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Retaliation: The Dangerous EPL Claim

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Retaliation Rears Its Head

- It is the most dangerous claim
- What is it exactly?
- The Yanowitz Case
- Factual Scenarios
- How to avoid it with current
Why Retaliation Claims Are So Dangerous

• Juries do not like employers that punish employees for doing the right thing or even thinking they were doing the right thing
• Big money damages usually come from a retaliation claim
  – More so than the underlying matter that they were complaining about
The Law On Retaliation

- Federal & State Law Protects against retaliation in the workplace
- Federal Law
  - Title VII of the Civil Rights Act of 1964
  - Other federal laws
- California Law
  - The California Government Code, Section 12940, et. seq.
  - Other California Statutes
Retaliation – What is It Exactly?

• It’s against the law to retaliate against employee for:
  – Making a complaint
  – Participating in a complaint

• Retaliation is ANY adverse employment action that materially changes the terms & conditions of employment
Elements of the Claim

- The employee was engaged in a “protected activity”
- The employer subjected the employee to an adverse employment action
- A causal link existed between the protected activity and the employers’ action
The Obvious Questions

- What is “protected activity”? 
- What is “adverse action”? 
- Who can be sued? 
- What can an employee recover?

ASK
Protected Activity

- Employee complains to a government agency about illegal activities or that they refused to participate in certain activities
- Employee has a “reasonable belief” are against a law
- Different statutes offer different protections
  - Discrimination/Harassment
  - Health & Safety Issues
  - Fiscal issues
  - Workplace Violence
  - Violations of Cal Law
Statutes re Retaliation for Engaging in Protected Activity

- DFEH/EEOC Retaliation
  - Complaints re Discrimination or Harassment
  - The one most known but not alone
- Labor Code Retaliation Claims
  - 1102.5 claims
  - Other Labor Code statutes
- False Claims Act ("CFCA")
- Whistle Blower Protection Act ("WPA")
- Health & Safety under OSHA
DFEH/EEOC Claims

Department of
FAIR EMPLOYMENT AND HOUSING

• If an employee complains about discrimination or harassment or participates in an investigation into such complaints they are protected from retaliation from doing so
  – Applies to other government agencies as well
Labor Code 1102.5

• An employer may not retaliate against an employee for disclosing
  – Information to a government or law enforcement agency
  – Where the employee has reasonable cause to believe that the information
  – Discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation

• This statute forms the basis for most of the non-FEHA based retaliation claims
Other Labor Code Claims: Labor Code 232.5

- Cannot require, as a condition of employment, that an employee refrain from disclosing information about the employer's working conditions.
  - i.e health and safety issues
  - Other matters of public concern
- Cannot require an employee to sign a waiver or other document that purports to deny the employee the right to disclose information about the employer's working conditions.
- Discharge, formally discipline, or otherwise discriminate against an employee who discloses information about the employer's working conditions
  - Not intended to permit an employee to disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege without the consent of his or her employer.
CFCA

• Modeled after the federal False Claims Act
• Prohibits an employer from taking adverse action against an employee for acts taken to expose false claims presented to the government
  – Which would include complaints about internal financial matters involving public entities
  – i.e. misuse of public funds by the board, committee, etc.
• Civil and treble damages from any person who knowingly presents a false claim for payment to the state or a political subdivision.”
• Aka a “qui tam” CLAIM
  – Filed in the name of the state or political subdivision whose funds are involved
  – Plaintiffs receive a significant portion of CFCA litigation proceeds
• The CFCA “ferrets out fraud on the government by offering an incentive to persons with evidence of such fraud to come forward and disclose that evidence to the government.”
• "Whistleblower Protection Act"
• Not Subject to claims presentation under Government Claims Act
• prohibits retaliation against state employees who “report waste, fraud, abuse of authority, violation of law, or threat to public health”
• The Act authorizes “an action for damages” to redress acts of retaliation.
OSHA

• Reporting Health & Safety Violations at work
  – Not using proper equipment
  – Not protecting employees from injury

• Anything under OSHA’s jurisdiction
Reasonable Belief What does that really mean?

