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Employees in California need not explicitly say they are opposing discrimination in order to claim retaliation, and can show opposition simply by refusing to comply with an employer's directives.

California Edition

A Littler Mendelson California-specific Newsletter

Whistleblower Protection Without Blowing The Whistle? The California Supreme Court Says That Employees Can Silently Oppose Discrimination And Still Sue For Retaliation

By Nancy E. Pritikin and Philip L. Ross

California employers will need to be on their increased guard to protect themselves against retaliation claims brought under the Fair Employment and Housing Act (FEHA) following a California Supreme Court decision that significantly expands employee rights to sue for retaliation. In order to establish a claim for retaliation, an employee must establish that he or she engaged in "protected activity"(i.e., opposed unlawful conduct); that he or she was subjected to an "adverse employment action" because of that activity; and that he or she suffered damages. In *Yanowitz v. L'Oreal USA, Inc.,* the California Supreme Court clarified the standard for opposing unlawful conduct, and resolved a conflict among the lower courts about how to define an adverse employment action. The decision will make it easier for employees to bring claims of retaliation, and will make it correspondingly more difficult for employers to get retaliation cases dismissed prior to trial.

Under the decision, employees need not state that they are opposing discrimination in order to be protected from retaliation. If the employee can establish that the employer was on notice of the employee's belief there was discrimination (even if never stated out loud), the employee can sue for retaliation. Additionally, while an "adverse employment action" must *materially* affect terms and conditions of employment to be actionable, the cumulative effect of a series of actions can be considered in determining whether the threshold standard of materiality is met.

The Factual Background

In the case before the court, the plaintiff, Yanowitz, was a Regional Sales Manager employed by L'Oreal USA, Inc. Yanowitz alleged that she was repeatedly ordered by a male superior to terminate a female sales associate who, in the superior's view, was not sufficiently attractive. Yanowitz asked for an "adequate justification" before she would terminate the associate. No other justification was given and Yanowitz refused to comply with the termination order. In her lawsuit, Yanowitz stated that she refused the order because she felt it was sex discrimination (as she had never been ordered to terminate an unattractive male employee). Yanowitz, however, never told her superior, nor anyone else at L'Oreal, about her belief the order was discriminatory. After Yanowitz refused to comply with the order, she claimed she was subjected to heightened scrutiny and increasingly hostile adverse treatment. This treatment included management soliciting negative information about Yanowitz from her subordinates; and increased verbal and written criticism of Yanowitz' performance, including public criticism of Yanowitz in front of her subordinates. Prior to this incident, Yanowitz had good reviews and received sales awards. The court viewed contacts with subordinates to solicit negative information as undermining Yanowitz' effectiveness, and saw the months of criticism of a previously honored employee as an implied threat of termination. In all, the court found that the increased criticism and scrutiny put Yanowitz' career in jeopardy.

For Purposes of a Retaliation Claim, "Protected Activity" Can Exist Even Where an Employee Never Expressly Complains of Discrimination

To constitute "protected activity," an employee must complain of or oppose a practice forbidden by the FEHA (e.g., sex, race, etc, discrimination). In its decision, the California Supreme Court first reaffirmed the established principle that "protected activity" includes complaints or opposition to conduct that the employee "reasonably" and in "good faith" believes to be unlawful, even if the conduct is not actually prohibited by the FEHA. In probably the most far reaching portion of its decision, the California Supreme Court went on to hold that it is not necessary in all cases for an employee to expressly indicate to the employer that he or she believes the challenged

conduct is discriminatory. Instead, according to the court, protected activity occurs "when the circumstances surrounding an employee's conduct are sufficient to establish that an employer knew that an employee's refusal to comply with an order was based on the employee's reasonable belief that the order is discriminatory . . . [and] the employee [need] not explicitly inform the employer that she believed the order was discriminatory." While a wholly unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected activity, according to the Supreme Court, the relevant question is not whether a formal accusation of discrimination is made, but whether the employee's communications to the employer sufficiently conveyed the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.

In the case before it, the Supreme Court concluded that Yanowitz' requests for an "adequate justification" before she would terminate the employee, were sufficient to raise a triable issue of fact whether she had engaged in protected activity, even though Yanowitz never explicitly mentioned that she thought the termination order was discriminatory. In reaching that conclusion, the Supreme Court found significant that the employer had never inquired what Yanowitz meant by the use of the term "adequate justification." In dissent, two Justices pointed out that a manager's request for "adequate justification" from a superior could convey reservations about the soundness of the supervisor's directive from a business standpoint, which has nothing to do with discrimination. Thus, according to the dissent, Yanowitz' alleged complaint of sex discrimination was really not a complaint of discrimination at all, and that the burden should not be on the employer to ferret out a possibly hidden meaning.

