INDIVIDUAL LIABILITY UNDER ELLIOTT-LARSEN

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Executive Summary

The principle that discrimination under the Elliott-Larsen Civil Rights Act can create liability against a fellow employee as well as against the employer was treated as settled law for some 20 years, until a recent Court of Appeals opinion took the opposite view. That view is binding under the first-out rule, though a subsequent panel has sharply disagreed. The decision that a fellow employee could not be liable as an "agent" was based on a federal court's reinterpretation of employee liability under federal law, but the federal statute predicates liability on an employer's negligence in failing to prevent discrimination rather than respondeat superior principles, so the analogy is not a strong one, even apart from the fact that a federal court's interpretation of a federal act is not a strong precedential basis for interpreting a state act..

If the issue should reach the Supreme Court, the textualist approach to interpreting statutes should lead to a reinstatement of the prior rule, because Michigan's act specifically defines "employer" to include the employers "agent."

Introduction

Defense attorneys, particularly those in the labor and employment field, need to be aware of a recent conflict in the Court of Appeals on the issue of individual liability for violations of Michigan's Elliott Larsen Civil Rights Act.[1] The issue, simply stated, is whether an individual employee who alleges discrimination at work can hold both the employer and the person who committed the discrimination liable.

The settled rule for nearly 20 years was that individual employees, as well as the ultimate employer, could be held liable for civil rights violations. But in 2002 a Court of Appeals decision broke from precedent and held that individual employees cannot be held liable for violations of the Civil Rights Act. A subsequent panel of the Court of Appeals issued an opinion sharply disagreeing, and held that but for the precedential effect of the first-out opinion, it would have ruled that individual employees can be held liable for civil rights violations. This conflict in the Court will likely result in the Supreme Court weighing in on this issue.

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Most of the cases dealing with individual liability for civil rights violations are in the sexual harassment context. Under Michigan law, sexual harassment is a form of sex discrimination and is treated no differently than discrimination on the basis of race, color, religion, etc. The reason this issue arises frequently in the sexual harassment context is most likely due to the fact a sexual harasser is an easily identifiable individual. Where the claim is, for example, denial of a promotion based upon race, the person who committed the discriminatory act is not so easily identified, because decisions of this sort are often made by groups of people or committees. Sexual harassment is not the only context in which individual liability arises, but it is the most frequent, and it provides the clearest application of the issue.

Michigan's Civil Rights Act

The Civil Rights Act makes it unlawful for an employer to discriminate against an employee with respect to employment, compensation, or a term, condition or privilege of employment on the basis of religion, race, color, national origin, age, sex, height, weight, or marital status.[2]

A common understanding of the term "employer" would imply that only the employer or corporate entity can be held liable for civil rights violations, but the statutory definition of employer indicates otherwise. The legislature's definition of employer provides, "'Employer' means a person who has 1 or more employees, and includes an agent of that person."[3] In other words, the statute appears to provide that an agent is an employer under the Act. Consequently, an agent, in addition to the employer, could be held liable for civil rights violations.

This was the way the Civil Rights Act was initially interpreted. In *Jenkins v American Red Cross*,[4] the Court of

Appeals interpreted the CRA as imposing liability on individual defendants for violations of the Act. The Court ruled that two supervisory personnel were agents for the Red Cross and could therefore be held liable as employers for violating the Act's prohibition against race discrimination.

The trial court relied on a federal district court opinion that held that individual employees could be held liable for violating Title VII, the key federal law prohibiting discrimination.[5] The *Jenkins* Court affirmed on the basis that "*Munford* controls" and therefore ruled that the 2 supervisors faced employer liability.[6]

Clearly, a federal district court's interpretation of a federal statute was not binding on a Michigan Court interpreting a Michigan statute. But this does not mean that *Jenkins* did not reach the right result for the wrong reason. All this shows is that the *Jenkins* decision was a little short on analysis. In fact, the Court stated that it considered arguments that *Munford* did not apply and policy arguments against applying *Munford*, but found them to be without merit.[7]

Unfortunately, the Court never stated what arguments were made or why they were meritless.

Jenkins' Foundation Is Overruled

The decision that ultimately overturned *Jenkins* was *Jager v Nationwide Truck Brokers, Inc*.[8] When *Jager* was decided, the case *Jenkins* relied on in finding that individual employees could be held liable for Title VII violations, *Munford, supra*, had been overruled. The *Jager* panel was fully aware of this development in the federal system.

In *Wathen v General Electric Co*,[9] the Sixth Circuit held that individual employees could not be held individually liable for Title VII violations. While not specifically stating that *Munford* was overturned, this decision wiped out the notion that individual employees were liable for Title VII violations.

