ego theory was that Cooper was the sole owner of the dealership, owned the land it was on, and made all business decisions for the dealership, including the termination decisions at issue in the case.

The trial court held that the evidence was wholly insufficient to establish an alter-ego theory and that there was no other demonstrated basis for holding Cooper individually liable. As a result, it granted Cooper's request to dismiss the claims. The court then went a step further and ordered the former employees to pay his attorneys' fees incurred to defend the claims, finding that the claims were frivolously filed and maintained.

Appellate court agrees

The employees appealed the dismissal of their claims, but to no avail. The California Court of Appeal agreed

with the trial court that Cooper was entitled to judgment in his favor because the employees hadn't established any basis for individual liability for discrimination. Notably, the court didn't address whether actual discrimination occurred. The merits of those claims weren't reached.

Instead, the sole issue before the court was the propriety of suing Cooper individually. The court held that the legal basis for holding an individual shareholder liable for the acts of the corporation is that he is actually the alter ego of the corporation. The court explained that this requires proof that the shareholder and the corporation share a "unity of interest" (e.g., commingling of assets, disregard for corporate formalities, and undercapitalization) and that an inequitable result would flow from not treating the individual as the alter ego (e.g., there can be no recovery because the corporation is bankrupt and there is some evidence of bad faith).

The former employees had presented no evidence to establish Cooper was the alter ego of the dealership. Their evidence that he made all business decisions for the corporation and was the sole owner didn't make him the alter ego of the corporation. The court noted that "ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations" and that "the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require." The court held that the former employees had fallen far short of meeting that test and that Cooper couldn't be held individually liable for alleged discrimination by Auburn Honda.

Appellate court pulls back award of attorneys' fees

Although Cooper prevailed on the appeal and succeeded in having the former employees' claims against him thrown out, he wasn't successful in retaining the award of attorneys' fees the trial court had ordered. In employment discrimination cases, a prevailing employee is entitled to an award of attorneys' fees incurred to prosecute the case. A prevailing employer, on the other hand, is entitled to an award of attorneys' fees only if the court finds the lawsuit was frivolous or vexatious.

In this case, the trial court found that the claims against Cooper were just that — frivolous — and awarded him attorneys' fees. The appellate court disagreed that the action was frivolous, explaining that that's a high standard to meet, and in this case, it wasn't met. The court held that the former employees' failure to present sufficient evidence didn't mean the alter-ego theory was totally frivolous or that the claims against Cooper were frivolous. Therefore, the court held that the former employees didn't have to pay Cooper's attorneys' fees. *Leek v. Cooper* (California Court of Appeal, Third Appellate District, 4/15/11).

Bottom line

This case is a positive one for employers, serving as a reminder of the rule that individual owners and supervisors

generally aren't liable for discrimination. Moreover, when improperly sued, such individuals may be able to recover their attorneys' fees from the employees who sued them.

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