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Calif. High Court Says 3rd Parties Liable For Worker Bias

By **Patrick Hoff**

Law360 (August 21, 2023, 10:12 PM EDT) -- The California Supreme Court on Monday said third parties contracted by employers to screen job applicants can be held responsible under state civil rights law for asking intrusive medical questions, allowing companies acting on behalf of employers to be held directly liable for employment discrimination claims.

The unanimous seven-member state high court said in a **32-page opinion** that the definition of "employer" in California's Fair Employment and Housing Act includes business-entity agents with at least five employees who help employers make employment decisions.

The ruling comes in a years-old proposed class action in which workers allege Concentra subsidiary U.S. Healthworks Medical Group asked prospective employees inappropriate questions on behalf of employers, in violation of the FEHA. The Ninth Circuit **in March 2022** asked the California Supreme Court to clarify whether the state law allowed a third party acting on behalf of an employer to face bias claims.

"A business-entity agent of an employer can fall within the FEHA's definition of employer, and it may be directly liable for FEHA violations, in appropriate situations. … Consistent with the FEHA's language and purpose, a business-entity agent can bear direct FEHA liability only when it carries out FEHA-regulated activities on behalf of an employer," Justice Martin J. Jenkins wrote for the court.

Kristina Raines, who underwent a medical screening after applying for a job as a food service aid, filed suit against U.S. Healthworks and other providers of occupational health services in California in 2019. The suit was later amended to include Darrick Figg, who applied to serve as a member of the volunteer communication reserve at the San Ramon Valley Fire Protection District.

The workers alleged the medical providers conducted thousands of invasive screening exams and asked questions unrelated to job responsibilities, such as whether applicants had venereal disease, problems with menstrual periods, prostate or other cancers**,** mental illness, HIV and hemorrhoids, among other things.

A federal trial judge dismissed the lawsuit in 2021, finding the FEHA does not impose direct liability on third parties that act as employers' agents and screen workers. The workers subsequently appealed, but the Ninth Circuit held off on deciding the issue and asked the California Supreme Court to weigh in.

U.S. Healthworks said two California Supreme Court decisions demonstrated that third-party agents can't be held liable under the FEHA. In a 1998 decision in Reno v. Baird, the court held individual supervisors aren't directly liable as agents of their employers for engaging in discriminatory conduct. A decade later, the state high court held in Jones v. Lodge at Torrey Pines Partnership that nonemployer individuals aren't liable for retaliation under FEHA.

But the California Supreme Court on Monday said Reno and Jones were focused on individual supervisory employees, whereas the case at hand involves a business entity that allegedly has more than five employees.

The court also said U.S. Healthworks' argument that the FEHA doesn't let an employer delegate its legal responsibilities to another entity doesn't apply because Monday's decision was about whether business-entity agents can be held liable for their own FEHA obligations.

"A business-entity agent's obligation to comply with FEHA and its consequent liability for FEHA violations results from the entity's own engagement in FEHA-regulated activities on the employer's behalf," Justice Jenkins wrote.

The high court said its definition of "employer" as inclusive of third-party agents is also backed up by federal courts' interpretation of federal civil rights statutes, including Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act.

"Federal courts have generally focused on whether the agent exercised an administrative function traditionally exercised by the employer," according to the opinion.

Randy Erlewine, who is representing Raines and Figg, told Law360 he expects Monday's decision will have an impact on the outsourcing many employers do to third-party vendors, particularly platforms that use algorithms to target job ads toward potential applicants.

Erlewine said the state high court's decision also could help target discrimination on a broader scale by making it easier for workers at different companies to file a class action against a third-party agent.

"A lot of these agents have expertise that the employer does not have, and the third-party agent covers either an entire industry or various employers within an industry or across various industries," he said. "So, you're really combating, with today's decision, discrimination that's done at that level across various industries or various employers within one industry. It's much more efficient at combating the discrimination."

Representatives of Concentra and U.S. Healthworks Medical Group did not immediately respond to requests for comment.

Raines and Figg are represented by R. Scott Erlewine, Brian S. Conlon and Kyle P. O'Malley of Phillips Erlewine Given & Carlin LLP.

U.S. Healthworks Medical Group and other defendants are represented by Raymond A. Cardozo and Kathryn M. Bayes of Reed Smith LLP and Tim L. Johnson and Cameron O. Flynn of Ogletree Deakins Nash Smoak & Stewart PC.

The case is Raines et al. v. U.S. Healthworks Medical Group et al., case number S273630, in the Supreme Court of the State of California.

--Additional reporting by Dorothy Atkins. Editing by Leah Bennett.