



Matt McNicholas

MCNICHOLAS & MCNICHOLAS



Holly N. Boyer

ESNER, CHANG & BOYER

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The Bane Act and beyond

CALIFORNIA'S CIVIL RIGHTS STATUTES, ESPECIALLY THE TOM BANE ACT, ARE AN UNTAPPED RESOURCE THAT EXTENDS FAR BEYOND THE USUAL POLICE MISCONDUCT CASES

California's civil rights statutes represent an untapped resource for plaintiffs whose rights have been interfered with as a result of the intentional tortious conduct of public and private actors in a variety of contexts and circumstances. In addition to broad statutory language that can encompass a multitude of tortious conduct, including conduct of employers and others who have "aided" another in the deprivation of one's statutory and common-law rights, these statutes contain significant remedies such as punitive damages and attorney's fees. Exploring just three of California's civil rights

statutes provides a glimpse of what is possible and will hopefully spark an interest in pursuing these virtuous claims.

California Civil Code § 52.1 (The Bane Act)

Civil Code Section 52.1, the Tom Bane Civil Rights Act, authorizes suit against anyone who by threats, intimidation, or coercion interferes with the exercise or enjoyment of rights secured by the state or federal Constitutions or laws without regard to whether the victim is a member of a protected class.

(Civ. Code § 52.1.) To obtain relief under Section 52.1, a plaintiff does not need to allege that a defendant acted with discriminatory animus or intent; liability only requires interference or attempted interference with the plaintiff's legal rights by the requisite threats, intimidation, or coercion. (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 841-843 ("Venegas I").)

"The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did

McNicholas & Boyer, Next Page

prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.” (*Austin B. v. Escondido Union Sch. Dist.* (2007) 149 Cal.App.4th 860, 883.)

While Bane Act violations most often accompany section 1983 and *Monell* claims in federal court, the reach of the Bane Act extends far beyond police misconduct cases. Indeed, while one might assume that a constitutional right must be at issue, the statute does not require interference with only those rights secured by the constitution. Rather, as described in Section 52.1, a plaintiff’s legal rights include “rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.” (Civ. Code, § 52.1, subd. (a) (emphasis added).) Although in *Venegas I*, the California Supreme Court repeatedly referred to “laws of this state” as “statutory rights” (see *Venegas I*, *supra*, 32 Cal.4th at pp. 841-43), in construing the exact same term in the context of the Fair Employment and Housing Act (“FEHA”), the Supreme Court found that the phrase “laws of this state” includes *both* statutes and common law (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 75-76). Thus, the reach appears to extend beyond the interference of constitutional and statutory rights and includes rights secured by common law.

Furthermore, and as explicitly stated in Section 52.1, liability does not require actual interference with a plaintiff’s legal rights. Rather, even an attempted interference is enough to give rise to a Bane Act claim. (Civ. Code, § 52.1, subds. (a), (b); *Ramirez v. County of Los Angeles* (C.D. Cal. 2005) 397 F. Supp. 2d 1208.)

The Act provides for liability for interference or attempted interference with an individual’s rights “by threats, intimidation, or coercion.” While the terms “threat,” “intimidation” or “coercion” are not defined in Section 52.1, courts have applied their ordinary and common meaning. (See, e.g., *Zamora v. Sacramento Rendering Co.* (E.D. Cal. 2007) No. Civ. S-05-00789 DFL KJM, 2007 WL

137239, *8, n. 6 [defining intimidation according to its ordinary meaning as “to make timid or fearful”]; *McCue v. S. Fork Union Elem. Sch.* (E.D. Cal. 2011) 766 F. Supp. 2d 1003, 1011 [explaining “[f]or the purposes of the Bane Act, the term ‘threat’ means ‘an “expression of an intent to inflict evil, injury, or damage to another.”]; see also Kahn and Links, Cal. Civ. Practice: Civil Rights Litigation (2016) § 3:19.) But with the lack of attention litigants have devoted to the Bane Act, there is little to no authority discussing the meaning of these terms.

A federal district court case, *Cole v. Doe 1 thru 2 Officers of City of Emeryville Police Dept.*, 387 F. Supp. 2d 1084, 1102-04 (N.D. Cal. 2005), addressed the meaning and found that even in the absence of any excessive force, “[u]se of law enforcement authority to effectuate a stop, detention (including use of handcuffs), and search can constitute” a threat, intimidation or coercion. (*Cole*, 387 F. Supp. 2d at p. 1103.) In reaching this conclusion, *Cole* relied on the “persuasive reasoning” of the unpublished California court of appeal decision in *Whitworth v. City of Sonoma*, 2004 WL 2106606 (Cal.App.1st Dist. 2004), which held that the conduct of a police officer physically barring a person from entering a meeting is a form of “coercion” under the Bane Act, even if there was no actual use of force. (See also *O’Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 502 [assuming without deciding that police officers’ conduct in demanding that protesters leave a college campus and then arresting one of them after he refused to discontinue his activities constituted “coercion” for purposes of Civ. Code, § 52.1].)

