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Proving retaliatory animus through circumstantial evidence

METHODS FOR ESTABLISHING AN EMPLOYER'S RETALIATORY MOTIVES THROUGH INDIRECT EVIDENCE

Jurors tend to strongly disapprove of employers who target employees for punishment because of their protected activities. When employers engage in hateful, oppressive, and/or deceitful conduct to advance their retaliatory plans, disapproval turns into anger, and it's no secret that angry jurors render big verdicts. It makes sense then, that one of the primary goals in an employment retaliation trial should be to draw out and emphasize the defendant's animus against the plaintiff.

The thing is, employers usually don't verbalize or memorialize their desires to retaliate against an employee who reports the business to OSHA, files an HR complaint against a sexual harasser, requests accommodations for a disability, or refuses to sign off on the business's fraudulent paperwork. If that type of direct evidence does exist, it's usually hidden, destroyed, or the case settles well before trial. That's why "[p]roof of discriminatory or retaliatory intent often depends on inferences rather than direct evidence." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1386.) Fortunately, "[a]s far as the law is concerned, it makes no difference whether evidence is direct or indirect," and presenting your case through circumstantial evidence offers exciting opportunities for creative storytelling and keeping jurors intrigued and engaged throughout the trial. (CACI 202.)

While the focus of this article will be on trying retaliation cases under the FEHA and Labor Code section 1102.5, many of the concepts contained herein are universal and can generally be applied to any federal or state retaliation case where the employer's animus is a material component of the cause of action.

The burdens of proof

Under the FEHA, "[i]t is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492.) For section 1102.5, plaintiffs must "show that retaliation was a 'contributing factor' in their termination, demotion, or other adverse action." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 713.) For the most part, substantial, motivating, and contributing factor causation operate the same. CACI 2507 defines "Substantial Motivating Reason" as "a reason that actually contributed to the adverse employment action [which is] more than a remote or trivial reason [and] does not have to be the only reason motivating the adverse employment action."

There are burden-shifting mechanisms under both the FEHA and section 1102.5 to keep in mind. In either case, when an employee proves that his or her protected activity was a substantial motivating or contributing factor for the adverse employment action, a presumption of retaliation is established. Under the FEHA, the burden shifts to the employer to demonstrate they had a legitimate, non-retaliatory, reason for subjecting the employee to adverse employment action. If the employer meets that burden, the employee then has an opportunity to show that the proffered legitimate reason is pretextual by proving intentional retaliation. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) Under section 1102.5, once an employee has established a prima facie case for retaliation, the employer faces a heightened burden of proving by *clear and convincing evidence* that they would have taken the adverse action for legitimate, independent reasons, even if the employee had not engaged in protected activities. (Lab. Code, § 1102.6.)

Framing your case around a plausible improper motive

In a retaliation case, the plaintiff typically engages in some form of protected activity, like whistleblowing, that causes the employer to become hostile towards the plaintiff. This hostility and retaliatory animus manifests in the form of adverse employment actions such as a wrongful termination, a decrease in hours/wages, or a reassignment to an undesirable position or job location. By the time you get to trial you should have a concrete understanding of what you believe are the underlying unlawful reasons that motivated the adverse employment actions taken against your client.

Put yourself in the shoes of the employer and contemplate their reasons for retaliation. Don't be afraid to get conspiratorial, as long as you can remain credible. Retaliation is often motivated by an employer's pride or humiliation, such as when an employee challenges a supervisor's authority, causes a coworker to receive formal discipline, or openly reports something to the press or a governmental agency that exposes a company's unlawful workplace practices. Employers frequently decide to retaliate because of financial consequences, such as when an employee reports a health and safety issue to a company's compliance department that necessitates expensive repairs and renovations. Sometimes, the motive for retaliation is as simple as an employee's failure to fall in line within a workplace culture that expects workers to keep their mouths shut.

