Individual Liability and Retaliation: Toward a Sensible Solution

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Individual Liability and Retaliation: Toward a Sensible Solution

Dominick C. Capozzola†

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† Associate attorney with the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. This note is dedicated to one of the finest attorneys in the state, my father, Carl A. Capozzola, who I am proud to say was victorious this year in his battle against cancer. I also would like to express heartfelt gratitude to my beloved wife Jennifer for her intellectual and emotional support throughout the writing process.
I. INTRODUCTION

For almost forty-five years, California's Fair Employment and Housing Act (FEHA), and its predecessor statute, the Fair Employment Practices Act (FEPA), have prohibited employers from retaliating against employees who complain of unlawful discrimination and harassment occurring in the workplace. Although the prevention of retaliation is a crucial component of effective civil rights legislation, recent developments involving the use of individual liability have left the current retaliation provision of the FEHA outdated, if not wholly obsolete.

Over the past few years, the use of individual liability as an added deterrent to harassment and other discriminatory activity has received a significant amount of attention from California courts and legislators. Unlike Title VII of the Civil Rights Act of 1964, which only allows aggrieved employees to recover damages from their employers, the FEHA permits employees to recover damages not only from their employers, but, depending on the circumstances, from the employees responsible for the unlawful conduct as well.

The problem with the retaliation provision lies not with the language of the provision itself, but rather, with the relationship between that provision and other parts of the FEHA. Currently, the FEHA contains three separate provisions pertaining to employment discrimination, retaliation, and harassment. The first, section 12940(a) of the California Government Code, prohibits discrimination based upon a protected category such as race, age, or sex. Under this section, only employers, and not individual supervisors, can be held liable for discriminatory personnel actions. This structure guarantees that managers can make business decisions without fearing personal liability, while at the same time ensuring that aggrieved

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4. Chen v. County of Orange, 116 Cal. Rptr. 2d 786, 803 (Ct. App. 2002) (“Antiretaliation statutes are a necessary concomitant for antidiscrimination statutes, lest they be easily circumvented.”).
5. See infra Part II(C)–(F).
7. Id. § 2000e–5(g); Miller v. Maxwell’s Int’l Inc., 991 F.2d 583, 587 (9th Cir. 1993).
8. E.g., CAL. GOV’T CODE § 12940(h), (j)(1), (j)(3); see also Walrath v. Sprinkel, 121 Cal. Rptr. 2d 806, 808–10 (Ct. App. 2002) (stating that an individual supervisor may be held personally liable for retaliation under FEHA).
9. CAL. GOV’T CODE § 12940(a).
employees have a remedy for discriminatory employment actions.\textsuperscript{11}

The second provision, section 12940(j),\textsuperscript{12} prohibits harassment. Under California law, harassment under section 12940(j) is distinguished from discrimination under section 12940(a) by the “delegable authority” test.\textsuperscript{13} If the discriminatory conduct alleged falls within the delegable authority of an employer, such as hiring, firing, demotions, and job assignments, then it constitutes discrimination under section 12940(a).\textsuperscript{14} By comparison, if the conduct falls outside the scope of an employer’s delegable authority, such as verbal threats or sexual assaults, then the activity qualifies as harassment under section 12940(j).\textsuperscript{15} Unlike section 12940(a), section 12940(j) provides that courts can hold supervisory and non-supervisory employees personally liable for harassment.\textsuperscript{16}

The third provision, section 12940(h), prohibits retaliation. This section declares that it is an unlawful employment practice for “any 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 Act] or because the person has filed a complaint, testified, or assisted in any proceeding under [the Act].”\textsuperscript{17}

Until recently, it was unclear whether courts would hold individuals liable for retaliation under section 12940(h).\textsuperscript{18} In 2001 and 2002, however, state and federal courts interpreting this provision found that individual supervisors could be held personally liable for violating this provision.\textsuperscript{19} These courts reasoned that the inclusion of the term “person” in section 12940(h) evinces a legislative intent to hold individuals liable for retaliation under the FEHA.\textsuperscript{20} In their analysis, the courts found it significant that section 12940(a) only applies to an “employer,” while section 12940(h) applies to an “employer, labor organization, employment agency, or person.”\textsuperscript{21}

As a matter of pure statutory interpretation, this result is probably correct. Indeed, in 1987, the legislature amended section 12940(h) for the

\begin{flushleft}
\textsuperscript{11} Id.
\textsuperscript{12} CAL. GOV’T CODE § 12940(j).
\textsuperscript{13} Reno, 957 P.2d at 1336–37, 1343 (quoting Janken v. GM Hughes Elecs., 53 Cal. Rptr. 2d 741, 745–46 (Ct. App. 1996)).
\textsuperscript{14} Id. at 1336.
\textsuperscript{15} Id.
\textsuperscript{16} CAL. GOV’T CODE § 12940(j)(1), (3).
\textsuperscript{17} Id. § 12940(h).
\textsuperscript{18} Carrisales v. Dep’t of Corr., 988 P.2d 1083, 1086–87 (Cal. 1999).
\textsuperscript{19} Winarto v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1288 (9th Cir. 2001); Walrath v. Sprinkel, 121 Cal. Rptr. 2d 806, 808–10 (Ct. App. 2002).
\textsuperscript{20} Winarto, 274 F.3d at 1288; Walrath, 121 Cal. Rptr. 2d at 809–10.
\textsuperscript{21} CAL. GOV’T CODE § 12940(h) (emphasis added); Winarto, 274 F.3d at 1288; Walrath, 121 Cal. Rptr. 2d at 809.
\end{flushleft}
sole purpose of adding the term, "or person," and the FEHA defines "person" to include "one or more individuals." However, these judicial decisions failed to address the problems generated by a bright line rule holding supervisors liable for all types of retaliation. For instance, under the current structure of the statute, because the FEHA’s definition of “employer” excludes businesses with less than five employees, small businesses are, for the most part, exempt from the FEHA. In light of this rule, holding individuals liable for retaliation yields a bizarre result: an employee of a small business who suffers retaliation can recover damages from the retaliating supervisor, but not from the employer on whose behalf the supervisor acts. The same situation arises in claims against religious organizations, which also are excluded from the definition of employer. Without explaining this deviation from the normal rule of respondeat superior, the Legislature has undermined its effort to exempt small employers and religious organizations from the FEHA by exposing individuals in these organizations to liability for retaliatory management decisions.

Additionally, the application of individual liability to retaliation threatens to encroach on the immunity of individuals under section 12940(a) for discriminatory personnel decisions. Through the current structure of the FEHA, the Legislature has devised a system where individuals can be held liable for harassment, but not for discrimination. This structure balances important but sometimes conflicting policies, namely, economic progress and civil rights. As the California Supreme Court recently noted, imposing individual liability for personnel management decisions would create a conflict of interest between managers, who reasonably fear the costs of litigation, and their employers,

22. Act of Sept. 12, 1987, ch. 605, § 1, 1987 Cal. Stat. 1942, 1944. When the legislature passed this statute in 1987, the retaliation provision was located at section 12940(f). It has since been renumbered without change as section 12940(h). See Prudence Kay Poppink Act, ch. 1049, § 7, 2000 Cal. Legis. Serv. 5812, 5822 (West).
23. CAL. GOV’T CODE § 12925(d).
24. Id. § 12926(d). Although the FEHA exempts small employers from most of its provisions, in the provision relating to harassment, section 12940(j), the FEHA defines employer for that provision only as “any person employing one or more persons . . . .” Id. § 12940(j)(4).
29. Id. (“By limiting the threat of lawsuits to the employer itself, the entity ultimately responsible for discriminatory actions, the Legislature has drawn a balance between the goals of eliminating discrimination in the workplace and minimizing the debilitating burden of litigation on individuals.”).
who need their managers to make decisions and act on their behalf.\textsuperscript{30} The court observed that this conflict of interest would cause a "chilling of effective management,"\textsuperscript{31} to the detriment of California's economy.