By its terms, Section 52.1 *does not* require a showing of violence or threat of violence. (*Cole*, at p. 1103; but see Judicial Council of California Advisory Committee on Civil Jury Instructions (“CACI”) 3066 [incorporating an element of violence within the prescription for threats, coercion or intimidation for a Bane Act violation].) The only express exception, and it is, arguably, the exception that proves the rule, is that liability may not be based on “speech alone”

unless “the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.” (Civ. Code, § 52.1, subd. (j).) Thus, the only place where section 52.1 specifically requires the threat of violence is where the threats, intimidation or coercion are being accomplished by *speech alone*.

The test for whether a defendant violates Section 52.1 for interference with a legal right by threats, intimidation or coercion is whether a reasonable person, standing in the shoes of the plaintiff, would have been intimidated, threatened or coerced by the actions of the defendants. (*Richardson v. City of Antioch* (2010) 722 F.Supp.2d 1133, 1147; *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289-90.)

A defense gains traction

One issue that is gaining some traction among those defending Bane Act violation claims is the notion that the showing of “threats, intimidation or coercion” must be *separate and independent* from the wrongful conduct constituting the rights violation. Defendants often argue that in order to maintain a claim under the Bane Act, the threatening, intimidating or coercive conduct at issue must be separate from the interference with constitutional or statutory rights. But such an interpretation conflicts with plain language of the statute and is premised upon a flawed understanding of *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947.

Shoyoye, a wrongful-detention case where the plaintiff had been over-detained by approximately 16 days as a result of unintentional clerical error, merely held that a Bane Act claim cannot be premised upon a constitutional violation – occurring as a result of “mere negligence rather than a volitional act intended to interfere with the exercise or

McNicholas & Boyer, Next Page

enjoyment of the constitutional right" – where the element of coercion is implicit in the constitutional violation. (*Id.* at pp. 957-959.) As noted by the Court, Section 52.1 was not intended to redress harms "brought about by human error rather than intentional conduct." (*Id.* at p. 959.)

Neither *Shoyoye*, nor the statutory language of Section 52.1, requires that the conduct amounting to a threat, intimidation or coercion *cannot* also be the conduct alleged to be a violation of civil rights.

With respect to who a Bane Act claim may be brought against, Section 52.1 allows claims to be brought against "a person or persons, whether or not acting under color of state law" (Civ. Code § 51, subd. (a).) The scope of this is as broad as it seems. The word "person" includes the panoply of non-biological legal persons, including corporations and public agencies. (See Civ. Code, § 14 [defining "person" to include a corporation]; see, e.g., *Jones v. Kmart Corp.* (1998) 17 Cal.4th 329 [reversing liability against a corporation under the Bane Act on unrelated substantive grounds, but never disputing the liability of a corporation under the Bane Act]; *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744 [affirming Bane Act liability against a county].) Further, "[g]overnment entities have *respondeat superior* liability for their employees' Bane Act violations." (*Gant v. County of Los Angeles* (C.D. Cal. 2011) 765 F. Supp. 2d 1238, 1249-50.)

Relief includes attorney's fees

For violation of the Bane Act, Section 52.1, subdivision (b) states that any individual whose rights have been interfered with by threats, intimidation or coercion, "may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured." (Civ. Code § 52.1.) Section 52 permits such relief as actual damages, statutory damages (including civil penalties), exemplary damages, and attorney's fees. (Civ. Code § 52.)

In light of these significant remedies, and the broad scope of liability, it is surprising that more Bane Act violations are not pursued. In his concurrence opinion in *Venegas v. County of Los Angeles*, Justice Baxter highlighted the breadth of Bane Act liability as the statute is currently worded. (*Venegas*, 32 Cal.4th at pp. 844-45.) According to Justice Baxter, the Legislature "might have inadvertently transformed section 52.1 from its originally intended purpose as a weapon... to combat the rising incidence of hate crimes, to a generally applicable catchall provision that will encourage claimants to seek section 52.1's sweeping remedies... in commonplace tort actions to which those special statutory remedies were never intended to apply." (*Ibid.*) He further noted that "it should not prove difficult to frame many, if not most, asserted violations [of federal and state rights]... as incorporating a threatening, coercive, or intimidating verbal or written component." (*Id.* at pp. 850-51.) Notably, in the more than 10 years that have passed since *Venegas*, the Legislature has taken no action to narrow the scope of the Bane Act's language.

