What Is Protected Activity Under FEHA and Title VII?

A Survey of Retaliation Cases and Their Practical Implications for Employees and Employers

By Mary L. Topliff

Mary L. Topliff is Principal of the Law Offices of Mary L. Topliff in San Francisco. Her practice focuses on prevention of employment lawsuits through counseling and training. She regularly conducts workplace investigations and compliance audits and can be reached at topliff@joblaw.com.

Eight years ago, the California Supreme Court in *Yanowitz v. L'Oreal USA, Inc.*[1] expanded the "protected activity" element of a prima facie claim for retaliation under the Fair Employment and Housing Act (FEHA).[2] The court held that an employee engages in protected activity by refusing to follow a manager's directive so long as the employee had a reasonable belief that the order was discriminatory, even without evidence that the employee informed her employer of this belief.[3] Questions abounded as to the practical impact of this ruling. For instance, how could an employer carry out its obligation to investigate complaints of discrimination and harassment if the complaint had not been articulated? And should employers treat insubordinate employees as though they had engaged in protected activity?

This article examines "protected activity" developments under FEHA and Title VII of the Civil Rights Act of 1964 (Title VII) since *Yanowitz* and identifies practical implications for employees and employers.

Sufficiency of Employee's Opposition to Unlawful Employment Practice

A prima facie claim for retaliation under FEHA and Title VII has three elements: (1) the employee engaged in protected activity by reporting or opposing an unlawful employment practice (the "opposition" clause) or by participating in a hearing or proceeding (the "participation" clause); (2) the employee suffered an adverse action; and (3) there was a nexus between the two events.[4]

In *Yanowitz*, a regional manager for L'Oreal's fragrance division was ordered by her division manager to terminate the employment of a dark-skinned female sales associate because he did not find the associate sufficiently attractive. The division manager ordered Yanowitz to get someone "hot," preferably a fair-skinned blonde.[5] Upon discovering that the associate remained employed, the manager reiterated his order to Yanowitz on several occasions.[6] Although Yanowitz asked her manager for adequate justification for terminating the associate, she never complained to management or Human Resources, nor did she explicitly tell the manager that she believed his order was discriminatory.[7] Subsequently, she was often criticized in front of her subordinates and received negative performance evaluations. Among other things, Yanowitz sued for retaliation under FEHA.

Setting forth the standard for assessing whether an employee adequately opposed discriminatory conduct, the *Yanowitz* court stated: "[s]tanding alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to 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."[8] The court further noted that an employee's complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice of what it ought to investigate do not establish protected activity. However, if an employee's comments and actions, in their totality, oppose discrimination, then no particular buzzwords are required, nor should employees be forced to complain about discriminatory conduct directly to their immediate supervisors.[9]

The court held that the proper inquiry is whether an employee's communications or conduct sufficiently conveyed a reasonable belief that unlawful conduct had occurred.[10] Based on Yanowitz's refusal to carry out the termination on multiple occasions and her repeated requests for adequate justification, the court determined that a trier of fact could find that Yanowitz's manager knew that she believed his directive was unlawful, and therefore that her refusal was more than simply an unexplained insubordinate act.[11]

Although not citing *Yanowitz*, the United States Supreme Court, in *Crawford v. Metropolitan Govt. of Nashville & Davidson County,*[12] agreed with its premise. The Court noted that an employee may engage in "opposition" activity by taking a stand against an employer's discriminatory practices not only by raising a complaint but by refusing to follow a supervisor's order to fire an employee for discriminatory reasons.[13] At issue was whether Crawford had adequately engaged in protected activity when she had not complained directly, but had reported a director's sexually harassing behavior towards her when questioned during an internal investigation into rumors

of sexual harassment. Two other employees reported being harassed by the director, and soon after the investigation, they were terminated along with Crawford.[14]

The high court held that an employee opposes unlawful conduct when reporting discrimination during an investigation of a complaint made by another employee. It noted that if an employee witness could be penalized with no remedy, then employees would likely keep quiet about Title VII offenses against themselves and others.[15]

An employee's complaint or opposition must be based on a reasonable belief that the conduct was unlawful.

In 2011, the Court, in *Kasten v. Saint-Gobain Performance Plastics Corp.*,[16] clarified that a verbal complaint would be sufficient to object to perceived violations of the Fair Labor Standards Act. The Court concluded that a complaint is deemed to be "filed" if it is sufficiently clear and detailed for a reasonable employer to understand it in light of both its content and context as an assertion of rights protected by statute.[17]

A review of reported decisions reveals a variety of employee actions found to be adequate "opposition," including: (1) an employee's refusal to comply with a manager's directive to approve another employee's timesheet because that employee had not been at work on the days she claimed;[18] (2) an employee's report to the Dean of the school that he felt that he was the victim of "some kind of weird retaliation" along with a letter to his manager stating that he had been treated unfairly because he was HIV positive;[19] and (3) a police officer's comments to his colleagues that he would tell the truth about racism in the police department.[20]

However, in the recent decision of *Rope v. Auto-Chlor System*,[21] the court upheld a demurrer on the ground that the plaintiff's request for paid leave to be an organ donor (prior to the effective date of Cal. Lab. Code §§ 1508–1513) was not considered opposing conduct prohibited by FEHA, but was merely a request for an accommodation. Moreover, the Northern District of California, in *Alhozbur v. McHugh*,[22] held that an employee's rejection of her supervisor's sexual advances did not constitute opposition for purposes of protected activity.[23]

