

# Corfee Stone & Associates

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## Employment / ADA Access/Fair Housing Law Alert!

Updates you need to know but in a millisecond..

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Corfee Sone's Success

New Price Savings



Catherine Corfee is a principal of *Corfee Stone & Associates*.

### ABOUT OUR FIRM

The firm exclusively practices employment law, ADA access (defense only) and Fair Housing discrimination/harassment complaints (defense only). Our attorneys have extensive experience in defending wrongful termination cases, harassment/ discrimination cases, trade secret matters, FMLA, wage/hour. We defend businesses against ADA disabled access lawsuits. These cases involve disabled individuals claiming they were banned or denied access to a building because there was no van accessible parking sign, the doorway was too narrow, the restrooms were not compliant, etc. We represent companies of all shapes and sizes and have an extremely competitive nature.

Ms. Corfee has worked for two United States Federal Magistrate Judges. She has an intense amount of experience and knowledge regarding trial strategy and case management.

Associate attorney Zachary Best has over 13 years of litigation experience and trial work.

### EMPLOYMENT ARTICLES

#### Employees Who Retaliate Against Employees Cannot Be Sued Individually

~ By Catherine M. Corfee, Esq

Even if one of your employees retaliates against another employee for complaining about his/her legal right, that employee cannot be sued individually. Only you as the employer can be sued.

For example, in the recent California Supreme Court case of Jones v. The Lodge at Torrey Pines Partnership (2008) 42 Cal. The plaintiff complained to the director and human resources director about the director making gay bashing jokes. After that the plaintiff received warnings, was excluded from meetings and forced to resign. Plaintiff had sued his employer and the director individually.

The court held that the director could not be sued for his retaliation, only the employer.

On a different note, individual supervisors can be sued for harassment. The reason for the difference is that a supervisor could avoid harassment by fearing he/she could be sued. However, if the supervisor

needed to issue a warning, he/she would fear being sued for discrimination when the employee may deserve the warning or discipline.

The good news is that a plaintiff can only sue one party not two. Generally, an employer must defend and indemnify an employee being sued (with some limited exceptions) by not having to defend the supervisor who retaliated. Due to this ruling, employers could save money.

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## **Employers Can Terminate An Employee Based on His/Her Personality**

**~ By Catherine Corfee, Esq.**

In a recent case, the court held that an employee can sue for discrimination, but if the termination or negative employment decision is based on his/her personality, then such is a legitimate business reason for the termination. Two points: (1) a white person can sue for “reverse discrimination; and (2) personality conflicts count in operating a business.

Most employers believe that discrimination can only be based on minorities, such as women, African Americans, Latinos, Asian, etc. However, white individuals can sue for unfair treatment based on being a Caucasian. This is called “reverse discrimination.” Recently, the California Court of Appeal reminded us of this in Hicks v. KNTV Television, Inc. However, the white male plaintiff did not prevail.

A Caucasian must prove what any other minority must prove in a discrimination case, i.e., that he/she was subjected to an adverse employment action, like termination, refusal to hire, refusal to promote, etc and it was because of his/her being caucasian. Next, the employer must establish that it made a legitimate business decision not based on race. Then, the plaintiff must prove that the employer’s reason is untrue and that the real reason is based on the fact that he/she is white.

In Hicks, the plaintiff was a white male anchorman whose contract expired with the television station, which refused to hire him because he was Caucasian. A black male had replaced him. The plaintiff argued that he had 13 years of journalism experience whereas the black person only had 2 years. He claimed he had 8 years of consistent weekend anchor work, and his replacement only had 2 years that was not regular work. He argued that a minority replaced every white person who was terminated. The employer argued that the plaintiff’s on-air personality was not good. They claimed he was aloof, distant, standoffish, unapproachable and anchor-like. They wanted someone who seemed like a regular person just like everyone else.

On the face of it, the plaintiff’s claims were very convincing but the court made a very interesting ruling. It held that an employer’s subjective evaluation of one’s personality should not be second-guessed by a court. It stated that personality traits like common sense, good judgment, originality, loyalty and tact are essential to an employee’s success in a supervisory or professional position. It therefore held that the employer did not discriminate against the plaintiff based on his race, but terminated him because of his anchor style and personality, which no longer worked for the station.

Many times an employee does excellent work, but may have a difficult personality to work with. This can hurt morale and effect the “culture” of the work environment. The employee just does not fit in. While the Hicks case involved “personality” traits for on air T.V., it should apply to other businesses as well.

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## **You Hire an Employee Over 40 and Fire the Employee, The Courts Presume there was No Age Discrimination**

**~ By Zachary Best**

After representing many employers in discrimination cases, there are certain reactions from employers that are universal. Many employers that have become embroiled in discrimination lawsuits have asked us: “How can I have discriminated against an employee who is over 40 regarding his/her termination, when I hired the employee when he/she was over 40 in the first place?”

Fortunately, the courts realize this dichotomy. In the May 2008 unpublished case of Kane v. Label-Aire, Inc. 2008 WL 2139583, the California Court of Appeals reiterated the “same actor” presumption. Simply put, the same actor presumption comes into play when the same person hires, and then subsequently fires an employee. The courts have stated the presumption this way: “Where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive. One is quickly drawn to the realization that claims that employer animus exists in termination but not in hiring seem irrational. From the standpoint of the discriminator, it hardly makes sense to hire workers from a group of dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.” Kane v. Label-Aire, Inc., at page 6.