The Jager Court recognized the similarities between the Michigan and federal definitions of employer, and downplayed their differences. Ultimately, the Court decided to follow the Sixth Circuit's interpretation of employer under Title VII.

The Court of Appeals Reexamines Individual Liability under CRA

Because *Jenkins, supra*, relied on *Munford, supra*, and because *Munford, supra*, had been overruled by *Wathen, supra*, the *Jager* Court deemed itself free to readdress the individual liability issue anew. Before turning to the Civil Rights Act, itself, the Court stated, "we decline to follow *Jenkins* because we are not bound by it, MCR 7.215(I)(1), because it relied on a case that was not controlling and that since has been implicitly overruled and because we find its reasoning unpersuasive."[10]

The *Jager* Court recognized the similarities between the Michigan and federal definitions of employer, and downplayed their differences. Ultimately, the Court decided to follow the Sixth Circuit's interpretation of employer under Title VII. "We believe that, like Title VII, the language in the definition of 'employer' concerning an 'agent' of the employer was meant merely to denote respondeat superior liability, rather than individual liability."[11]

But the way to show employer fault is very different under the two statutes. Michigan's CRA relies on common law agency principles, whereas federal law relies on principles of negligence.

But this conclusion is belied by other decisions that highlight the differences between the federal and state laws.

Differences Between Title VII And Michigan's CRA

In *Sheridan v Forest Hills Public Schools*,[12] the Michigan Court of Appeals identified a key difference between the federal framework and Michigan framework for showing employer liability for sexual harassment. "[C]ommon-law agency principles determine when an employer is liable for sexual harassment committed by its employees under the CRA, whereas federal principles of vicarious liability pertinent to Title VII are founded in negligence."[13]

This distinction was also recognized by the Michigan Supreme Court—before *Jager* was decided—in *Chambers v Trettco, Inc*.[14] In *Chambers*, the Court held that it was error for the Court of Appeals to look to federal precedent to determine vicarious liability principles under the CRA because of the different approach offered by the two statutes.

Under both the federal and Michigan approach to sexual harassment, the Court noted, an employer can be held liable for an employee's sexual harassment if the plaintiff can show some sort of fault of the employer.[15]

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of negligence. Essentially, under Title VII, a plaintiff shows employer fault if the employer fails to show that it was not negligent in failing to prevent the harassment or if the employer shows that the employee was negligent in failing to avail himself of opportunities provided by the employer to avoid the harassment.[16]

This framework under Title VII operates under a negligence standard and the Court in *Chambers* stated that to follow *Faragher* would be to stray considerably from Michigan's approach to sexual harassment.[17]

The Court in *Jager* stated that the Legislature included the word "agent" to affirm the intent that the CRA was based on respondeat superior liability.[18] This impression of why the definition includes the word "agent" was key to the *Jager* Court's holding because it allowed the Court to get around the canon of statutory interpretation not to construe a portion of a statute as surplusage.[19] Without stating that the Legislature sought to affirm the agency basis of the CRA, the *Jager* interpretation would render the "includes an agent" language meaningless.

But if the CRA really is based on common law agency principles, then it is entirely consistent for the Legislature to state that the definition of employer "includes an agent" because under the common law, agents could be held individually liable for their torts. "It is firmly established that an agent may be held liable in damages for a tort in which he or she participates and that the agent and the principal may be sued jointly or severally."[20]

In other words, stating that both the employer and the employer's agent could be held liable for civil rights violations is harmonious with the common law approach to agency.

Criticisms of the *Jager* Decision

While the fact that an interpretation of the CRA, which provides that individuals can be held liable, is consistent with common law agency principles does not necessarily mean that it is the correct interpretation, it certainly bolsters that interpretation. Given that the Supreme Court was clear that the CRA is based on common law rules of agency, interpreting the statute with this intent in mind is paramount.

Interpreting the statute in this manner also keeps with the statutory canon against interpreting a statute in such a way as to render a portion of it surplusage.[21] If the Legislature did not intend for individual liability, then why would it specifically provide that an employer "includes an agent"? In other words, the *Jager* Court interpreted the statute as if the agent language were not there.

The *Jager* Court's statement that the phrase "including an agent" was included to reaffirm the legislative intent that the statute be based on common law agency principles is quite weak considering that it was a very indirect and ineffective means of communicating that intent. If the Legislature wanted to reaffirm this principle, there were much clearer ways of doing so. It also seems odd to state that the CRA is based on common law agency principles, but to then interpret in a way that is inconsistent with common law agency principles.

