

## Labor Law Release

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### Avoiding Retaliation Claims Under Civil Rights Laws

Retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) rose from 7,500 in 1991 to 22,690 in 2003. The Department of Fair Employment and Housing has seen a similar rise in retaliation claims.

Retaliation claims pose very serious and unique challenges for an employer. Unlike other civil rights claims, they don't require proof of discrimination. In fact, an employee may have a viable retaliation claim even if the underlying discrimination complaint was meritless.

Under federal law an employee may claim retaliation if (s)he has suffered adverse employment action because (s)he filed a charge of discrimination, participated in an EEOC investigation or has opposed a discriminatory practice. Under California state law, an employee can assert discrimination if (s)he has opposed any practice prohibited by the employment provisions of the Fair Employment and Housing Act. ("FEHA") or has participated in a proceeding investigating discrimination. These actions are referred to as "protected activities."

Proof of retaliation is typically inferred either by "stray" comments of the employer or by the taking of adverse action shortly after the employee engaged in a protected activity. Consider, for example, the comment of an employer when considering several candidates for a promotion, "He's not management material; you can't trust his judgment." This comment could support a retaliation claim unless the employer had other specific examples of poor judgment. Even with other examples, a jury might not believe the employer's explanation.

The passage of time might provide a defense, but how much time is sufficient? Unfortunately, there is no set answer to this question. One court permitted a retaliation claim to proceed although it was based on a comment made by the employee at the time of termination *six years later*. (*Fabela v. Socorro Independent School District*, 329 F.3d 409 (5<sup>th</sup> Cir. 2003)). Although this would appear to be an exceptional case, it illustrates the harm an employer does to itself by making references to a prior protected activity.

An employer must also consider what conduct constitutes adverse employment action. According to the EEOC, it is any treatment "based on a retaliatory motive and is reasonably likely to deter individuals from engaging in protected activity." This is very broad and includes harassment, negative evaluations, demotions, suspensions, lower wage adjustments, threats or anything that has a negative effect on employment. With such a broad range of potentially protected activity, prevailing on a motion for summary judgment may be nearly impossible, forcing an employer to take its case to trial. Thus, cases become protracted, expensive and subject to the unpredictability of a jury.

An employer may also be subject to a claim if it considers a person's protected activity against another entity. In one case, the court permitted an action to proceed where the employee's complaint was directed against his union rather than against his employer. The employee alleged that he was denied a promotion because he complained against a union official who was a friend of the employer's top executive. (*McMenemy v. City of Rochester*, 241 F.3d 279 (2001)).

Under California law, the person making employment decisions also risks a claim against him or herself. Unlike some other provisions of the FEHA, a retaliation complaint may be asserted against an employer or *any other person*. While we believe this is an incorrect interpretation of the law, courts have concluded that FEHA's use of the term "any person" means individuals can be held personally liable for retaliation.

Employers can take certain action to avoid retaliation claims. First, establish and implement a policy prohibiting discrimination and retaliation. Make sure your policy is well communicated and consistently followed. Investigations should be kept as confidential as possible-including the names of complainants and witnesses. Notes of complaints should not be kept in the complainant's personnel file for future supervisors or managers to review before making employment decisions. Train supervisors and managers to understand the law and their obligation to avoid retaliation. Instruct them to avoid stray comments that could support a retaliation claim.

At Fishman, Larsen, Goldring & Zeitler and Sierra HR Partners we are committed to helping employers understand California employment laws and meet workplace challenges. We have developed a course, specifically for managers and supervisors, on Avoiding Employment Retaliation Claims in California. If you and your organization want to participate in this training, contact Doug Larsen at 256-5000.

This is not intended as a complete analysis of the subject matter, or legal advice on any specific matter. Contact us if you have specific questions or need further assistance.