California Civil Code section 51.7 (The Ralph Act)

Beyond the Bane Act is Civil Code section 51.7, "The Ralph Act," which prohibits all violence or intimidation by threat of violence committed against any person or property because of a person's sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, or position in a labor dispute or because of the perception that a person has one or more of these characteristics. The Ralph Act *does not limit* its protections to persons with these explicitly enumerated characteristics, but rather notes that the "identification ... of particular bases of discrimination is illustrative." (Civ. Code, § 51.7, subd. (a).) The civil right protected by the Ralph Act is the right to be free from violence because of a person's protected characteristic such as race, sex or sexual orientation.

Similar to the Bane Act, the Ralph Act does not define any of the three

operative words "violence," "intimidation" or "threat." Words alone can violate the Ralph Act. (See *Long v. Valentino* (1989) 216 Cal.App.3d 1287, 1296-98.) The appropriate standard to determine whether the threatened violence was intimidating is "would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violence?" (*Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289-90 [because the victim of the threat in that case was a woman, the Ninth Circuit stated that its test would specifically focus on the standard of "the reasonable woman."].)

Unlike a claim under the Unruh Act, a Ralph Act claim can be made by an employee against an employer. (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441.) Recognizing that neither the language nor the history of the Ralph Act bars claims arising in an employment setting, the Court observed "[s]adly, hate does not end when an employee walks through the door of his or her place of employment. The staggering impact of cases of workplace violence based on race, religion and other classifications described in these statutes is unfortunately known to us too well." (*Id.* at p. 1457.)

The remedies for a Ralph Act civil claim are set forth in Civ. Code § 52, subd. (b), which provides for actual damages, punitive damages, civil penalty, attorney's fees as well as injunctive relief.

Civil Code § 51.9 (sexual harassment in defined relationships)

Another civil rights statute that is often overlooked is Civil Code section 51.9, which was enacted in 1994, and establishes a cause of action for sexual harassment in certain defined relationships where "[t]here is an inability by the plaintiff to easily terminate the relationship," including, but not limited to, relationships between a plaintiff and a physician, landlord or teacher. (See Civ. Code,

McNicholas & Boyer, Next Page

§ 51.9, subd. (a), subsection (1), (a),(d) & (e).)

The cause of action requires: (1) the existence of a business, service, or professional relationship; (2) the defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe; (3) there is an inability by the plaintiff to easily terminate the relationship; and (4) "[t]he plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph (2)." (Civ. Code, § 51.9.)

While a claim for violation of Section 51.9 may often accompany a claim for violation of the FEHA (Gov. Code, § 12900 et seq.), as explicitly provided in the statute itself, it is no way limited to sexual harassment in the workplace. Such a claim may be appropriate where a teacher sexually abuses a student, or a landlord regularly harasses a tenant on the basis of gender. The availability of such statutory liability may expand theories otherwise unavailable to such victims.

Concluding thoughts

One further observation that may entice use of these civil rights statutes is the provision in Civil Code section 52, providing that: "Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable ..." for actual damages as well as exemplary damages, a civil penalty and attorney's fees as may be determined by the court.

Pursuant to this provision, where a police officer is found liable for denying a plaintiff the right to be free from violence or the threat of violence based on a protected characteristic under Section 51.7, and, where there are facts supporting the police department's knowledge of similar such violations (similar to *Monell* liability), the police department may be equally liable to the victim for its conduct in *aiding, inciting or conspiring* in that denial under section 52(b). Or, considering a claim for violation of section 51.9 involving a teacher and a student, should the facts reveal that the school knew that the teacher had engaged in inappropriate conduct with other students and yet took no action to investigate or otherwise protect the plaintiff, the school could very well be found to have *aided* the teacher in sexually harassing the student and thus equally as liable under section

52(b). Indeed, the very presence of subsection (b) in section 52 suggests that the Legislature contemplated the role of third parties in assisting in the violation of these statutory claims.

In short, California's civil rights statutes, and specifically Civil Code sections 52.1, 51.7 and 51.9, are worth reviewing, and hopefully pursuing, in the fight to protect our clients.

Holly Boyer is a partner with Esner, Chang & Boyer, a boutique appellate firm with offices in Southern and Northern California. All of the partners are certified by the State Bar of California as appellate specialists. In addition to handling all aspects of appellate litigation, the firm also assists trial lawyers with dispositive and post-judgment motions.

Matthew S. McNicholas is a partner with McNicholas & McNicholas, LLP in Los Angeles. Mr. McNicholas has been practicing law for approximately sixteen years, spending nearly his entire career doing plaintiff's litigation. Mr. McNicholas graduated from Loyola Law School and the University of California, Los Angeles. Mr. McNicholas is a member of the American Board of Trial Advocates and the American College of Trial Lawyers, among other professional associations.

