

SUPREME COURT REJECTS NINTH CIRCUIT'S ATTEMPT TO EXTEND LIABILITY UNDER THE FEDERAL FAIR HOUSING ACT



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In a recent unanimous decision, the United States Supreme Court held that the federal Fair Housing Act, 42 U.S.C. §3601-3631 (the "Act"), imposes vicarious liability on a corporate employer whose employee discriminates on the basis of race, but the Act does not impose liability upon the corporation's officers or owners. *Meyer v. Holley*, No. 01-1120, 2003 U.S. LEXIS 902 (January 22, 2003). The Court's holding rejects a Ninth Circuit decision, *Holley v. Crank*, 258 F.3d 1127 (9th Cir. 2001), that held the Act specified such liability for officers and owners when they "direct or control or have the right to direct or control the conduct of another," even if the employer did not direct, authorize or otherwise participate in the unlawful discrimination. *Id.* at 1129, 1131, 1133.

In October 1996, Emma Mary Ellen Holley and David Holley, an interracial couple, were searching for a home in Twenty-Nine Palms, California. They met with real estate agent Grove Crank who worked for a real estate corporation called Triad, Inc., and inquired about new homes ranging from \$100,000 to \$150,000. The Holleys alleged that the only homes in the area Crank showed them were all above \$150,000. *Id.* at 1129.

By November 1996, the Holleys had located a home with an asking price of \$145,000, which happened to be listed by Triad. Through a different Triad agent, the Holleys offered to pay the asking price and to put \$5,000 in escrow for the builder to hold the house for six months until the escrow closed on their existing home. Although the Triad agent and the builder (via direct communications with the Holleys) indicated that the offer seemed fair, Triad never presented the offer to the builder, and the Holleys were later told that "more experienced" Triad agents, including Crank, felt that \$5,000 was an insufficient down payment. The Holleys decided not to raise their offer and eventually contracted to build a house elsewhere. When the builder inquired about the Holleys' offer, Crank allegedly used racially denunciatory language in referring to the Holleys, and told him that he did not want to deal with them. The builder later sold his house for approximately \$20,000 less than the Holleys had offered. *Id.*

The Act forbids racial discrimination in the sale or rental of housing. 42 U.S.C. §§3604, 3605. Specifically, section 3604(b) makes it unlawful:

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

Further, section 3605(a) provides:

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

The Holleys filed suit in federal court against Crank and Triad under the Act. The Holleys later filed a separate suit against David Meyer as president and owner of Triad. Although there was no allegation or evidence that Meyer approved of, or was otherwise involved, with the alleged discrimination, the Holleys claimed he was vicariously liable for Crank's unlawful actions. The district court consolidated the two cases, and then dismissed the claims against Meyer because it believed the Act did not impose personal vicarious liability on corporate officers. The district court reasoned that "any liability against Meyer as an officer of Triad would only attach to Triad," and the Holleys had "not urged theories that could justify reaching Meyer individually," i.e., by piercing the corporate veil. *Meyer*, 2003 U.S. LEXIS 902 at *7-8.

The Ninth Circuit reversed the dismissal. While recognizing that "under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action," the court concluded that the Act specifies liability for shareholders and officers "who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling." *Holley*, 258 F.3d at 1129. Although the Act does not explicitly define who can be sued for discriminatory housing practices, the Ninth Circuit relied on the following Department of Housing and Urban Development ("HUD") regulation to determine when liability attaches under the Act:

A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale . . . of dwellings or the provision of brokerage services relating to the sale[] of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

Id. at 1130-31 (emphasis in original, citing 24 C.F.R. § 103.20(b) (1999)).

Relying on the law in other Circuits, the Ninth Circuit further reasoned that due to the "compelling policy" of the Act and because it involves a "nondelegable duty," a corporation's officers may be held liable for "their failure to ensure the corporation's compliance with the [Act], whether or not the officers directed or authorized the particular discriminatory acts that occurred." *Id.* at 1131-34. The court explained that the "overriding societal priority" of the Act indicated that owners have the power to control the acts of their agents, and thus they must compensate injured parties and ensure that similar injuries do not occur in the future. *Id.* at 1132. Therefore, the Ninth Circuit concluded, even if Meyer did not participate in or authorize the discrimination, his "control" or "authority to control" was enough to hold Meyer personally liable. *Id.* at 1131, 1133.

On January 22, 2003, the Supreme Court unanimously vacated the Ninth Circuit's decision, concluding that "the Act imposes liability without fault upon the employer in accordance with traditional agency principles, i.e., it normally imposes vicarious liability upon the corporation but not upon its officers or owners." *Meyer*, 2003 U.S. LEXIS 902 at *6. The Court rejected the notion that the Act imposes more extensive vicarious liability beyond traditional vicarious liability rules, since the Act is silent on that point. The Court explained, "And Congress' silence, while permitting an inference that Congress intended to apply ordinary background tort principles, cannot show that it intended to apply an unusual modification of those rules." *Id.* at *14 (emphasis in original).

The Court also relied on the same HUD regulation cited by the Ninth Circuit, but focused on the words after those emphasized by the lower court:

. . . against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale . . . of dwellings . . . if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person . . . has engaged . . . in a discriminatory housing practice.

Id. at *16 (emphasis in original, citing 24 C.F.R. § 103.20(b) (1999)). Looking at the regulation as a whole, the Court concluded that it supported applying ordinary, not unusual, rules of vicarious liability. *Id.* at *18. The Court noted that even the respondents conceded that applying traditional vicarious liability principles was appropriate. *Id.*

While the Court agreed with the Ninth Circuit's characterization of the Act's objective as an "overriding societal priority," it did not agree that such an objective

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carries with it "a legal rule that would hold every corporate supervisor personally liable without fault for the unlawful act of every corporate employee whom he or she has the right to supervise." The Court similarly criticized the Ninth Circuit's finding that a "nondelegable duty" existed, where nothing in the language or legislative history of the Act supported the existence of that "special kind of liability." The Court explained that a "nondelegable duty" exists only in certain special circumstances or relationships like that between an employer and independent contractor. *Id.* at *20-21.

In the end, the Court acknowledged that, if warranted by the evidence, Triad's liability may be imputed to Meyer through a "piercing of the corporate veil." However, if the separateness of the corporation and its owner survived, the Court made it clear that Meyer could not be held vicariously liable under the Act for the unlawful discrimination practiced by his corporation's employee. ❖