Whatever the reason is, find it, believe it, and anchor your storytelling at trial so that your explanation of the facts is the only one that makes sense in the end. Use the witnesses and documentary evidence to show that it's a person's actions, not their words, that reflect their true intentions. After all, "when all

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legitimate reasons… have been eliminated… for the employer's actions, it is more likely than not the employer, whom we generally assume acts with some reason, based his decision on an impermissible consideration…" (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 381.)

Presenting and proving retaliation

There are many ways to draw out animus through inference. "Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers," or "weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for [its] action[s]." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153; *Hersant v. Cal. Dept. of Soc. Services* (1997) 57 Cal.App.4th 997, 1004.)

Timeline of events and historical evidence

Retaliation "may be established by an inference derived from circumstantial evidence, such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." (*Morgan v. Regents of Univ. of Cal.* (2000) 88 Cal.App.4th 52, 69.)

This concept, known as temporal proximity, is a powerful tool for showing animus through circumstantial evidence. If the termination or demotion happens shortly after the employee complains about workplace discrimination, that suggests that the employer's motivations for the adverse action were retaliatory. If the plaintiff is put on a performance improvement plan after complaining about not being provided meal and rest breaks, that suggests that the PIP is a form of retaliatory punishment.

The inferences derived from temporal proximity can be bolstered by looking at the plaintiff's employment history before and after the protected activities. For example, an employee who enjoyed years of growth and positive performance reviews until he testified on behalf of a harassed coworker is probably the victim of retaliation.

The employer's policies, practices, and procedures

Employers have human-resource departments that create employee handbooks containing the employer's rules of the road that all managerial and non-managerial employees must follow. Many of these written policies, practices, and procedures are purportedly designed to safeguard employees from retaliation. Moreover, managers are given training on how to implement and enforce these protocols, and at trial, the employer will have no choice but to recognize and acknowledge the importance of adhering to anti-retaliation procedures to ensure workplace safety. When an employer disregards its own written policies that are designed to protect whistleblowers, an inference arises that the employer's objective is to harm the whistleblower.

For example, many employment policies require that the identity of an employee who reports unlawful conduct in the workplace be kept confidential. A supervisor who receives a complaint of harassment and then discloses the identity of the informant to the accused, in violation of company policy, must be targeting the whistleblower. Likewise, employee handbooks often obligate managers who receive complaints of discrimination, harassment, or retaliation, to report the issue to human resources or some other department responsible for receiving and responding to such complaints.

When a supervisor receives a complaint from a subordinate and buries the issue instead of reporting it, the inference is that the supervisor either doesn't like the complainant, was complicit in the misconduct, or wants to protect the accused. Whatever the reason, the supervisor knowingly breaches company policy because of the whistleblower, and that logically creates the type of animosity that leads to retaliation.

Defendants will put on numerous witnesses to testify about how much they welcome and encourage employees to speak up. Defendants will go on and on about their open-door policies. But words are cheap. Employers have protocols that define how investigations are supposed to be carried out when an employee reports workplace misconduct. Showing jurors that these policies were ignored, that an employee's complaints went unanswered, and that the investigation was cursory, reveals the employer's animus, because employers who genuinely value whistleblowers take their complaints seriously. They interview all the necessary people, they keep the whistleblower informed as to the outcome of the investigation, they remedy the underlying problems, and they issue appropriate levels of discipline against the wrongdoers. When employers drag their feet or conduct perfunctory investigations instead of being prompt and thorough by following their own rules, the inference is clear.

Hostility and disparate treatment

An employer's demonstrable hostility against an employee who engages in protected activity is consistent with retaliatory intent. (*Wysinger v. Automobile Club of Southern Calif.* (2007) 157 Cal.App.4th 413, 421.) Accordingly, powerful inferences of retaliatory animus can be developed for the jury by eliciting a pattern of hostile conduct against your client during your case-in-chief. This can range from something as obvious as removing an employee's ergonomic equipment, to something more sinister like giving an employee nasty, undesirable, and dangerous job duties.