In contrast, because harassment involves conduct "outside the scope of necessary job performance,"\textsuperscript{32} the Legislature can hold individuals liable for harassment without chilling the effective management of an enterprise. No conflict of interest exists because employers do not benefit in any way when managers commit sexual assaults or post derogatory cartoons.\textsuperscript{33}

Individual liability for retaliation upsets the FEHA's balance between economic progress and civil rights by exposing supervisors to liability for retaliatory personnel decisions made on behalf of their employers. Indeed, as long as courts can hold managers liable for retaliatory business decisions, managers will never enjoy the unfettered discretion to make necessary business decisions the Legislature intended them to have. The Legislature has never explained why retaliatory personnel actions are so much more reprehensible than discriminatory personnel actions that they require the added deterrence of individual liability, despite the detrimental effect it could have on California businesses.

Furthermore, the imposition of personal liability for retaliation works directly against the FEHA's policy of enlisting the support of employers in the struggle against workplace discrimination. Section 12940(k) requires employers to fight discrimination by making it unlawful for them "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."\textsuperscript{34} Indeed, as one California court of appeal has held, "[t]he employer's duty to prevent harassment and discrimination is affirmative and mandatory. Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment."\textsuperscript{35} However, imposing individual

\textsuperscript{30} Id.
\textsuperscript{31} Id. at 1340 (citing Janken v. GM Hughes Elecs., 53 Cal. Rptr. 2d 741, 751 (Ct. App. 1996)).
\textsuperscript{32} Janken, 53 Cal. Rptr. 2d at 745.
\textsuperscript{33} The California Code of Regulations defines "harassment" as follows:
Harassment includes but is not limited to: (A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the [FEHA]; (B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the [FEHA]; (C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings on a basis enumerated in the [FEHA]; or (D) Sexual favors, e.g., unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors.
\textsuperscript{34} CAL. GOV'T CODE § 12940(k) ("It shall be an unlawful employment practice . . . (k) For an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.").
\textsuperscript{35} Northrop Grumman Corp. v. WCAB, 127 Cal. Rptr. 2d 285, 296 (Ct. App. 2002) (citation omitted); see also Am. Airlines v. Super. Ct., 8 Cal. Rptr. 3d 146, 153 (Ct. App. 2003) ("The affirmative and mandatory duty to ensure a discrimination-free work environment requires the employer to conduct
liability for retaliation may discourage supervisors from soliciting or investigating these complaints, because these supervisors may recognize that they are better off not learning about protected activity in the first place. Thus, rather than promoting the end of discrimination in the workplace, the FEHA actually provides a disincentive for managers to seek out and eliminate discrimination.

In the final analysis, not only does the imposition of individual liability for retaliation upset the careful balance established by the discrimination and harassment provisions, but it also works against other established policies that the Legislature intended the FEHA to promote.

Before the Legislature incorporated individual liability into the FEHA, the existence of a separate provision for retaliation made little difference, because only employers were responsible for misconduct under the Act. As this article will show, under the FEHA's current remedial scheme, it no longer makes any sense to maintain a separate provision relating to retaliation. All retaliatory conduct can and should be broken down into either discrimination (if the retaliatory conduct falls within the realm of delegable management authority) or harassment (if it does not). There is no compelling reason to distinguish between retaliation, on the one hand, and discrimination and harassment based on a protected characteristic, on the other.

With a simple amendment, the Legislature could fold the prohibition of retaliation into the discrimination and harassment provisions, thereby ensuring that retaliatory conduct involving personnel management decisions would be treated as discrimination, while retaliatory conduct involving conduct outside the normal scope of necessary job performance would be treated as harassment. While preserving all of the current protections offered by the FEHA, this modest change would benefit employees and employers alike by bringing greater certainty to the law, allocating responsibility where it belongs, and facilitating the effective management of California businesses.

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36. See infra Part II.
37. A proposed amendment is appended to this article.
II.

THE DEVELOPMENT OF INDIVIDUAL LIABILITY UNDER THE FEHA

A. The Fair Employment Practices Act

The origins of the FEHA date back to 1959—five years after the Supreme Court's decision in Brown v. Board of Education,\textsuperscript{38} and five years before the passage of the Civil Rights Act of 1964.\textsuperscript{39} In that year, the California Legislature passed the Fair Employment Practices Act, which prohibited discrimination on account of a person's "race, religious creed, color, national origin, or ancestry."\textsuperscript{40} The statute declared that "[t]he opportunity to seek, obtain and hold employment without discrimination . . . is hereby recognized and declared to be a civil right,"\textsuperscript{41} and it established the Fair Employment Practice Commission (FEPC),\textsuperscript{42} a branch of the Division of Fair Employment Practices.\textsuperscript{43} The FEPC's responsibility was to formulate policies to effectuate the purposes of the FEPA and to make recommendations to state and local governments.\textsuperscript{44}

Among the FEPA's original provisions was a prohibition on retaliation. That provision, Labor Code section 1420(d), made it an unlawful employment practice "[f]or any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this part."\textsuperscript{45}

The original version of the FEPA also contained a prohibition on discrimination. According to that provision, it was an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, or ancestry of any person, to refuse to hire or employ him or to bar or to discharge from employment such person, or to discriminate against such person in compensation or in terms, conditions or privileges of employment."\textsuperscript{46} The 1959 Act did not include a provision explicitly prohibiting harassment.\textsuperscript{47}

\textsuperscript{38} 347 U.S. 483 (1954).
\textsuperscript{40} CAL. LAB. CODE § 1420(a)-(c) (repealed 1980).
\textsuperscript{41} Id. § 1412 (repealed 1980).
\textsuperscript{42} Id. § 1414 (repealed 1980).
\textsuperscript{43} Id.
\textsuperscript{44} Id. §§ 1414–18 (repealed 1980).
\textsuperscript{45} Id. § 1420(d) (repealed 1980).
\textsuperscript{46} Id. § 1420(a) (repealed 1980).
\textsuperscript{47} In 1980, the FEHC promulgated a regulation which provided that "harassment of an applicant or employee by an employer or other covered entity, its agents or supervisors is unlawful." CAL. CODE REGS. tit. 2, § 7287.6 (2003). Two years later, the Legislature expressly designated
In its original form, the FEPA did not permit individuals to bring private causes of action to enforce the provisions of the Act. Instead, the statute required aggrieved employees to file claims with the FEPC, which would then investigate the matters, hold hearings, and issue findings.\textsuperscript{48} If the FEPC found that an employer had engaged in an unlawful employment practice, it could require the employer to cease and desist from that practice, and it could order affirmative relief, “including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay.”\textsuperscript{49} The FEPA did not permit employees to recover any actual damages other than back pay, nor did it authorize the FEPC to hold individuals personally liable for employment discrimination.\textsuperscript{50}

Between 1959 and 1976, the FEPA was amended twenty-four times.\textsuperscript{51} Through these amendments, the Legislature provided additional protections against discrimination based on physical handicap, medical condition, marital status, age, and sex.\textsuperscript{52} During this period, the statute’s enforcement scheme remained largely the same.

In 1977, the Legislature changed the FEPA dramatically. Although the statute retained its structure, all of the existing protections, and the administrative agencies established by the Act, the Legislature greatly modified the enforcement mechanisms, most notably, granting aggrieved employees a private right of action:

\textsuperscript{48} CAL. LAB. CODE §§ 1422-29 (repealed 1980).

\textsuperscript{49} \textit{Id.} § 1426 (repealed 1980).


If an accusation is not issued [by the Division of Fair Employment Practices to an employer] within 150 days after the filing of a complaint, or if the division earlier determines that no accusation will issue, the division shall so notify the person claiming to be aggrieved. Within one year of receipt of such notice, any person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization or employment agency named in the verified complaint.\textsuperscript{53}

The Legislature did not mention the remedies aggrieved employees could recover, nor did it establish from whom these employees could obtain damages or other relief. Instead, the Legislature simply authorized employees, after first filing a complaint with the Division of Fair Employment Practices, to file a civil action against the parties named in the administrative complaint.