While the Kane case is a state case, the federal courts are also in agreement: “In cases where the hirer and firer are the same individual and the termination for employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer. It is simply incredible that the company officials who hired an employee at age fifty-one had suddenly developed an aversion to older people two years later.” Buhrmaster v. Overnite Transportation Co. (6<sup>th</sup> Cir. 1995) 61 F.3d 461, 463.

When the same actor inference is raised by the employer, the litigation usually centers on the length of time between the hiring and firing. Generally, the longer the length of time between the hiring and firing in age discrimination cases, the less weight the same actor inference carries. However, the Kane v. Label-Aire case upheld a termination in an age discrimination case where the plaintiff had been hired at age 66, and was fired at age 72. In Horn v. Cushman Wakefield Western, Inc. (1999) 72 CA 4<sup>th</sup> 798, 809, the court allowed the same actor inference to apply where the employee was fired five years after being hired.

One should note that the same actor inference is just that—an inference. The same actor inference can be rebutted by a plaintiff, depending on the evidence. For example, if the same person who hires and fires an elderly employee has also made numerous offensive comments regarding the employee’s age, the same actor inference can be rebutted.

actually deterred and injured. There would be no more minimum payments for deterrence only.

The bill has pros and cons. The pro is that litigation may be stalled, or prevented if the parties settle early. This could control attorney’s fees. The con is that the bill encourages owners to hire ADA certified compliance persons to survey their site for non-compliance. If the person is not an attorney, they sometimes do not know how the access codes are being litigated and interpreted by the courts. Overzealous plaintiff’s attorneys go overboard in pushing for compliance that may not be required. Almost all plaintiffs have attorneys so they will have an unfair advantage over a business that does not hire an attorney. They can manipulate the settlement conference Judge, who will not know ADA law like a plaintiff’s attorney would.

Almost anyone can be certified by knowing the codes, not the law regarding the codes. Just because a code was not complies with does not mean the business discriminated against the plaintiff. A mere deviation is not a violation of a disabled person’s civil rights. This is a critical legal point. Businesses may be forced to perfectly comply, which is not the law unless the business is brand new construction and no undue hardship waiver was obtained. Existing buildings only have to make access changes that are “readily achievable,” i.e., easy to do without much difficulty or expense.

## ADA ACCESS ARTICLES



## FAIR HOUSING ARTICLES

### **SB 1608 Bill To Potentially Reduce ADA Cases**

~ By Catherine M. Corfee, Esq.

SB 1608 is a bill in the legislature, which attempts to reduce out of control ADA Access lawsuits. When a disabled plaintiff sues, he/she would be required to inform the business of its right to request an early settlement conference if the business obtains an ADA compliance survey. The court “must” grant this request and has no power not to. The good news is that the plaintiff cannot engage in discovery, like take depositions, serve demands for documents, etc., before the settlement conference. Discovery is very expensive causing businesses to incur more attorney fees. The bill prevents a disabled person from recovering emotional/compensatory damages unless the plaintiff was

### **Watch Out For Discriminatory Questions to Potential Tenants**

~ By Catherine M. Corfee, Esq.

A recent Federal Court held that a website was potentially liable for requiring potential renters to disclose their sex, sexual orientation and family status who are looking for housing or roommates. These are discriminatory questions that apartments and housing accommodations may not ask applicants as a condition for accepting them as tenants. This is a caution to your questionnaires and to train staff accordingly. For further questions, contact Ms. Corfee at 916-487-5441.

## WEBSITE

Check out [www.corfeestone.com](http://www.corfeestone.com) !!!

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## QUOTE OF THE MONTH

*“10% of Life is Inevitable, 90% of Life Is Your Attitude”*

## CORFEE STONE'S SUCCESSES AND IN THE NEWS

~ Ms Corfee won a trial in favor of the employer who was sued under the Federal Polygraph Act. An Employee sued the employer claiming he was unlawfully required to take a lie detector test.

~ Ms. Corfee and Mr. Best were able to defeat a wage an hour class action at a preliminary procedure stage. However, the Plaintiff will try again.

~ Ms. Corfee and Mr. Best defeated a class action motion to compel irrelevant documents.

~ Ms. Corfee appeared in a North Coast Journal article entitled Jason Singleton Strikes Again on May 8, 2008 regarding ADA accessibility matters.

~ Ms. Corfee appeared in a Sacramento Business Journal article entitled Disabled Access Bill Aims to Increase Compliance, Reduce Laws on May 9, 2008 regarding ADA accessibility matters.

~ Ms. Corfee appeared in a Times-Standard article entitled ADA Suits Divide Businesses, Disabled Communities on May 18, 2008 regarding ADA accessibility matters.

## NEW PRICE SAVINGS!!!!

~ Standard handbooks prepared: \$750 (Normally \$1,200)

~ Review & Revisions to existing handbooks  
\$170/hr. (Normally \$250/hr)

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