INVESTIGATING COMPLAINTS OF RETALIATION – TIPS FOR MINIMIZING CLAIMS AND LITIGATION

Presented for
California Association of Joint Powers Authorities

by:
Karen Kramer and Amy Oppenheimer

November 5, 2014
WHY DO INVESTIGATIONS?

• The Fair Employment and Housing Act:
  Employers are to take all reasonable steps to prevent harassment and discrimination from occurring.

• Title VII
  Also requires employers to take all steps necessary to prevent harassment from occurring.
An employer can avoid or reduce liability by taking appropriate preventative measures

Appropriate preventative measures include:

- Appropriate policies that are distributed regularly and include an anti-retaliation policy.
- Training that includes non-retaliation policies.
- A fair, timely, and thorough investigation of complaints.
A fair and thorough investigation can prevent liability

*Cotran v. Rollins Hudig Hall,* 17 Cal.4th 93 (1998); and

• A reasonable and fair investigation of a sexual harassment complaint that led to plaintiff’s termination for violating the sexual harassment policy gives the employer a qualified immunity for liability for wrongful termination.
A biased/unfair investigation can make things worse

*Dindoza v. Western Medical Center of Santa Ana, 222 Cal.App.4th 334 (2014)*

- Judgment for plaintiff upheld in part due to testimony by plaintiff's expert witness who testified to numerous shortcoming in the investigation conducted by defendants following plaintiff’s complaint. An inadequate investigation is evidence of pretext.
BEST PRACTICES IN DOING INVESTIGATIONS

Association of Workplace Investigators (AWI) Guiding Principles - [www.aowi.org](http://www.aowi.org)

- An impartial workplace investigation should occur when an employer has determined that one is necessary;
- The investigator should be impartial and objective, and have the necessary skills and adequate time to conduct the investigation;
- The employer and the investigator should develop a mutual understanding concerning the scope of the investigation, particularly the issues to be investigated;
- The investigator should document the steps taken during the investigation, and the investigator’s decision making process, so that there will be a reliable record of the evidence the investigator relied upon in reaching his/her findings; and
- An investigator’s findings should be consistent with the scope of the investigation as defined by the employer.
RETALIATION –
EEOC & DFEH STATISTICS

The single most common charge filed with the EEOC and the DFEH against employers is retaliation.

The DFEH’s statistics for 2013 show that out of 18,480 charges against employers, a whopping 68.7 percent included a charge of retaliation.

The EEOC’s statistics show that in 1997, 22.6 percent of all claims included an allegation of retaliation, and by 2013 it had nearly doubled to 41.1 percent!
Retaliation and whistleblower protection has widened

• Whistleblower protections now extend to:
  • Discharging or discriminating against employee or applicant due to conduct relating to enforcement of his/her rights, including owed wages (Labor Code section 98.6);
  • Disclosing violations to state or federal agencies or to someone in authority over the employee who has the power to act on the complaint, or who testifies before a public body (Labor Code section 1102.5);
  • Unfair immigration-related practices; and
  • OSHA complaints.
Policies also prohibit retaliation

• Evaluation of whether conduct is “materially adverse” involves an evaluation of the context of the action.

• Employer policies are often broader than the law and include anti-retaliation protections.

• Investigations may arise out of these policies in addition to the law.
  • Does the policy define what type of behavior is considered “adverse action”? 
CLAIMS OF RETALIATION – THE LAW

• Elements of a retaliation claim
  • Protected activity
  • Adverse action
  • Causation

• Title VII/FEHA – Action against a complainant or witness can violate the law EVEN IF THERE IS NO UNDERLYING DISCRIMINATION OR HARASSMENT!
What is protected activity?

• An employee engages in protected activity when he/she:
  • Reports or opposes an unlawful employment practice internally or to an administrative agency (DFEH/EEOC)
    • Employee must have good faith belief that a violation occurred
    • Refusing to obey a directive reasonably thought to be discriminatory
  • Participates in a hearing or proceeding by helping someone bring a complaint forward or by testifying as a witness
    • Cooperating with an internal investigation
  • Picketing in opposition to discrimination
  • Discussions/actions about the terms and conditions of employment, which may include union activity
  • Requesting an accommodation
Protected activity could come from

- Current or former employee
- Applicant
- Someone closely related or connected to the complaining party (i.e. spouse/significant other, child)

Yanowitz v. L’Oreal USA, Inc. 36 Cal.4th 1028 (2005)

• Standing alone, an employee’s unarticulated belief that an employer is engaging in discrimination will not establish a *prima facie* case of retaliation, where there is no evidence the employer knew that the employee’s opposition was based upon a reasonable belief that the employer was engaging in discrimination.