Emails can be used to illustrate the negative and aggressive tone of communications from the employer. Coworkers can confirm that your client was ostracized and excluded from team meetings. Your client can testify about how he or she was subjected to humiliation and personal attacks. The more hostility levied against the employee subsequent to the protected activities, the stronger the inference of retaliation,

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especially if the historical evidence shows that your client was a good job performer who was previously well regarded by her peers.

Comparative evidence involving similarly situated employees can also create an inference of retaliatory targeting. (*Gupta v. Trustees of Calif. State Univ.* (2019) 40 Cal.App.5th 510, 519-522.) Examples include setting unrealistic and unprecedented performance goals for the plaintiff compared to other similar employees, denying requests for accommodations that are regularly given to others, choosing less-qualified employees for promotion, or giving the plaintiff the least amount of overtime hours. These are just a few examples. The point is, if a whistleblower is singled out for adverse treatment compared to his or her coworkers, that creates a strong inference of retaliatory animus.

Covering up lies and willful suppression of evidence

When an employer subjects an employee to adverse employment actions for retaliatory reasons, there will invariably be a lie, or two, or three, that the employer will have to create to justify its actions. Typically, this involves falsification of the employee's performance, or a manipulation of the facts surrounding the adverse employment actions.

This is where mastery of record becomes critical at trial. Remember that the defendant will need to keep its pretextual story straight among multiple witnesses spanning supervisors, rank-and-file employees, PMK designees, and expert witnesses. If you know the record inside and out, they won't be able to keep up with their lies. I suggest creating a master timeline with document and deposition citations that you have mostly committed to memory so that you become fluent in the facts and can impeach witnesses who try to testify based on their own self-serving revisionist history.

CACI 203 tells jurors, "[i]f a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence." CACI 204 states, "[y]ou may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party." These instructions are particularly powerful in an employment retaliation case because the employer has unilateral access to their employees and internal records. They are the ones in complete control of all the documents. They have no excuse for failing to present their best evidence at trial.

Employers who have nothing to hide openly reveal their deliberative process while employers who harbor retaliatory animus tend to hide their internal communications. As such, when the employer attempts to advance canned explanations for their actions without documentation to back it up, attack their credibility. When they try to claim they inadvertently destroyed critical termination-related documents or surveillance footage before trial, call them out for violating their own record-retention policies. If you send a preservation of evidence letter early on, you can use it as evidence of the defendant's willful spoliation of evidence.

Final thoughts

Earlier, I suggested putting yourself in the employer's shoes to identify the ulterior motives behind the employer's retaliatory conduct. I would also encourage spending an equal amount of time and effort considering what a lawful, reasonable, and righteous employer would do under the same circumstances. What would an honorable employer do to protect an employee who blows the whistle? How would a legitimate employer document and carry out a non-retaliatory adverse employment action? What do peaceful and professional communications between superior and subordinate look like? What would you do if you were an employer investigating a claim of sexual harassment? With those answers in mind, you can juxtapose non-retaliatory behavior against the defendant's misconduct during witness examinations and in closing argument to powerful effect.

Also, there is usually an executive, director, or high-level manager who has been directing the campaign of retaliation against your client after feeling personally besmirched by your client's protected activities. That person is the villain of your story and should be identified early and presented to the jury as soon as possible. Linking the retaliatory animus to a managing agent not only informs your client's harms, but also creates a path to punitive damages.

Finally, common sense rules the day. Most of your jurors will be employees who, at some point in their lives, have had a boss they didn't like, have been afraid to speak up for fear of retaliation, or have been flat-out mistreated by their coworkers. With that said, it's extremely important to expressly argue the inferences during closing argument. Even though jurors can relate to workplace mistreatment, putting on all the indirect circumstantial evidence in the world won't be effective if you don't directly explain the inferences to be drawn from the evidence. Closing argument is your opportunity to articulate the defendant's animus against your client and explain how the circumstantial evidence in the record shows the true motives and intentions behind the defendant's adverse employment actions.

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