In 1978, the Legislature amended the FEPA to allow employees to recover attorneys' fees and costs in civil actions brought under the Act, but the Legislature remained silent on other important issues, such as the availability of emotional distress, punitive, and other types of damages. \textsuperscript{54} Similarly, the Legislature once again neglected to indicate who would be responsible for damages.

B. The Fair Employment and Housing Act

In 1980, the Legislature removed the FEPA from the Labor Code, combined it with provisions relating to discrimination in housing, and reinserted the statutes into the Government Code as the Fair Employment and Housing Act.\textsuperscript{55} Again, however, the Legislature did not elaborate on the scope of remedies recoverable in civil claims for discrimination.

In the same year, the Fair Employment and Housing Commission ("FEHC"), which replaced the FEPC and assumed all of its responsibilities,\textsuperscript{56} promulgated a regulation outlining the remedies that an

\textsuperscript{53} CAL. LAB. CODE § 1422.2 (added as part of the Act of Sept. 30, 1977, ch. 1188, § 34, 1977 Cal. Stat. 3895, 3911 (repealed 1980)).

\textsuperscript{54} Act of Sept. 26, 1978, ch. 1254, § 10, 1978 Cal. Stat. 4071, 4074 ("In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney fees and costs except where such action is filed by a public agency or a public official, acting in an official capacity.").


\textsuperscript{56} CAL. GOV'T CODE § 12910(a) (West 2003) ("The Department of Fair Employment and Housing and the Fair Employment and Housing Commission succeed to, and are vested with, all of the powers, duties, purposes, responsibilities, and jurisdiction of the Division of Fair Employment Practices and the State Fair Employment Practices Commission, respectively, in the Department of Industrial Relations, which are hereby abolished."); see also Dep't of Fair Employment & Hous. v. Ambylou Enters., Inc.,
employee could recover under the FEHA. The regulation provided: "While normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious, or inexcusable." However, while administrative regulations may provide insight into the meaning of a statute, "[t]he final meaning of a statute . . . rests with the courts. An administrative agency cannot by its own regulations create a remedy which the Legislature has withheld." Accordingly, this regulation did not resolve the uncertainty about the remedies an employee could recover in a civil action under the FEHA.

In 1982, the California Supreme Court provided answers to some of the questions concerning the remedies available under the FEHA. In *Commodore Home Systems, Inc. v. Superior Court*, the court addressed whether an employee could recover punitive damages in a civil claim brought under the FEHA for discrimination. The court declared that "[w]hen a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears." Finding no contrary intent in the FEHA, the court held that punitive damages were available in civil claims brought under that statute.

The *Commodore* decision announced that an employee in a civil action could recover all of the remedies available to civil litigants generally, including actual and exemplary damages. However, the court did not discuss in any detail who would have to pay these damages.

In the same year the California Supreme Court decided *Commodore*, the Legislature amended the FEHA to outlaw harassment. As drafted, the new provision made it an unlawful employment practice:

For an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age, to harass an individual or to knowingly permit or fail to take reasonable precautions to prevent this harassment, including, but not limited to, sexual harassment. Loss of tangible job benefits shall not be necessary in order to establish harassment.

By expressly separating harassment from discrimination, this

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59. 649 P.2d 912 (Cal. 1982).
60. *Id.* at 914.
61. *Id.* at 918.
63. *Id.*
amendment created yet another category of unlawful activity for which the courts would have to assign remedies and identify parties liable for the misconduct.

Despite the absence of clear rules relating to liability, employers and employees continued to litigate their claims under the FEHA, and the FEHC and the courts had no choice but to interpret the Act to the best of their ability. Throughout the early and mid-1980s, in a handful of decisions, the FEHC began holding individuals personally liable for violations of the Act. Initially, the FEHC based these decisions on the notion that the individuals involved fit within the FEHA's definition of "employer," which includes "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." The FEHC reasoned that because supervisors act as agents of their employers, they are "employers" subject to liability under the FEHA.

The FEHC's analysis in Department of Fair Employment & Housing v. Bee Hive Answering Service aptly demonstrates this "agent/employer" theory of liability.

The [FEHA] defines an employer as "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly ...." Thus, the question is whether [the supervisor] acted as an agent of Bee Hive Answering Service. If he did, then [he] is also an employer under the Act.

In Bee Hive Answering Service, the FEHC ultimately concluded that the supervisor acted as an agent of his employer, and as a result, the FEHC found him liable to the complainant for back pay, compensatory damages, and punitive damages.

In 1985, the FEHC introduced a new theory of liability for individuals. In at least two cases, it found that individuals could be held liable not as employers, but as "persons" in their own right. In Department of Fair
Employment & Housing v. Del Mar Avionics, for example, the FEHC found Coy Wall, the complainant’s supervisor, liable for harassment under two separate theories. In addition to the agent/employer theory, the FEHC also found Wall liable for harassment because the Act prohibits any “person” from harassing an employee. The FEHC applied what this article will refer to as the “person” theory of liability:

We also find Wall personally liable under Government Code section 12940, subdivision (i), which provides that it is unlawful for an employer “or any other person” to harass an employee. Government Code section 12925, subdivision (d), defines “person” to include one or more individuals and Wall is thus liable for his racial and sexual harassment of complainant.

California’s courts of appeal adopted both of the FEHC’s theories of individual liability. However, in the late 1980s, the courts began to untangle the two theories. Courts interpreting the harassment and retaliation provisions relied solely on the “person” theory of liability, while courts interpreting the discrimination provision relied on the “agent/employer” theory of liability.

For example, in a frequently cited appellate decision, Fisher v. San Pedro Peninsula Hospital, a California court of appeal stated in dicta that a coworker could be held liable for retaliation under the FEHA. The court discussed the 1987 amendment to the retaliation provision that added the term “person” to the list of entities prohibited from retaliating against employees who engage in protected activity. Although the court ultimately held that this amendment did not apply retroactively to the facts of the case, the addition of the term “person” to the retaliation provision persuaded the court that the Legislature intended individuals to be held liable for retaliation as of the date the amendment went into effect—January 1, 1988. The Fisher court did not mention the “employer/agent” theory applied in Bee Hive Answering Service, and a review of several cases decided after Fisher confirms that courts have generally applied the “person” theory of liability to retaliation and harassment claims.

In contrast to cases analyzing the harassment and retaliation

70. FEHC Dec. No. 85–19.
71. Id. at 18 (citations and internal footnotes omitted); see also La Victoria Tortilleria, Inc., FEHC Dec. No. 85–04 (finding the supervisor liable both as an “employer” and as a “person” subject to liability under the harassment provision).
72. 262 Cal. Rptr. 842, 856 (Ct. App. 1989).
73. Id.
74. Id.
provisions, the cases analyzing discrimination under section 12940(a) continued to rely on the "agent/employer" theory of liability. Because section 12940(a) did not expressly prohibit "persons" from engaging in discrimination, courts could not rely on the "person" theory of liability to hold individuals liable under 12940(a). For example, in Jones v. Los Angeles Community College District, the court overturned a summary judgment in favor of individual supervisors who argued that they could not be held liable for discrimination in their individual capacity.

[Section 12926(c)] defines employer as including "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly . . . ." No evidence was presented to negate the allegations that the individuals were acting as agents for the District, so it was improper for the court to grant summary adjudication of this issue.

In Jones and in other cases, courts impliedly approved of the notion that supervisors, as agents of their employers, can incur personal liability for discrimination.

