

## Manager/Supervisor Risk Management

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A twice weekly e-mail training for YCPARMIA members

### TOPIC: EMPLOYMENT LIABILITY – RETALIATION

Both the federal EEOC and the state DFEH prohibit employment based discrimination, harassment and retaliation. These are separate actions; you do not have to prevail on discrimination or harassment in order to bring a retaliation action. It stands on its own as a separate offense.

Under California's Fair Employment and Housing Act (FEHA) it is an unlawful employment practice to retaliate against anyone because that person opposed any practices forbidden under the FEHA, or filed a complaint, testified, or assisted in any proceeding under the FEHA. To prevail in a retaliation action the plaintiff must show:

- They engaged in protected activity (opposing any practice forbidden by the DFEH),
- That they suffered an adverse employment decision, and
- That there was a causal connection between the protected activity and employment decision.

The employer will respond by trying to show a legitimate non-retaliatory explanation for the adverse employment decision to defeat the causal connection. This can be a difficult prospect because it is a violation of FEHA if the employer's motivation was even partially retaliatory; retaliation does not need to be the sole, or even the principal reason for the adverse action. The claimant will try to show that the employer's alleged reason for the adverse action is a pretext to hide the underlying retaliatory motive.

Retaliation claims create a unique dynamic that can challenge human nature. It is not at all uncommon for an employee to bring a questionable employment action accusing their supervisor and coworkers of discrimination and/or harassment. The supervisor/manager is then warned that they cannot retaliate against the employee for bringing the action, regardless of its merits. The employer often prevails on the harassment/discrimination action, but the supervisor/manager is still reminded that the exposure to a potential retaliation claim continues. Trust is gone, but the employment relationship continues.

The situation can be greatly aggravated when the claimant is a marginal employee whose job performance makes them a legitimate target for discipline. One of the first things that we look at when investigating employment claims is whether the employee is the subject of a pending disciplinary process; in those situations we have to explore the inference that the employment claim is an effort by the employee/claimant to avoid or control the disciplinary process.

Bringing an action or threatening a retaliation claim does not make an employee bullet-proof. It does require that the involved manager/supervisor and the HR Department work closely together to document the legitimate reasons for the adverse employment action, and the absence of a retaliatory motive. Our advice is usually for the employer to do the right thing, and let the chips fall where they may – BUT – only if the documentation and witnesses are there to support the employer's action.

Next topic: Time frames: how long are you exposed?

