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STATE LEGISLATIVE & HR CONFERENCE

April 3-5, 2019 | Sheraton Grand Sacramento | Sacramento, Calif.





The Many Faces of Retaliation in California

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Objectives of This Session

- Recognize what “retaliation” is under California (and federal) laws
- Learn from examples of retaliation
- Develop strategies to minimize the risk of retaliatory actions against employees

The *Worst* Retaliation

Arias v. Raimondo

- Arias sued employer for wage & hour violations
- Employer's attorney contacted ICE
 - Told agents time and place for Arias' deposition
 - "Invited them to attend"

“



Retaliation

It is **unlawful** for an employer to retaliate against an employee who **reports or otherwise opposes** prohibited discrimination or harassment.

Cal. Gov. Code § 12940(h)

The Claim that LIVES!

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Retaliation claims may be brought to trial **even where the employee's primary claims are dismissed.**

What is Retaliation?

Federal Title VII

Prohibits retaliation against
“employees or applicants for
employment” who engage in
protected activities.

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What is Retaliation?

California FEHA

Prohibits retaliation against “any person”

- Job applicants
- Current employees
- Former employees.
- Business partners

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Who is liable?

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- Employer alone is liable for retaliating against an employee.
- Supervisors and coworkers are **not personally liable** for their roles in the retaliation.

How prove retaliation?

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- Plaintiff must prove a *prima facie* case
- Employer must articulate a legitimate, nonretaliatory reason
- Plaintiff must prove the employer's reason is a pretext

Employee must show:

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- Protected activity
- Adverse employment action
- Causal connection

The background of the slide is a blue-tinted photograph of the California State Capitol building. The image shows the grand neoclassical architecture, including a large dome and several tall columns. In the foreground on the left, a statue is visible. Three flags are flying on a pole to the left of the building: the United States flag, the California state flag, and a smaller flag with a seal. The title "Participation and Opposition" is written in a yellow, sans-serif font across the upper right portion of the image.

Participation and Opposition

Participation Clause

Protected Activity

Participation Clause

Make a charge, testify, assist or participate in any manner in proceedings or hearings under the statutes

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Protected Activity

Opposition Clause

Oppose acts made unlawful by
the statutes

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Protected Activity

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The “participation clause” is usually interpreted broadly.

Protected Activity

Participation Clause

- Formal or informal complaints to a supervisor regarding unlawful discrimination are protected activities
- Complaints need not be well-founded

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Protected Activity

Participation Clause

Threatening to file a charge of discrimination is protected activity.

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Protected Activity

Participation Clause

Man's admission in deposition that he sexually harassed a colleague was protected participation.

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Protected Activity

Participation Clause

Unreasonable testimony (e.g., derogatory comments about another employee unrelated to that claim) is protected

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Protected Activity

Participation Clause

Adverse action against employees who are prospective complainants or witnesses for complainants is retaliation.

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Third Party Claim

Participation Clause

- Unclear if 3rd party retaliation action claims under FEHA
- FEHA protects persons associated with someone who has, or is perceived to have, protected characteristics

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Adverse Action

Participation Clause

- Terminations and demotions
- Spectrum of actions reasonably likely to adversely and materially affect job performance or opportunity for advancement

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Adverse Action

Temporal Proximity

Adverse action must be at the **same time** or **after** the employee exercises the protected right.

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Temporal Relationship

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“Just” temporal proximity not enough if employer offers a **legitimate, nondiscriminatory**, reason for the adverse action.

Opposition Clause

Protected Activity

Opposition Clause

Employee must have opposed an employment practice made unlawful by the statute

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Protected Activity

Opposition Clause

The illegal activity that is the subject of the opposition must be directed toward those covered by FEHA (not just discrimination against general public)

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Unlawful Practice

Opposition Clause

- Employee does need to know the practice is unlawful.
- Enough that the employee complained regarding its discriminatory impact.

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Unlawful Practice

Opposition Clause

- Not need to prove the practice was in fact discriminatory.
- Protected act as long as employee had a reasonable and good faith belief it was unlawful.

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Protected Activity

Opposition Clause

An unarticulated belief that the employer's conduct is unlawful does not establish opposition.

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Oppose too much?

Opposition Clause

Employee's opposition must not unreasonably interfere with the employer's business operations.

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Proof

Employee must prove

- Protected activity
- Adverse employment action
- Causal link exists

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Adverse Action

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- Terminations
- Demotions
- “Entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement.”

Adverse Action

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Adverse action must happen
after or simultaneously with the
protected activity



What about “at-will”?

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- Materially affects the terms, conditions or privileges of employment
- Reasonably likely to impair a reasonable employee's job performance

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- Reasonably likely to impair prospects for advancement or promotion”
- “Likely to deter” a reasonable worker from complaining
- Series of acts

Adverse Action

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- Reassignment of job duties
- Suspension without pay despite full reinstatement
- Demotion and isolation
- Co-worker retaliation

Adverse Action

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- Unnecessary and burdensome job duties
- Obstacles
- Setting up to fail
- Post-separation bad reference

The background of the slide is a blue-tinted photograph of the California State Capitol building. The image shows the grand dome and classical columns of the building. In the foreground on the left, there is a statue of a figure, possibly representing Justice or Liberty, and several flags are flying on a tall pole. The overall tone is serious and official.

Is everything retaliation?



Evidence of Causal Connection

Causal Connection

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Causal connection between a materially adverse action and the individual's protected activity, is found based on relevant evidence, alone or in combination.

Evidence

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- Suspicious timing
- Inconsistent or shifting explanations

Evidence

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- Treating employees differently
- Justification for taking action is not believable, was pre-determined, or is hiding a retaliatory reason



Got an LBR?

Legitimate non-retaliatory reason
(Okay – that is a LNRR?)



What can employers do?

Anti-Retaliation Policy

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- Clearly define retaliation
- Make clear that you will not tolerate retaliation from managers or other employee
- Describe complaint process

No Tolerance

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- Means NO TOLERANCE
- Your managers MUST walk the walk

Clear Your Mind

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- Temptation: get rid of a “complainer”
- Don’t harbor a grudge
- Keep emotions and personal feelings out of all employment decisions.

Train! Train! Train!

Managers and Yourself!

- Use specific examples
- Give “do’s and don’ts”
- Continue your own education!

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Circle Back

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- Check back
- Confirm they are not experiencing retaliation
- Be proactive!

The Need To Know

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- Keep confidential any complaints that you receive.
- The fewer people who know about a complaint, the smaller the chances are that someone will retaliate against the complainer.

The Need To Know

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- Disseminate information on a “Need to Know” basis.
- If someone does “need to know,” remind them retaliation is and tell them that you won't tolerate it.

If you must. . .

Step back and review:

- Has the person has opposed discriminatory behavior or participated in a claim?
- Weigh the retaliation risk carefully

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If you must. . .

Step back and review:

- Follow your policies
- Avoid treating the person more severely than other employees who have engaged in similar misconduct or performance problems.

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Document!

Clearly document:

- Legitimate, non-retaliatory reasons for taking adverse action
- That you reminded everyone of the “no retaliation” policy

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Document!

Documentation

- Preserves information
- Serves as evidence
- Drives fairness!

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Can Still Correct?

Finality is the Question

- Does employee still have power to contest it? Appeal?

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Questions?



Thank you!

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