C. Restricting the Use of Individual Liability

In 1996 and 1997, two court of appeal decisions discussing individual liability for discrimination set the stage for the California Supreme Court's landmark decision, Reno v. Baird. The first of these cases, Janken v. GM Hughes Electronics, held that contrary to the great weight of administrative and judicial precedents, neither the courts nor the FEHC could hold individuals personally liable for discrimination under section 12940(a). In Janken, the court began its analysis with a discussion of the distinction between discrimination and harassment. Looking at various state and federal authorities, the court observed:

[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal

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77. 244 Cal. Rptr. 37.
78. Id. at 48.
79. See supra note 76.
80. 53 Cal. Rptr. 2d 741, 744 (Ct. App. 1996).
gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job.

Discrimination claims, by contrast, arise out of the performance of necessary personnel management duties. While harassment is not a type of conduct necessary to personnel management, making decisions is a type of conduct essential to personnel management. While it is possible to avoid making personnel decisions on a prohibited discriminatory basis, it is not possible either to avoid making personnel decisions or to prevent the claim that those decisions were discriminatory.

Courts have employed the concept of delegable authority as a test to distinguish conduct actionable as discrimination from conduct actionable as harassment. We adopt this approach to find that the exercise of personnel management authority properly delegated by an employer to a supervisory employee might result in discrimination, but not in harassment.\textsuperscript{8}

After distinguishing harassment from discrimination, the court then took a fresh look at the "agent/employer" theory of liability. Unlike prior judicial and FEHC decisions, the court found that the use of the term "agent" in the definition of "employer" did not necessarily imply that individuals could be held liable.

Two alternative constructions are available. One construction is that argued for by plaintiffs here: that by this language the Legislature intended to define every supervisory employee in California as an "employer," and hence place each at risk of personal liability whenever he or she makes a personnel decision which could later be considered discriminatory. The other construction is the one widely accepted around the country: that by the inclusion of the "agent" language, the Legislature intended only to ensure that employers will be held liable if their supervisory employees take actions later found to be discriminatory, and that employers cannot avoid liability by arguing that a supervisor failed to follow instructions or deviated from the employer's policy.\textsuperscript{82}

Deciding against the weight of California authority, the court concluded that the Legislature did not intend to hold agents liable as "employers," but rather, the Legislature merely intended to ensure that employers could not avoid liability by blaming a rogue supervisor.\textsuperscript{83} The court provided four reasons for this interpretation.

The first reason derived from federal cases interpreting similar definitions under federal statutes, including Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). The court noted:

\begin{itemize}
  \item[\textsuperscript{81}] Id. at 745-46 (citations omitted).
  \item[\textsuperscript{82}] Id. at 747.
  \item[\textsuperscript{83}] Id.
\end{itemize}
Title VII defines employer as "a person... who has fifteen or more employees... and any agent of such a person." The ADEA defines employer as "a person... who has twenty or more employees" including "any agent of such a person." The ADA defines employer as "a person... who has 15 or more employees... and any agent of such person." These three federal statutes thus contain definitions of employer identical in all relevant respects to the definition of employer contained in the FEHA: specifically, all the definitions of employer in these statutes are worded to cover the "agent" of the employer.4

The Janken court recognized that, of the courts that have considered the use of similar "agent" language, the "clear and growing consensus" is that the intent of this language was to ensure that employers would be held responsible for discriminatory conduct by their managing agents.5 The court further observed that "[t]hese courts have found that the 'agent' language was not intended to expose individual, nonemployer, supervisory employees to personal liability on discrimination claims."6

The second basis for the Janken court's interpretation of the FEHA arose from the incongruity between exempting small employers and holding individual employees liable. Drawing from federal precedent, the court explained:

In Title VII and the ADA, employer is defined as a person employing 15 or more. In the ADEA, employer is defined as a person employing 20 or more. These definitions exempt small employers from federal employment discrimination litigation because "Congress did not want to burden small entities with the costs associated with litigating discrimination claims." Many of the federal cases which found no personal liability against individual supervisory employees based their decisions in part on the incongruity that would exist if small employers were exempt from liability while individual nonemployer supervisors were at risk of personal liability.7

Agreeing with the rationale of the federal courts, the Janken court summarized:

The same reasoning applies to our task of construing the employer definition in the FEHA. The Legislature clearly intended to protect employers of less than five from the burdens of litigating discrimination claims. We agree that it is "inconceivable" that the Legislature

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6. Id.
7. Id. at 751 (quoting Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)) (other citations omitted).
simultaneously intended to subject individual nonemployers to the burdens of litigating such claims. To so construe the statute would be "incongruous" and would "upset the balance" struck by the Legislature.\textsuperscript{88}

The third reason behind the \textit{Janken} court's construction of the FEHA was that placing liability on supervisors "would do little to enhance the ability of victims of discrimination to recover monetary damages, while it can reasonably be expected to severely impair the exercise of supervisory judgment." In support of this argument, the \textit{Janken} court relied on poignant language from Judge Learned Hand, who long ago defended the decision not to hold government officials liable for their conduct.

The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.\textsuperscript{89}

Applying Judge Hand's philosophy to the private sector, the \textit{Janken} court wrote:

No one could reasonably doubt that effective and efficient management of industrial enterprises and other economic organizations is also important to the public welfare. The societal interest in effective private sector personnel management may be less direct, but only marginally (if at all) less compelling, as our recent economic malaise has demonstrated. Yet it is manifest that if every personnel manager risked losing his or her home, retirement savings, hope of children's college education, etc., whenever he or she made a personnel management decision, management of industrial enterprises and other economic organizations would be seriously affected.\textsuperscript{90}

Finally, the \textit{Janken} court rejected the argument that immunizing supervisors from liability would "open the floodgates of discrimination."\textsuperscript{91} Again referring to federal precedent, the court found that, because the employer remains liable for discrimination, "the employer, to protect its own interests and to avoid further liability, almost certainly will impose some form of discipline upon the offending employee."\textsuperscript{92} Accordingly, "[T]he fact that the employer is liable via the respondeat superior effect of the 'agent' language provides protection to employees even if individual supervisors are not personally liable."\textsuperscript{93}

\textsuperscript{88} Id. (citation omitted).
\textsuperscript{89} Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (quoted in \textit{Janken}, 53 Cal. Rptr. 2d at 752).
\textsuperscript{90} \textit{Janken}, 53 Cal. Rptr. 2d at 752.
\textsuperscript{91} Id. at 754.
\textsuperscript{92} Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 381 (8th Cir. 1995) (quoted in \textit{Janken}, 53 Cal. Rptr. 2d at 754).
\textsuperscript{93} \textit{Janken}, 53 Cal. Rptr. 2d at 754. The \textit{Janken} court's discussion concerning individual liability
The *Janken* court concluded its analysis by rejecting the argument that supervisors could be individually liable under section 12940(i), which prohibits aiding and abetting in discrimination.\(^9\) Explaining that a corporate employee cannot conspire with his or her corporate employer, the court concluded that “the Legislature did not intend to impose personal liability upon individual supervisory employees by the roundabout method of ‘aiding and abetting’ language.”\(^9\)

Little over a year after the *Janken* decision, another court of appeal decided the case that the California Supreme Court eventually took up on review. In the appellate decision of *Reno v. Baird*, the court of appeal rejected the reasoning of *Janken* and concluded that courts could hold individuals personally liable for discrimination.\(^9\) The court noted that court of appeal and administrative decisions were in conflict with the *Janken* decision:

Court of Appeal cases prior to *Janken* do not directly address the issue of individual liability, presumably because the clear language of the statute seems to impose liability on any person “acting as an agent of an employer.” They have, however, without analysis and discussion, permitted the plaintiff to sue both the employer and agent employee.\(^9\)

The court of appeal, endorsing the “agent/employer” theory of liability, cited with approval a host of the judicial and administrative decisions that found individuals liable based upon that theory.\(^9\)

D. The California Supreme Court’s Decision in *Reno v. Baird*

With a clear conflict in the courts of appeal, the California Supreme Court granted review of the *Reno* decision.\(^9\) In its opinion, rendered in 1998, the Supreme Court opened its discussion by reciting, almost

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9. *Id.* at 677 (quoting CAL. GOV’T CODE § 12926(d)).