An "Adverse Employment Action" Exists Where the Totality of Conduct "Materially" Affects the Employee's Terms and Conditions of Employment

In its decision in *Yanowitz*, the Supreme Court also resolved a dispute among the lower courts as to the definition of an "adverse employment action." The Supreme Court agreed with the view taken by two California appellate courts, and most federal circuit courts under Title VII, that an adverse employment action is one that "materially" impacts a plaintiff's terms and conditions of employment. The Supreme Court rejected a broader standard adopted by the federal Ninth Circuit and the EEOC (which the lower appellate court in *Yanowitz* had applied) that additionally includes as adverse actions any action that is reasonably likely to "deter" employees from engaging in protected activities.

While the Supreme Court adopted the "materiality test" over the "deterrence test" for purposes of a FEHA retaliation claim, the Supreme Court gave the concept of "materiality" an expansive reading. Borrowing from federal "harassment" law, the Supreme Court indicated that a "material impact" does not require that an employee suffer an economic detriment or psychological injury. While mere offensive utterances or petty social slights are not actionable, the Supreme Court held that FEHA's anti-retaliation language protects employees from "the entire spectrum of 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."

Further, noting that there is no requirement that an employer's retaliation "constitute one swift blow, rather than a series of subtle, yet damaging, injuries," the Supreme Court went on to hold that the proper approach was not to look at each alleged retaliation action individually to see if it meets the "materiality" standard. Rather, courts should look at the totality of the employer's actions to see if they collectively rise to the level of having a material impact on the employee. In the case before it, the Supreme Court concluded that Yanowitz' allegations that she was subjected to increased unwarranted criticism and attempts to undermine her effectiveness raised a triable issue that she had been subjected to materially adverse employment actions.

Retaliation Claims Are Subject to the "Continuing Violations" Doctrine

Finally, the Supreme Court also held that an employee can bring a claim for retaliation based on conduct that occurred years earlier as long as the employee alleges that it is part of a pattern of retaliatory conduct. Under the FEHA, an employee generally has one year to make a claim for retaliation with the state agency. L'Oreal argued that many of the acts Yanowitz relied on had occurred years earlier. The court rejected the argument and held that where an employee alleges a retaliatory *course of conduct* (as compared to discrete acts), the "continuing violations" doctrine applies and the statute of limitations does not begin to run on any of the related alleged retaliatory acts until the adverse employment action acquires some degree of permanence or finality.

Recommendations

In order to encourage employees to be open and *explicit* about any concerns they may have regarding possible discrimination or harassment in the workplace, and thus minimize the risk of there being "silent opposition," the first step should be for California employers to review their policies and make sure that they have an express and well-publicized policy prohibiting discrimination, harassment and retaliation. Employers should also have multiple avenues for employees to raise concerns or complaints regarding discrimination, harassment and other unlawful conduct. Such concerns or complaints should be taken seriously, promptly investigated, and appropriate corrective action taken. Careful attention should also always be given to ensure that the complaining employee is not punished in any way for making the complaint.

Because the Supreme Court's ruling provides for the possibility of retaliation claims being brought where employees have not explicitly raised an issue of discrimination (even despite available avenues to do so), employers may also wish to be more proactive in determining whether an employee's complaints or opposition to following directions is based on the employee's feeling that there is conduct occurring that the employee reasonably believes is unlawful. In given cases, prudence may require that an employer initiate further communication with an employee in order to determine whether an inarticulate complaint or resistance to following directions, masks some protected concern on the part of the employee against discriminatory conduct.

Finally, the California Supreme Court's decision also requires that employers give heightened scrutiny to the possibility of retaliation claims arising out of everyday workplace actions. Now, verbal and written criticisms of an employee's performance as well as other acts which do not themselves have a direct financial impact on an employee, may, in combination with other actions, support a retaliation claim. Where many employers now have in place mechanisms for a secondary level review of more significant employment actions such as suspensions or terminations, where practical, employers may also now want to consider whether secondary review should also be given to records of any oral or written warning that will become part of an employee's record and may thus adversely affect an employee's performance or future job opportunities.

Nancy Pritikin and Philip Ross are shareholders in Littler Mendelson's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, littler@info.com, Ms. Pritikin at nepritikin@littler.com or Mr. Ross at plross@littler.com.