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Employer Records Are Key To Defense In Retaliation Cases

By **Mishell Taylor and Zoe Bekas** (August 22, 2022, 5:37 PM EDT)

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Workplace retaliation claims under state and federal laws continue to rise,[1] and some states have implemented regulations making those claims more difficult for employers to successfully defeat.

This potentially lethal combination necessitates an employer's focus on contemporaneous decision-maker documentation — a well-planned antidote to retaliation claims.

California's whistleblower protection statute — California Labor Code Section 1102.5 — is the perfect example of a statute requiring such an increased focus. Section 1102.5 is tougher on employers than either the California Fair Employment and Housing Act or federal anti-discrimination law Title VII when it comes to amassing evidence.

This was affirmed earlier this year by the California Supreme Court in Lawson v. PPG Architectural Finishes Inc.[2] In Lawson, the California Supreme Court confirmed that whistleblower retaliation claims under Section 1102.5 should be analyzed under California Labor Code Section 1102.6, rather than the familiar McDonnell Douglas burden-shifting framework.

Under McDonnell Douglas, the employee must first establish a prima facie case of unlawful retaliation. If the employee achieves the first step, the burden shifts to the employer to demonstrate it had a legitimate, nondiscriminatory reason for the adverse employment action. If the employer meets its burden, the burden then shifts back to the employee to show that the employer's offered reason was merely a pretext for retaliation.

By contrast, under Section 1102.6, an employee must set forth by a preponderance of the evidence that the employee's protected activity was a contributing factor in a contested employment action.

If the employee succeeds in meeting their burden, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons — even had the employee not engaged in protected activity.

In Lawson's wake, employers and their counsel pondered whether Section 1102.5 whistleblower claims

could still realistically be dismissed on summary judgment given the clear and convincing evidence standard.

The California Third District Court of Appeal's May decision in Vatalaro v. County of Sacramento[3] provides reassurance for employers that pretrial dismissal is an option and includes a road map for organizational leaders to consider in memorializing performance-related concerns in advance of employment action.

In Vatalaro, the plaintiff brought claims for whistleblower retaliation in violation of Section 1102.5 and constructive termination in violation of public policy against the county of Sacramento. During her employment, the plaintiff had complained about bullying, harassment and being assigned low-level tasks.

The plaintiff was ultimately relieved from her promotion because the county found that she had been "insubordinate, disrespectful, and dishonest." The plaintiff refused to return to her previous position and instead filed a lawsuit for whistleblower retaliation and constructive discharge. The county moved for summary judgment and the trial court granted the county's motion.

In affirming the trial court's grant of summary judgment in favor of the employer, the Court of Appeals relied heavily on the recommendation memorandum prepared by the plaintiff's supervisor. As recognized by the court, the supervisor provided "detailed specific instances in which the [plaintiff] had been 'insubordinate, disrespectful, and dishonest.'"

Though the memo was prepared after the alleged protected activity, it was replete with specific examples and contained facts the plaintiff did not, and perhaps could not, dispute. The court repeatedly cited directly to the detailed memo in rejecting the plaintiff's attempts to mischaracterize her termination rationale as born of prejudice or retaliatory intent. "Although [the supervisor's] memorandum, as discussed, detailed various specific incidents," the court stated pointedly, "[the plaintiff] generally, if not entirely, ignores these incidents."

The importance of contemporaneous documentation reaches beyond California's borders, even though evidentiary standards may vary. In 2020 in Gonzalez v. City of New York in the U.S. District Court for the South District of New York,[4] the plaintiff complained to his supervisors about perceived corruption and refused to fire an individual, claiming the firing would have been on the basis of race. He was later demoted and terminated, and alleged that his complaints "inspired his supervisors to instigate a retaliatory campaign against him."

But the employer was well prepared. The employer had kept contemporaneous records of the rationale behind the employment decisions. For example, the employer maintained interview notes explaining why the plaintiff was not chosen for a promotion, recorded concerns about his performance and kept documentation regarding his excessive absenteeism.

The contemporaneous notes were a key factor in the employer's success in court. In dismissing his failure to promote the claim under Title VII, the court referenced notes made at the time of his interview that his performance was poor.