9. *Id.*

99. *Id.* at 677–78, review granted, 948 P.2d 412 (Cal. 1997).
verbatim, the arguments used in the Janken decision. Then, the Supreme Court declared that it found "unpersuasive" all of the counter-arguments offered by the plaintiff and the Reno court of appeal. The remainder of the decision consisted of the Supreme Court discrediting the arguments raised in opposition to the Janken opinion. Notably, the court approved of the Janken court's distinction between discrimination and harassment, and it agreed with the Janken court's reliance on federal court authority to interpret the definition of employer: "Although the high court has not yet ruled on this question, the federal circuit courts support the Janken ruling overwhelmingly. . . . We find the cases concluding supervisory employees are not individually liable persuasive in both number and reasoning."

The court also found convincing "the Janken court's discussion of the incongruity between exempting small employers and imposing liability on individual supervisors." The court noted:

Litigation is expensive, for the innocent as well as the wrongdoer. By limiting the threat of lawsuits to the employer itself, the entity ultimately responsible for discriminatory actions, the Legislature has drawn a balance between the goals of eliminating discrimination in the workplace and minimizing the debilitating burden of litigation on individuals.

The Reno decision trumpeted the end of the "agent/employer" theory of liability. Following that decision, plaintiffs bringing discrimination claims under section 12940(a) were required to seek damages from their employers only, and not from their employers' agents.

E. The Development of Individual Liability After Reno v. Baird

Just over a year after deciding Reno, the California Supreme Court delivered its opinion in Carrisales v. Department of Corrections. In Carrisales, the court discussed individual liability for harassment under section 12940(j), holding that individual, non-supervisory employees could not be held liable under this section.

In dicta, the court stressed that it expressed no opinion about the liability of a supervisor for harassment. Although the court noted that, based on the "person" theory of liability, numerous courts of appeal and FEHC decisions had found that supervisors could be held liable for
harassment, the court declined to discuss the merits of those decisions or the
theory of liability upon which they rested.\footnote{Id. at 1087.}

The court also noted that several cases "contain dicta suggesting that
[section 12940(h)] imposes personal liability on coworkers for
retaliation."\footnote{Id. at 1086.} However, the court once again refused to consider the merits
of this topic.\footnote{Id. at 1086–87.} As a consequence, the "person" theory of liability advanced
in the courts of appeal survived this decision.

Shortly after Carrisales, the Legislature passed an amendment to the
specifically passed to overturn the rule of Carrisales,\footnote{Act of Sept. 30, 2000, ch. 1047, § 1, 2000 Cal. Legis. Serv. 5806 (West).} reads as follows:

An employee of an entity subject to this subdivision is personally liable for
any harassment prohibited by this section that is perpetrated by the
employee, regardless of whether the employer or covered entity knows or
should have known of the conduct and fails to take immediate and
appropriate corrective action.\footnote{See Carrisales, 988 P.2d at 1086.}

After this amendment, all employees—supervisory or non–supervisory—
were susceptible to suit for harassment.

At the close of 2000, it was settled law that: (1) individual liability did
not exist for discrimination under section 12940(a), and (2) individual
liability existed for all employees for harassment under section 12940(j).
Individual liability for retaliation under section 12940(h), however,
remained an open question of law.\footnote{274 F.3d 1276 (9th Cir. 2001).}

In December, 2001, the Ninth Circuit Court of Appeals applied the
"person" theory of liability in the retaliation case, Winarto v. Toshiba
America Electronics Components, Inc.\footnote{Id. at 1288.} In Winarto, the lower court had
ruled that, under Reno, a supervisor could not incur individual liability for a
retaliatory termination.\footnote{Id. at 1086.} The Ninth Circuit held that the lower court had
erred:

The retaliation provision of the FEHA applies to "any employer, labor
organization, employment agency, or person." "Person" in this section
means, in part, "one or more individuals." Giving these words their
ordinary meaning, we conclude that the plain meaning of the statute is susceptible to only one interpretation: supervisors can be held liable for retaliation . . . . 117

The court further explained that its holding was consistent with California lower court decisions, including Fisher118 and Page v. Superior Court.119 Like Winarto, these two cases relied on the inclusion of the term "person" in the statute to find that courts could hold individuals liable for retaliation.

The following year, a California court of appeal decided Walrath v. Sprinkel.120 Aligning its analysis with the analysis in Winarto, Fisher, and Page, the Walrath court also relied on the "person" theory of liability to conclude that individuals can incur personal liability under section 12940(h).121 The court observed: "In contrast to the discrimination provision at issue in Reno v. Baird, which applies only to 'an employer,' the retaliation provision of the FEHA, applies to 'any employer, labor organization, employment agency, or person.'"122

Since the Legislature added the term "person" to the retaliation provision in 1987, every court discussing individual liability in the retaliation context has stated that individuals can be held liable. Beginning in 1996, however, the courts began to limit the application of individual liability in order to promote certain policies. By applying individual liability only to cases involving harassment, the FEHA was able to deter conduct unnecessary to business management, while leaving managers free to carry out necessary business functions without the fear of litigation. During this period, the retaliation provision was largely ignored, as demonstrated below the retaliation provision now conflicts.

III.
THE NEED FOR CHANGE

History reveals no compelling reason for the maintenance of a separate retaliation provision. However, due to recent changes to the FEHA, plenty of reasons now exist to eliminate that provision and to incorporate the

117. Id. (citations omitted).
118. See supra notes 72-75 and accompanying text.
119. 37 Cal. Rptr. 2d 529 (Ct. App. 1995). In Page, the plaintiff in a sexual harassment case challenged the trial court's dismissal of her harassment claim against her former supervisor. Id. at 530. The court of appeal issued a peremptory writ of mandate, holding that the manager could be held liable as a "person" under the harassment provision. Id. at 532-36. The court noted that its "interpretation [found] support in the decisions of the FEHC, which have consistently held supervisors personally liable for sexual harassment as 'persons' under [the] FEHA." Id. at 534.
120. 121 Cal. Rptr. 2d 806 (Ct. App. 2002).
121. Id. at 808-11.
122. Id. at 809 (citations omitted).
INDIVIDUAL LIABILITY AND RETALIATION

protections of section 12940(h) into other parts of the FEHA. First, permitting courts to hold individuals liable for retaliation raises the same policy concern that the Janken court expressed when it decided that individual liability did not apply to discrimination, namely, that holding individuals liable for personnel decisions will chill effective management without providing a significant benefit for employees. Individual supervisors are seldom the "deep pocket," yet the fear of high litigation costs is enough to deter supervisors from making necessary personnel decisions, such as demotions, reassignments, or terminations.

Second, holding individuals liable for retaliation creates a disincentive for supervising employees to investigate complaints of discrimination and harassment. This issue is similar to the first concern because it involves the deleterious effect of individual liability on business management, but it carries the added detriment of direct interference with the FEHA’s efforts to enlist the support of employers in the struggle to end workplace discrimination.

Third, applying individual liability to retaliation claims creates a bizarre situation, in view of the FEHA’s policy exempting small employers from most of the provisions of the Act. If a supervisor in a company with four or fewer employees engages in unlawful retaliation, the employee can only recover damages from the supervisor, and not the company on whose behalf the supervisor acts. The same problem arises with religious organizations, which also are excluded from most of the FEHA’s provisions. In most cases, this will substantially limit the aggrieved employee’s opportunity to recover damages.

This section demonstrates that all of these concerns are the product of a misallocation of liability under the FEHA’s retaliation provision that not only creates hardship for California employers and employees, but also interferes with the very purposes of the Act.