• However, no particular buzzwords are required, nor should employees be forced to complain about discriminatory conduct directly to their immediate supervisors. Rather, did the employee communicate a “reasonable belief that unlawful conduct had occurred?”
Adverse Action

• Must “materially affect” the employment (state court)
  – or

• Be “likely to deter” (federal court)
What might adverse action include?

• Termination
• Refusal to hire
• Failure to promote
• Disciplinary action (demotion, suspension, reprimand)
• Denial of job benefit (flexible schedule, telecommuting, assignment)
• Negative evaluation or reference
• Harassment (must be more than something that is contrary to the employee’s interest or something the employee dislikes)
• Assignments
  • See Burlington Northern & Santa Fe Railway Company v. White – U.S. Supreme Court (2006)
Causation

• Adverse action must be taken BECAUSE of the protected activity
  • Rely on direct or circumstantial evidence
    • Timing of events
    • Knowledge of protected activity
    • Legitimate explanation for action taken
Factors an Investigator should look to when evaluating causation

- Timing of adverse action
- Legitimate reasons for the action
- Respondent’s knowledge of and interest in the protected activity
- Credibility
  - Corroborating evidence
  - Inconsistencies in explanations/how others treated – e.g. comparative data
  - Inherent plausibility
  - Bias/motive
Framing the Findings

- Was there protected activity? If so, when and what and who knew?
  - Often assumed for purposes of analyzing a retaliation claim unless the investigator was asked to determine if a violation of law occurred
  - Even if assumed, facts should be laid out so an attorney can know what occurred when analyzing whether or not protected activity occurred
Framing the Findings

• Was there an adverse action? If so, what and by whom?
  • Does ignoring someone or yelling at him/her rise to the level of adverse action?
  • Impact to work environment
  • Often assumed for purposes of analyzing a retaliation claim unless the investigator was asked to determine if a violation of law occurred
    • Report should not determine if adverse action occurred, but instead lay out the facts of regarding this element
Framing the Findings

• Was there a “causal connection” between the complaint and the adverse action?
  • Rarely will direct evidence exist (“You’re being demoted because you filed a complaint against me” or, “You’re going to pay for making that complaint”)
  • Look to timing of events (timeline might be helpful)
    • Relatively short period of time v. significant passage of time
    • Similar action taken prior to protected activity, or the action was in process before the protected activity occurred
  • Did accused know of protected activity?
    • Knowledge of employer/HR v. knowledge of accused (actual v. circumstantial knowledge/should have known)
Framing the Findings

• Was there a “legitimate business reason” for the action?
  • Multiple reasons for action – motivating factor analysis
  • Poor performance
    • Quality of work
    • Attitude
    • Others who engaged in similar conduct treated similarly
Main focus of report is generally causation

• Was there a nexus between the protected activity and the adverse action (assuming both exist)?
  • Analyze facts regarding timing, knowledge, explanation offered, and credibility of explanation
  • Preponderance of the evidence/more likely than not standard of proof
  • “More likely than not, respondent (subject) made the decision to demote complainant because complainant accused respondent of harassing him on the basis of his race.”
Preventing attack of the investigation

- Thorough investigation – make sure all witnesses and documents have been included;
- Analyze facts both ways and show alternate theories have been considered;
- Use correct standard of proof (more likely than not); and
- Explain the findings, including any credibility determinations
Hypothetical Complaint

• A female, Employee A, submitted a complaint to DFEH on January 1, 2014 based on gender discrimination related to a failure to promote.

• A male, Employee B, was promoted over Employee A, even though Employee A had more seniority with the agency.
Hypothetical Complaint

• An investigation revealed that there was a legitimate reason to promote the male employee – his experience was superior to Employee A’s experience – and the promotion was recommended by a panel that included two females, and a careful evaluation of the employees comparative skills. Based on this, the investigator determined it was more likely than not that the decision to not promote Employee A was for legitimate non-discriminatory reasons.
Hypothetical Complaint

• A week after the investigation was completed, on February 1, 2014, the supervisor informed Employee A that her office was being moved to a remote location. She was told the reason was that she was having difficulty getting along with her co-workers. This lengthened her commute by 30 minutes each day.
Hypothetical Complaint

• An investigation reveals that part of the supervisor’s reasoning in moving Employee A was that she had brought a complaint involving Employee B, and that the supervisor thought that continuing to work in the same work environment would create drama at work and make Employee B, and possibly other employees, uncomfortable.
Framing the Findings

Don’t Say

• Protected activity occurred.
• Adverse action occurred.
• This was retaliation.

Do Say

• Employee submitted a complaint to DFEH on January 1, 2014.
• Employee was relocated on February 1, 2014.
• It is/is not more likely than not that the complaint was a factor in the decision to relocate the employee.
Thank You for Participating in this Webinar!

Karen Kramer
925-838-6435

Amy Oppenheimer
www.amyopp.com
510-393-4212