One final criticism is that *Jager* strayed from binding of the Michigan Supreme Court. The *Chambers* decision, while not directly addressing the issue of individual liability under the CRA, gives strong indications that individual employees can be held liable under the CRA. Again, the *Chambers* Court was concerned with identifying what respondeat superior principles apply under Michigan's Civil Rights Act.

But the opinion, in addressing different ways of imposing employer liability, stated that a certain distinction "allows this Court to determine whether the sexual harasser's *employer*, in addition to the sexual harasser *himself*, is to be held responsible for the misconduct."[22] Elsewhere, the Court stated that the CRA "expressly addresses an employer's vicarious liability for sexual harassment committed by its employees by defining 'employer' to include both the employer *and* the employer's agents."[23]

Again, there is no clear pronouncement that individual employees can be held liable for violations of the CRA, but it appears that the Supreme Court simply took this fact for granted and did not feel the need to address it. After all, *Jenkins* was still good law at the time.

These criticisms of the *Jager* decision are found in two additional places: a federal district court and a subsequent panel of the Court of Appeals, who were both bound to follow *Jager*. The federal district court followed *Jager* not because it agreed with its holding, but because it was not convinced that the Michigan Supreme Court would rule otherwise.[24] The Court noted that *Jager* broke with 17 years of precedent under *Jenkins, supra*, but followed *Jager* due to concerns of Federalism. In following *Jager*, the Court issued the following caveat:

> this Court does not necessarily endorse the Michigan Court of

Appeals' interpretation of the language in the Elliot-Larsen Act in *Jager*, as it believes that the language "includes an agent of the employer," could, under principles of strict statutory construction, well be read as extending liability to individuals. Otherwise, this phrase is merely surplusage, as it adds nothing to the definitional scope of "employer," which itself defines the term "employer" as a person.[25]

The Conflict in the Court of Appeals

This criticism was echoed by a panel of the Court of Appeals which affirmed the grant of summary disposition to individual defendants in a sexual harassment claim only because it was bound by *Jager*.[26] Were it not bound by *Jager*, the Court would have ruled that the individual defendants could have been held liable under the CRA.

Specifically, the Court stated that it was, "unable to reconcile the holding in Jager with the Supreme Court's analyses in *Chambers* or the language of the CRA."[27]

Thus, the issue is settled for the near future, but given the conflict in Court of Appeals, there is a good chance that the Supreme Court will weigh in on this issue.

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And given the textualist approach to statutory interpretation, it is difficult to see how this approach could lead to any conclusion other than that the Legislature intended for individual employees to be held liable for CRA violations. "'Employer' means a person who has 1 or more employees, and includes an agent of that person."[28] Under a strict textualist approach, this means that an agent is an employer. Therefore, agents can be held liable as employers.

This conclusion obviously runs counter to the common understanding of the term employer, but the statute provides a definition of employer, so the justices cannot break out a dictionary for guidance and remain true to the textualist philosophy.

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Endnotes

1 MCL 37.2201 et seq.
2 MCL 37.2202.
3 MCL 37.2201.
4 141 Mich App 785 (1985).
5 *Munford v James T Barnes & Co*, 441 F Supp 459 (ED Mich, 1977).
6 *Jenkins, supra*, 141 Mich App at 799.
7 *Jenkins, supra*, 141 Mich App at 800.
8 252 Mich App 464 (2002).
9 115 F3d 400, 405 (6th Cir 1997).
10 *Jager, supra*, 252 Mich App at 482.
11 *Jager, supra*, 252 Mich App at 484.
12 247 Mich App 611 (2001).
13 *Sheridan* at 623 n 12.
14 463 Mich 297 (2000).
15 *Chambers, supra*, 463 Mich at 314.
16 *Faragher v Boca Raton*, 524 US 775, 807-808 (1998).
17 *Chambers, supra*, 463 Mich at 314.
18 *Jager, supra*, 252 Mich App at 484.
19 *Piper v Pettibone Corp*, 450 Mich 565, 571-572 (1995).
20 *Michigan Civil Jurisprudence*, Agency, § 158, p 302.
21 *Piper, supra*, 450 Mich at 571-572.
22 *Chambers, supra*, 463 Mich at 320 (emphasis in original).
23 *Id.* at 310 (emphasis in original).
24 *United States ex rel Diop v Wayne Co Comm College Dist*, 242 F Supp 2d 497 (ED Mich 2003).
25 *Id.* 242 F Supp at 507-508 n 11.
26 *Elezovic v Ford Motor Co*, 259 Mich App 187, 188 (2003).
27 *Elozovic, supra*, 259 Mich App at 201.
28 MCL 37.2201.