124. Rebecca Hanner White, Vicarious and Personal Liability for Employment Discrimination, 30 Ga. L. Rev. 509, 543 (1996) ("An award of backpay and compensatory and punitive damages against a supervisor often may be uncollectible, as most individuals do not have the assets to satisfy such awards.").
125. CAL. GOV’T CODE §§ 12926(d), 12940(h).
127. Id. § 12926(d).
128. Id. § 12926(d).
A. Chilling Effective Management

The potential dangers of imposing individual liability on managers for personnel management decisions have not gone unnoticed. In *Reno v. Baird*, the California Supreme Court expanded upon the *Janken* court’s well-reasoned discussion concerning the harmful effect that individual liability for discrimination claims could have on California businesses. In *Reno*, the court focused on the problems raised by collective decision-making:

Corporate decisions are often made collectively by a number of persons. Different individuals might have differing levels of awareness and participation in the decisions. When a collective decision is discriminatory, some participants might have acted innocently, others less so. Assessing individual blame might be difficult, in contrast to simply placing blame on the corporation, on whose behalf the individuals acted. Moreover, to make collective decisions possible, individuals often must rely on information or evaluations that others supply. Imposing individual liability for collective decisions might place the individuals in an adversarial position to each other (as well as to the corporation). Individuals might fear to act in reliance on input from others. Some might fear that a potentially controversial but, so far as they know, correct and necessary collective decision might be misconstrued and give rise to a discrimination action. Out of caution, they might feel compelled to dissent from that decision, or attempt to disassociate themselves from it, merely to protect their pocketbooks. For these reasons, imposing liability on the corporate whole rather than each individual who participated in the corporate decision is sensible.129

With this language, and with its approval of the *Janken* decision, the Supreme Court made it clear that part of the rationale behind its holding was that the constant threat of litigation would cause managers to act in their own interests, and not in the interests of their employers.

The court stressed that its decision only concerned individual liability for discrimination.130 However, the exact same concerns expressed above also arise from retaliatory personnel decisions. Indeed, the only difference between a discriminatory termination and a retaliatory termination is the motivation for the Act; discrimination is motivated by an individual’s membership in a protected category while retaliation is directed at an individual’s participation in a protected activity. Neither one is inherently more reprehensible than the other, yet only retaliation leads to individual liability.

As a result, a manager who knows that an employee participated in a protected activity cannot take any adverse action against that employee without risking personal liability. Even if that manager has innocent

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130. *Id.* at 1344.
intentions, his or her concern that other managers might act out of unlawful retaliatory animus could lead to distrust and dissension. Furthermore, as the Janken court pointed out, even if the manager acts alone, he or she still might have to defend that decision in court at significant expense. The problem is exacerbated by the ease with which employees can plead retaliation claims. A terminated employee need only file a charge with the DFEH, reapply for the position, and then claim that the supervisor’s inevitable failure to rehire the employee amounted to retaliation for filing a DFEH charge.131

One cannot reasonably dispute that holding individuals liable for retaliation will create a conflict of interest between managers and their employers that will impair the ability of managers to carry out their responsibilities. Nevertheless, that is the situation confronting businesses in California today.

B. Deterring Investigation

In addition to providing penalties for employers who engage in discrimination, retaliation, and harassment, the FEHA also requires employers to take an active role in the elimination of such conduct. The FEHA accomplishes this by making it an unlawful employment practice “[f]or an employer... to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”132 It simply does not suffice for employers subject to the FEHA to avoid misconduct; they must compel their managers to institute anti-discrimination policies, investigate complaints, and discipline employees who breach these policies.133

Despite this important and useful policy, however, exposing managers to individual liability for retaliation may actually deter them from taking the steps necessary to eliminate workplace discrimination. The same managers responsible for investigating complaints often must make decisions about whether to hire, fire, promote, or demote certain employees. If these managers know that they face personal liability for retaliation claims, they may have a disincentive to learn about and handle employee complaints. Indeed, they may recognize that they have a better chance defending themselves in a lawsuit for retaliation if they never acquire any personal knowledge about their employees’ complaints of discrimination in the first

131. E.g., Chen v. County of Orange, 116 Cal. Rptr. 2d 786, 788–89 (Ct. App. 2002) (amending a retaliation claim to include the employee’s failure to receive a promotion that she applied for after filing a DFEH charge and civil complaint against her employer for discrimination and retaliation).

132. CAL. GOV’T CODE § 12940(k).

Contrary to the intent of the Legislature, holding individuals liable for retaliation will not advance the policies behind the FEHA. In fact, it will work against these policies by causing self-interested managers to ignore employee complaints.

C. The Small Employer Anomalies

In the original version of the FEPA, the Legislature excluded small employers from the provisions of the Act by defining "employer" to include "any person regularly employing five or more persons." In an article published in the Hastings Law Journal in 1965, one commentator explained the numerous policy reasons behind the creation of a small employer exemption:

A sense of justice and propriety led the framers to believe that individuals should be allowed to retain some small measure of the so-called freedom to discriminate; besides, they feared the political repercussions of eliminating totally an area of free choice whose infringement had been so bitterly opposed. In the second place, the framers believed that discrimination on a small scale would prove exceedingly difficult to detect and police. Third, it was believed that an employment situation in which there were less than five employees might involve a close personal relationship between employer and employees and that fair employment laws should not apply where such a relationship existed. Finally, the framers were interested primarily in attacking protracted large-scale discrimination by important employers and strong unions. Their aim was not so much to redress each discrete instance of individual discrimination as to eliminate the egregious and continued discriminatory practices of economically powerful organizations. Thus, they could afford to exempt the small employer.

This small employer exemption still exists today, with one notable exception. In 1984, the Legislature established a new definition of "employer" that applied only to the harassment provision. That provision read as follows: "For purposes of this subdivision only, employer means any person regularly employing one or more persons." This amendment allowed the Legislature to put small employers on notice that improper conduct unrelated to business functions can and will...
lead to liability. At the same time, the amendment also left small employers free to make personnel decisions without fear of discrimination claims. Although the harassment provision has been modified several times since 1985, the "one or more employees" definition of "employer" still applies only to that provision.

In light of the recent cases applying the "person" theory of liability to hold individual supervisors liable for retaliation under section 12940(h), it now seems odd that the FEHA still exempts small employers from that provision. By holding all "persons," but no small employers liable for retaliation, the Legislature has set up a structure in which an employee of a small employer who suffers from retaliation may bring a claim against the individual supervisor responsible for the retaliation, but not the company. In most cases, the employee's recovery will be substantially reduced, because the employee will not have access to the financial resources of the company.

Furthermore, small employers who retaliate against their employees with verbal abuse or other improper conduct unrelated to the functioning of a business enjoy an additional protection that they do not deserve. When this type of nonbusiness–related conduct is motivated purely by an employee's membership in a protected class, it constitutes harassment. Small employers can be held liable under the FEHA for this activity, because they come within the single–employee definition of "employer" contained in the harassment provision. However, where the same improper conduct occurs, but the motivation is an employee's protected activity, the employer can retaliate with near impunity, as the employer fits within the small employer exemption, and only the individual supervisors who carried out the retaliation risk liability. Given the similarity between harassment and this type of retaliation, it is hard to understand why the Legislature would continue to afford less protection for retaliation than harassment.

The Legislature probably did not intend the anomalies presented by the intersection of individual liability and the small employer exemption for


138. CAL. GOV'T CODE § 12940(j)(4)(A) (West 2003) ("The definition of 'employer' in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.").


140. White, supra note 124, at 543.


142. Id. § 12940(h).
retaliation. Nevertheless, the anomalies exist, and if the Legislature does not address them, they will continue to create a windfall for employers, expose supervisors to excessive liability, and deprive small company employees of adequate protection from retaliation.

D. The Religious Employer Exemption

In addition to small employers, the FEHA exempts religious organizations by specifically excluding these agencies from the definition of "employer:" "Employer' does not include a religious association or corporation not organized for private profit." Consequently, if a court gives a strict interpretation to the FEHA, then a supervisor at a religious organization can incur personal liability for retaliation as a "person," but the employer for whom he or she works will remain immune from liability.