In dismissing his wrongful demotion claim under Title VII, the court cited the employer's contemporaneous memorandum documenting the plaintiff's poor performance, which documented that he had been warned about his poor behavior.

And, in dismissing his First Amendment claim for failure to interview him for a higher position, the court found the employer would have taken the adverse employment action even absent his complaints, despite the higher standard for dismissal of such claims, because there was proof he was excessively absent and had lied on a questionnaire.

Key Takeaways for Businesses Navigating an Evolving Workplace

Vatalaro, Gonzalez and cases like them are critical reminders of the importance of solid and contemporaneous documentation in employee performance management. As businesses navigate the quickly shifting waters of workforces, they may not have the benefit of reaching back to decision makers to capture recollections of past decisions.

Because of the varying frameworks and burdens of proof that organizations must meet to defeat employment-related claims, decision makers must appreciate the importance of contemporaneous documentation and record-keeping obligations.

The document creation and retention protocol of employment-related documentation can make or break a defense, particularly in states with high evidentiary burdens on employers. Documentation is especially helpful if it predates the alleged protected activity, as such documentation can overcome the nexus between the complaint and the alleged retaliatory action.

With average employee tenure dropping significantly over the last few years, businesses should invest in ensuring that decision makers are trained on how to document workplace performance issues. The following provides businesses with tips for effective workplace documentation management in light of evolving legal standards and workplaces:

Discipline should deliver practical, objective guidelines to allow the employee the opportunity to improve performance or behavior. Discipline should set forth the consequences of failing to improve poor behavior.

Employers should consistently issue discipline to prevent the appearance of bias. This means employers should take the same action against employees with similar performance or behavior issues.

It's also important to tie poor performance to a company policy. Explain how the conduct contravenes that policy and, if possible, set forth the effect of that policy violation. For example, repeat tardiness affects production, coworker schedules, client experience, etc.

Employers should also issue discipline in a timely manner. Waiting to document problematic performance until an employee makes an accusation can create the appearance of pretext.

It's also a good idea to consider periodic training for management and human resources teams to ensure they fully understand protocol associated with workplace management documentation. Performance management via text or instant messenger — for example, via Teams Chat or Slack — should be factored into document protocol procedures.

Finally, consider developing or updating employee departure documentation protocol. Workplace practices must evolve to keep up with the changing landscape of today's workplace.

According to the U.S. Bureau of Labor Statistics, voluntary attrition spiked from an average of 54.6% of total separations to 67% in 2021 — the highest rate in the past decade. Voluntary separations are also not what they used to be, with a higher percentage of employees reporting that they are leaving the workplace because of grief or burnout, some without another job offer in hand.

With increased attrition comes an increased post-separation risk for businesses. While many organizations have protocol in place for documenting performance management efforts leading up to involuntary separations, many do not have protocol in place to document events associated with or leading to voluntary separations.

As a result, businesses should evaluate how decision makers are tracking performance management and events related to and leading up to all employee separations. As we saw in Vatalaro, where the plaintiff claimed that she was constructively discharged from her employment following a promotion decision, contemporaneous and thorough documentation is critical in successfully defending legitimate employment decisions.

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[1] Statistical trends for Federal EEO filings confirming that retaliation complaints has increased from 22% in FY 1997 to nearly 56% in 2021 of total complaints-more than doubled and the number of claims filed has increased every year since at least FY 1997. Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021 | U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021.

The COVID-19 pandemic prompted a substantial increase in the number of whistleblower complaints and referrals to OSHA concerning alleged pandemic-safety related violations. Prior to 2020, the Agency received an average of 1,948 whistleblower complaints each year. On Feb. 18, 2020, OSHA started tracking COVID-19 related whistleblower claims. Throughout the last two years, federal and state OSHA affiliated agency programs received approximately 8,898 pandemic safety related whistleblower complaints. https://www.reuters.com/legal/litigation/health-care-employers-face-rise-whistleblower-claims-during-pandemic-2022-02-24/.

[2] Lawson v. PPG Architectural Finishes Inc. (2022) 12 Cal.5th 703.

[3] Vatalaro v. Cnty. of Sacramento (2022) 79 Cal.App.5th 367.

[4] Gonzalez v. City of New York (S.D.N.Y. 2020) 442 F.Supp.3d 665.