- That they believed based upon something reasonable that a law was broken or the conduct was illegal
- Can be their own common sense if it would seem so to the reasonable person
- Difficult to disprove absent key admissions from the employee
- Employees are usually prepped by their attorneys on how to testify on this issue
Not Retaliation

• Complaints about internal policies or procedures

• Complaints about “personnel issues” that do not address matters of public concern

• Discipline for failure to participate in a DFEH investigation or lying or with holding info during a DFEH investigation
  – Employees are shielded for participating in, witnessing or complaining about discrimination or harassment in the workplace

• Employer knowledge of activity is vital element
Protected Activity? What do you think?

• Reporting that coaches were not showing up for work which was a misuse of educational funds
  – Internal personnel matter?
  – Misuse of public assets?

• Students on an athletic team were signing blank “add” cards which had no class name on them – thereby putting them in classes they did not choose
  – Any state or federal law on this?
  – Tough sell without financial impact

• Overloading athletes with phys ed classes to the detriment of their education
  – Belief that this violates any laws?
Protected Activity? What do you think?

- With public agencies given that many decisions touch on public funds, education and public services, courts are liberal in defining protected activity
  - Employee attorneys have become very creative in looking to the Ed code, Govt. code and other statutes to fit the facts to the law to assert it

- Beware of all complaints and consider that they maybe protected activity
  - And that a problem employee will use them as a sword against you when they fear discipline or termination
Who to Complain to

• To a Government Agency
• What about Internal complaints?
  – What about to public employers?
Who Can They Sue?

• Generally only the employer
• Unless otherwise stated in the statute:
  – Education Code 87164 & 44114 (Colleges & Schools)
  – Individual is subject to a fine up to $10,000, imprisonment in the county jail for a period not to exceed one year and discipline by the public school/college employer.
  – Individual also liable in an action for damages brought against him or her by the injured party
    ▪ Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious.
Adverse Employment Action

• **California standard:**
  – The actions are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career

• **Different standard in California vs. Federal Court**
• Adverse acts are viewed for their “collective impact”
• Not limited to those with immediate impact
• Actions taken over the course of time that maybe relevant to future employment decisions
  – i.e continuous disciplinary matters in a personal file that may affect future raises or promotions
• The timing of the adverse actions is also key and could be enough for employee to get to a jury
  – Courts have found 7 months later is too far removed
Constructive Termination

- Can be an “offshoot” of retaliation
- The employee is subjected to retaliation for “exercising a statutory right or privilege”
- Creates working conditions so intolerable or aggravated that a reasonable person in the employee’s position would be compelled to resign (and that compelled the plaintiff-employee to resign)
- The employer deliberately created the “intolerable or aggravated” working conditions or knowingly permitted them to persist
- Difficult to prove
  - Resigning or accepting retirement alone is simply not enough
  - Some judges want the jury to decide this issue
Constructive Termination Factors

- Timing and escalation of events against the employee such that they believe they would be fired
  - i.e. that the last nail in the coffin is coming soon
- Alerting the employer of the behavior and concerns about losing their job
- Retirement after such events may not diminish the argument that the employee had to quit
The Burden of Proof

• Plaintiff must now prove that the protected activity was a “substantial motivating factor” in the adverse employment decision
• Used to simply be “a motivating factor”
• Federal law it is “but for” causation
  – Much higher burden
• What does this mean for you?
Casual Connection

- Timing Issues are key to defeating the claim
- How close was the adverse action to the protected activity?
- Are there problems with how the discipline/termination was handled such that it appears there is a connection?
What Can An Employee Recover?

- Lost wages and benefits
  - Past and Future
- Compensatory Damages
  - Emotional Distress, Medical, Pain & Suffering
- Other damages allowed by statute
- Attorney Fees
  - Depending upon the type of retaliation
The Yanowitz Case

- Seminal California Supreme Court Case on Retaliation under FEHA
  - But is cited for other types of retaliation cases as well
- Very Pro Employee
- Addresses many elements of the claims and facts that support them
- Was a summary judgment case
- Decision makes getting retaliation cases dismissed on MSJ much more difficult
- Found many retaliation issues should be decided by a jury as “questions of fact”
The Yanowitz Case: Adverse Employment Actions

• Protects an employee from “ultimate employment actions” such as termination or demotion
  – Any employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career