In a recent decision, Taylor v. Beth Eden Baptist Church, a federal district court faced this issue. In this case, a youth minister asserted claims of sex discrimination, harassment, and retaliation against a church and its pastor. The defendants brought a motion to dismiss on various grounds, one being that the pastor, as the employee of a religious organization, could not be held liable for retaliation. The court ruled in favor of the pastor:

While § 12926(d) does not explicitly address employees of [religious organizations], the Court concludes that, with respect to retaliation claims at least, the Legislature intended to include employees within the scope of the religious entity exemption for employers.

Indeed, if all employees of exempt religious entities were held to the standard of FEHA’s retaliation provisions, it would have the effect of forbidding retaliation by the exempt religious entity itself. . . . If the Court were to conclude that employees of exempt religious entities were subject to retaliation suits under FEHA, it would undermine the statute’s exemption for the entities.

Like the Janken court, the district court was struck by the incongruity of imposing individual liability on individual employees when their employers were exempt. However, a strict interpretation of the statute does not support this holding; the district court resorted to common sense, not the plain language of the retaliation provision, to arrive at the conclusion that supervisors of religious entities could not be held liable for retaliation.

143. Id. § 12926(d).
144. Id. § 12940(h).
146. Id. at *1.
147. Id. at *29–30.
148. See also Silo v. CHW Med. Found., 103 Cal. Rptr. 2d 825, 836, 840 (Ct. App. 2001), rev’d on other grounds, 45 P.2d 1162, 1169–71 (Cal. 2002) (reversing judgment against individual supervisors
An examination of legislative intent is only appropriate when there is ambiguity in the statute, and although a strict reading of the FEHA could lead to an unjust result, that does not necessarily mean that ambiguity exists. Indeed, a strict textualist court presented with this issue may argue that this injustice is for the Legislature to cure, not the courts. Until a California state court addresses this issue, it is unclear whether a strict or liberal interpretation of the FEHA will govern this issue.

IV. THE SOLUTION—A MODEST STATUTORY AMENDMENT

A. The Proposed Statute

As shown by the above discussion, it simply does not make sense to assign different remedies to what is essentially the same conduct. Retaliation in the form of a personnel decision looks a lot like discrimination; the only difference is that retaliation is motivated by protected activity while discrimination is motivated by a person’s protected class. Likewise, retaliation through conduct outside the scope of an employer’s delegable authority looks much like harassment, except that, once again, retaliation is motivated by protected activity while harassment is motivated by protected status. However, although the FEHA treats discrimination and harassment differently, it treats all types of retaliation the same.

In light of the careful and sensible balance that has been created by awarding different remedies for discrimination and harassment, the Legislature should divide the retaliation provision into two parts. Retaliation more akin to harassment should lead to the same remedies as harassment, while retaliation that is similar to discrimination should lead to the same remedies as discrimination. The Legislature could achieve this objective with a simple amendment, namely, deleting the retaliation provision and incorporating the prohibitions of that provision into other sections of the Act. Thus, the discrimination provision could be modified slightly to prohibit retaliatory conduct, as the following proposed amendment demonstrates:

§ 12940. It shall be an unlawful employment practice, unless based upon a
bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.150

Likewise, the Legislature could make a similar amendment to the harassment provision, which would provide, in relevant part, that it is an unlawful employment practice:

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part, to harass an employee, an applicant, or a person providing services pursuant to a contract.151

Until now, this article has ignored the other entities prohibited from engaging in discrimination, retaliation, and harassment—labor organizations, apprenticeship programs, and employment agencies. If the retaliation provision is deleted, the provisions that forbid these entities from engaging in discrimination also must be amended to prohibit retaliation. This could be done easily by amending sections 12940(b) (labor organizations), 12940(c) (apprenticeship programs), and 12940(d) (employment agencies) in the exact same way as section 12940(a).152 The

150. See Appendix. Emphasis indicates proposed additions to the FEHA.
151. See id.
152. Thus, section 12940(b) would make it an unlawful employment practice:
For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of the person, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part, in the election of officers of the labor organization or in the selection of the labor organization’s staff or to discriminate in
harassment provision already prohibits labor organizations and employment agencies from engaging in harassment, so no additional amendments are needed to prohibit harassment-type retaliation. 153

B. The Benefits of This Proposal

The amendment proposed above would not deprive employees of any of the FEHA's existing protections. Employees could still bring claims for retaliation under the FEHA, in addition to claims for harassment and discrimination based purely on protected status. This amendment only improves the environment in which these claims take place, and it does so by placing responsibility for unlawful employment practices where it belongs and eliminating the inequities created by the existence of a separate provision for retaliation.

1. Holding the Proper Parties Liable

By dividing the retaliation provision between discrimination and harassment, the Legislature could protect supervisors from liability for personnel decisions and other activities that fall within the scope of delegable authority. Because the FEHA provides that only employers, and not individuals, can be held liable for discrimination, this amendment will eliminate the concern that managers might have about personal liability for retaliation claims, while continuing to put managers on notice that

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any way against any of its members or against any employer or against any person employed by an employer.

See id.

Similarly, section 12940(c) would provide that it is unlawful:

For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of the person discriminated against, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

See id.

And section 12940(d) would provide in part that it is unlawful:

For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or because the employee or applicant has opposed any practices forbidden under this part or because the employee or applicant has filed a complaint, testified, or assisted in any proceeding under this part, or any intent to make any such limitation, specification or discrimination.

See id.

153. CAL. GOV'T CODE § 12940(k).
misconduct outside the scope of delegable authority can lead to personal liability.

One might argue that making supervisors immune from discrimination-type retaliation will lead some supervisors to believe that they can retaliate with impunity, provided that they do so under the guise of business management. The plaintiff in Janken raised the same argument about individual liability for pure discrimination, but the court, borrowing language from the Seventh Circuit, rejected that argument. The court explained: "The employing entity is still liable, and that entity and its managers have the proper incentives to adequately discipline wayward employees, as well as to instruct and train employees to avoid actions that might impose liability."\(^{154}\) Additionally, continuing to hold supervisors liable for retaliation would add little to the protection of employees, "and what little would be added would be at potentially great cost."\(^{155}\)

Furthermore, putting an end to the practice of holding managers liable for retaliatory personnel decisions would end the conflict between the FEHA's anti-retaliation provision and the provision that requires employers to take all reasonable steps necessary to eliminate discrimination from the workplace.\(^{156}\) Currently, supervisors have a disincentive to investigate complaints of discrimination, because they know that the knowledge of these complaints exposes them to retaliation claims for any adverse action taken after that complaint.\(^{157}\) This disincentive works directly against section 12940(k), which requires employers to invite complaints and investigate misconduct.\(^{158}\) Employers must act through their managing agents, and by freeing these agents from the risk of personal liability, the proposed amendment will encourage these agents to conduct thorough investigations into employee complaints of harassment and discrimination.

In sum, protecting supervisors from liability for all conduct necessary to personnel management, whether discriminatory or retaliatory, will further the economic and social goals of the state without harming the individual rights of California employees to seek redress in the courts.

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155. Janken, 53 Cal. Rptr. 2d at 753.
156. CAL. GOV'T CODE § 12940(k).
157. E.g., Chen v. County of Orange, 116 Cal. Rptr. 2d 786, 803–05 (Ct. App. 2002) (holding that employees must base retaliation claims on conduct occurring after the acting supervisor learns about an employee's protected activity).
2. Eliminating the Inequity Inherent in the Small Employer and Religious Organization Exemptions

As this article has demonstrated, the application of individual liability to retaliation leads to inequity. Through various exemptions, the FEHA has left the individual supervisors of small employers and religious organizations vulnerable to retaliation claims. At the same time, the FEHA prevents the employees of these entities from suing their employers for conduct wholly unrelated to the functioning of a business.\textsuperscript{159}

Breaking down the retaliation provision into discrimination and harassment would eliminate this inequity. If the supervisor of a small employer or a religious organization committed discrimination-type retaliation—such as a retaliatory termination—then under the amendment this conduct would be treated as discrimination. In that rare case, the employee would have no remedy under the FEHA, even though previously he or she could have sued the responsible supervisor. Although this might represent a small loss to employees, the change furthers the important policy of exempting small employers from the provisions of the Act; furthermore, supervisors seldom have the resources to make litigation worthwhile.