• Mere offensive utterance or even a pattern of social slights by either the employer or co-employees not enough

• the phrase “terms, conditions, or privileges” of employment is interpreted liberally
  – And with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination
The Yanowitz Case: The Facts

- Yanowitz presented evidence that her supervisor ordered her to terminate a female sales associate simply because he felt the associate was “not good looking enough,” and “[g]et me someone hot.”
- When supervisor discovered Yanowitz had not terminated the sales associate, he pointed out a young attractive blonde woman and stated, “God damn it, get me one that looks like that.”
- Supervisor failed to provide her with “adequate justification” for the dismissal despite her repeated requests
- Yanowitz admitted that she never explicitly stated to her supervisor that she believed his order was discriminatory
The Yanowitz Case: Protected Activity

- First issue was whether Yanowitz’s refusal to follow her supervisors’ order to terminate a sales associate because he found the associate sexually unattractive was protected activity for which she could not be subjected to retaliation.
- Second issue was the fact that she never notified her employer or the supervisor that she was disobeying the order because she thought it was sex discrimination.
- Court agreed that an unarticulated belief is not enough.
- Court found her repeated requests for justification was implied refusal based upon sex.
- No legal terms or buzz words are necessary.
Adverse Employment Action In Yanowitz

- Unwarranted negative performance evaluations
- Employers refusal to allow Yanowitz to respond to the allegedly unwarranted criticism
- Unwarranted criticism voiced by supervisor in front of her associates and others
- Refusing her request to provide necessary resources and assistance
- Supervisors’ solicitation of negative feedback from her staff
Adverse Employment Action In Yanowitz- The Factors

- The acts were sufficiently similar in kind
- Occurred with reasonable frequency
- Had not acquired a degree of permanence
- Court found that these actions were more than mere inconveniences or insignificant changes in job responsibilities.
  - Months of unwarranted and public criticism of a previously honored employee
  - An implied threat of termination
  - Contacts with subordinates that only could have the effect of undermining a manager’s effectiveness
  - New regulation of the manner in which the manager oversaw her territory did more than inconvenience Yanowitz

- Court found that this was not a case in which the plaintiff alleges merely commonplace indignities typical of the workplace.
The Yanowitz Case: What to Avoid?

- Adverse employment actions are not susceptible to a mathematically precise test
- Minor or relatively trivial adverse actions or conduct by employers or fellow employees that do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment
- Any employment actions that are likely to be viewed as adversely and materially affect an employee’s job performance or opportunity for advancement in an employee’s career
Yanowitz: The Aftermath

• Makes it easy for courts to allow all retaliation cases to trial

• Shows that timing of criticisms, even valid, may create perception of retaliation

• Shows you must be aware of this potential claim when dealing with employees who have engaged in protected activity
Retaliation Scenarios

• The bad employee who uses a bad situation at work to their advantage
• The Drunken Professor & No Tenure
• Turning failure to accommodate into retaliation when placed on the 39 month rehire list
• Using multiple work injuries as a lottery ticket
• Misc. Cases
  – Timing – proximity of action to investigation decision
  – Knowing about other whistleblowers that get money
Retaliation Do’s & Don’ts

• Be aware of employees who engage in protected activity
• Try to avoid bad timing if possible
• Investigate or have personal knowledge of the behaviors that are the basis for the adverse action
• Make sure that facts supporting the discipline are adequately investigated and accurate
  – Have backup docs and witnesses
  – Don’t rely upon the supervisors’ version of the facts only
• Tell them this has nothing to do with their complaints
• Give the employee a chance to respond
  – They may not claim it is retaliation initially
• Document the behaviors, meetings with employee, and actions taken
• Consult with your supervisor or legal counsel if termination is the adverse action
• Timing is the key
FAQs

• What to do with a bad employee that uses complaints as a “sword”?
• Do you need to walk on egg shells around an employee who engages in protected activity?
• How do you handle disciplining an employee who has engaged in protected activity?
• You don’t have to walk on eggshells around these employees
  – Just assume that whatever actions is taken will be reviewed by a judge or jury
  – How will the actions look from the outside?
Questions?

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Thank you for your participation!

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