Additionally, what little employees would lose would be more than compensated for by their ability to sue small employers for harassment-type retaliation. The “one employee or more” definition of “employer” would apply in this context, and as a result, small employers would no longer enjoy an exemption for harassment-type retaliation.\textsuperscript{160} In 1984, the Legislature amended the definition of employee contained within the harassment provision to exclude religious employers.\textsuperscript{161} Thus, consistent with the Legislature’s intent, religious employers would remain immune from the FEHA for harassment-type retaliation.

If the Legislature adopted the suggested amendment, individual supervisors would no longer be the only available defendant in retaliation claims brought under the FEHA. In addition, the amendment would reinforce the policies that led to the small employer and religious organization exemptions in the first place, namely, the right of these entities to engage in ordinary personnel-management activity without having to worry about discrimination claims.\textsuperscript{162} Moreover, employees would have more complete protection from small employers who engage in unlawful conduct that falls outside the realm of personnel management activity.

\textsuperscript{159} See supra Part III(C)-(D).
\textsuperscript{160} CAL. GOV’T CODE § 12940(j)(4)(B).
\textsuperscript{162} See Tobriner, supra note 135, at 342.
V. CONCLUSION

The prevention of retaliation has been a useful tool in the struggle to end workplace discrimination and harassment in California. However, applying the FEHA’s current enforcement scheme to the current retaliation provision now leads to confusion, interference with ordinary business management, and misallocation of responsibility.

This Article suggests a modest amendment that enables the Legislature to bring the retaliation provision up to date. If adopted, the new version of the FEHA would enable managers to carry out their duties—including the investigation of discrimination complaints—without fear of personal liability for retaliation. In addition, the Legislature would eliminate the various inequities presented by the small employer and religious organization exemptions. All of these changes represent a substantial benefit to employers, supervisors, and employees, with little to no cost to any of these groups.
An act to amend Section 12940 of the Labor Code relating to retaliation in employment.

Existing law provides that individual supervisors can be held personally liable for retaliating against an individual because the person has filed a complaint, testified, or assisted in any proceeding under the Fair Employment and Housing Act. As a result, existing law exposes supervisors to the threat of litigation for making personnel decisions necessary to the operation of the businesses they manage. Existing law also deters supervisors from investigating or inviting complaints of discrimination and harassment from other employees.

This bill would provide that supervisors can only be held liable for retaliation when the conduct falls outside the realm of an employer's delegable authority.

Existing law provides that, religious organizations and employers with fewer than five employees are exempt from retaliation claims under the FEHA, although the supervisors of these entities are vulnerable to such claims.

This bill would provide that when a religious organization or an employer with fewer than five employees engages in retaliation that bears close similarities to harassment, the entity can be held liable for retaliation. This bill also would provide that the supervisors of these companies will no longer be vulnerable to retaliation claims for conduct that has to do with
routine business decisions such as terminations, promotions, job assignments and suspensions.

*The People of the State of California do enact as follows*

SECTION 1. Section 12940 of the Labor Code is amended to read:

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee’s medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee’s health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee’s medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee’s health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:
(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans.

(5) Nothing in this part prohibits an employer from refusing to employ an individual because of his or her age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of the person, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part, in the election of officers of the labor organization or in the selection of the labor organization’s staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of the person discriminated against, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any non-job-
related inquiry of an employee or applicant, either verbal or through use of
an application form, that expresses, directly or indirectly, any limitation,
specification, or discrimination as to race, religious creed, color, national
origin, ancestry, physical disability, mental disability, medical condition,
marital status, sex, age, or sexual orientation, or because the employee or
applicant has opposed any practices forbidden under this part or because
the employee or applicant has filed a complaint, testified, or assisted in any
proceeding under this part, or any intent to make any such limitation,
specification or discrimination. Nothing in this part prohibits an employer
or employment agency from inquiring into the age of an applicant, or from
specifying age limitations, where the law compels or provides for that
action.

(e) (1) Except as provided in paragraph (2) or (3), for any employer or
employment agency to require any medical or psychological examination of
an applicant, to make any medical or psychological inquiry of an applicant,
to make any inquiry whether an applicant has a mental disability or physical
disability or medical condition, or to make any inquiry regarding the nature
or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency
may inquire into the ability of an applicant to perform job-related functions
and may respond to an applicant’s request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency
may require a medical or psychological examination or make a medical or
psychological inquiry of a job applicant after an employment offer has been
made but prior to the commencement of employment duties, provided that
the examination or inquiry is job-related and consistent with business
necessity and that all entering employees in the same job classification are
subject to the same examination or inquiry.

(f) (1) Except as provided in paragraph (2), for any employer or
employment agency to require any medical or psychological examination of
an employee, to make any medical or psychological inquiry of an
employee, to make any inquiry whether an employee has a mental
disability, physical disability, or medical condition, or to make any inquiry
regarding the nature or severity of a physical disability, mental disability, or
medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency
may require any examinations or inquiries that it can show to be job-related
and consistent with business necessity. An employer or employment
agency may conduct voluntary medical examinations, including voluntary
medical histories, which are part of an employee health program available
to employees at that worksite.

(g) For any employer, labor organization, or employment agency to
harass, discharge, expel, or otherwise discriminate against any person
because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any 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 this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) (h) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j) (i) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(4) (A) For purposes of this subdivision only, “employer” means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or
any person acting as an agent of an employer, directly or indirectly, the
state, or any political or civil subdivision of the state, and cities. The
definition of "employer" in subdivision (d) of Section 12926 applies to all
provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this
subdivision, "employer" does not include a religious association or
corporation not organized for private profit, except as provided in Section
12926.2.

(C) For purposes of this subdivision, "harassment" because of sex
includes sexual harassment, gender harassment, and harassment based on
pregnancy, childbirth, or related medical conditions.

(5) For purposes of this subdivision, "a person providing services
pursuant to a contract" means a person who meets all of the following
criteria:

(A) The person has the right to control the performance of the contract
for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established
business.

(C) The person has control over the time and place the work is
performed, supplies the tools and instruments used in the work, and
performs work that requires a particular skill not ordinarily used in the
course of the employer's work.

(j) For an employer, labor organization, employment agency,
apprenticeship training program, or any training program leading to
employment, to fail to take all reasonable steps necessary to prevent
discrimination and harassment from occurring.

(k) For an employer or other entity covered by this part to refuse to
hire or employ a person or to refuse to select a person for a training
program leading to employment or to bar or to discharge a person from
employment or from a training program leading to employment, or to
discriminate against a person in compensation or in terms, conditions, or
privileges of employment because of a conflict between the person's
religious belief or observance and any employment requirement, unless the
employer or other entity covered by this part demonstrates that it has
explored any available reasonable alternative means of accommodating the
religious belief or observance, including the possibilities of excusing the
person from those duties that conflict with his or her religious belief or
observance or permitting those duties to be performed at another time or by
another person, but is unable to reasonably accommodate the religious
belief or observance without undue hardship on the conduct of the business
of the employer or other entity covered by this part.

Religious belief or observance, as used in this section, includes, but is
not limited to, observance of a Sabbath or other religious holy day or days,
and reasonable time necessary for travel prior and subsequent to a religious observance.

(m) (l) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(n) (m) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

(n) (n) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.