Employee's Reasonable Belief That an Unlawful Employment Practice Occurred

An employee's complaint or opposition must be based on a reasonable belief that the conduct was unlawful. California courts have long held that employees are protected from retaliation even if the employee's reasonable belief is mistaken or a court later rules that the conduct was not unlawful.[24] The *Yanowitz* court found Yanowitz's assessment that the order was discriminatory to be reasonable, since it represented different standards for female versus male sales associates, and she was never asked to fire a male associate for being insufficiently attractive.[25]

A related standard was articulated by the United States Supreme Court in *Clark County School District v. Breeden*,[26] clarifying that complaints about "offhand comments, and isolated incidents (unless extremely serious)" do not constitute protected activity unless a reasonable person would believe they violated Title VII.[27] Such a reasonable person determination requires looking "at all the circumstances, including the frequency of the discriminatory conduct [and] its severity."[28]

Subsequent to the *Yanowitz* decision, courts have primarily examined the severity of the complained-of conduct in applying the "reasonable belief" standard.[29] For example, in affirming a jury verdict in favor of the plaintiff, the Ninth Circuit in *EEOC v. Go Daddy Software, Inc.*,[30] held that the testimony of Youssef Bouamama, a Muslim of Moroccan national origin, that he complained to a human resources representative about two comments by his manager regarding his religion and national origin sufficiently established his reasonable belief that such comments were discriminatory.[31] Citing *Breeden*, the court rejected the employer's contention that the evidence reflected only an isolated incident, finding that Bouamama had testified about three comments he perceived to be derogatory, even though one of them was not reported to the employer.[32]

In contrast, the California court of appeal in *Kelley v. The Conco Companies*,[33] looked at the state of the law at the time of the employee's internal complaint of same-sex harassment to determine whether the plaintiff had a reasonable belief that his supervisor's actions amounted to actionable harassment.[34] Kelley alleged that his male supervisor on a construction site subjected him to numerous profanities and vulgarities, including threats of physical violence and sexual acts. Kelley reported the comments, the supervisor admitted making them, and his coworkers

thereafter called him a snitch and other derogatory names. In reversing the trial court's order granting summary adjudication in favor of the employer and supervisor, the court of appeal noted that at the time that the incidents occurred, two California courts of appeal had concluded that same-sex harassment that consisted of humiliating sexual comments fell within the FEHA's prohibition of sexual harassment.[35]

Courts have also weighed in on whether a fabricated complaint, albeit an act opposing suspected unlawful conduct, ought to provide retaliation protections for the complaining party. For example, the court in *Joaquin v. County of Los Angeles*[36] held that an employee's fabrication of a complaint of sexual harassment did not insulate him from termination based on the employer's reasonable belief that the employee engaged in misconduct, resulting in the reversal of a $2 million jury award.[37]

Scope of Protection for Employee's "Participation" in a Proceeding Regarding an Unlawful Employment Practice

Just as public policy does not protect a "made up" complaint as "oppositional" conduct, it does not protect deception by an employee participating in an employer's internal investigation of a discrimination claim. In the recent California court of appeal case *McGrory v. Applied Signal Technology*,[38] the plaintiff, a male manager, was the subject of an internal investigation into his female subordinate's complaint that he had engaged in sexual orientation and sex discrimination and harassment, and that he had made off-color jokes that were insensitive to those of other cultures.[39] The employer retained an external investigator who concluded that McGrory had not discriminated against the female employee but that he had violated company policies prohibiting jokes based on race and sex. The investigator further found that McGrory was uncooperative in refusing to disclose certain information about other employees' job performance and appeared to have intentionally misrepresented some facts during his interview. McGrory was terminated based on the investigation.

The court pointed out that McGrory had assumed his participation in the employer's internal investigation was protected activity (i.e., a "proceeding under this part" pursuant to Cal. Gov't Code § 12940(h)), for which he could not be terminated.[40] It noted that no California state court decision had identified the limits of FEHA's "participation" clause, although some federal courts had found Title VII to be limited to participation in official administrative proceedings by the Equal Employment Opportunity Commission (EEOC).[41] The court went on to note that some federal courts have determined that protection is limited to "sincere" participation and an employer would not be prohibited from imposing discipline for an employee's misbehavior during an internal investigation, such as attempting to deceive the investigator.[42] The court concluded that FEHA does not shield an employee from termination for lying or withholding information during an internal investigation of a discrimination claim.[43]

Additionally, federal courts have held that Title VII's "participation" clause is to be interpreted broadly to prevent harm to employees who report discriminatory employment practices or assist in the investigation of such practices.[44] However, there are limits. In *Keenan v. Shinseki*, the plaintiffs, a staff psychologist and a licensed clinical social worker at a Veterans Affairs medical facility, were subjects of their coworker's EEOC complaint.[45] They argued that their participation in the EEOC investigation into their own conduct protected them from adverse action. The court dismissed their retaliation complaint, finding that they had not filed the underlying complaint, nor had they assisted their coworker in filing the complaint against them.[46]

Protected Activity When Employee Has Neither "Opposed" nor "Participated"

An employee who has neither opposed an unlawful employment practice nor participated in a proceeding regarding such a practice may nonetheless be an "aggrieved" person under Title VII's anti-retaliation provision. In *Thompson v. North Am. Stainless, LP*,[47] an employee sued his employer, claiming that it had fired him to retaliate against his fiancée, also an employee, because she had filed a sex discrimination charge with the EEOC. The United States Supreme Court held that the employee could state a claim for retaliation even though he personally had neither objected to any unlawful practice nor participated in any proceeding.[48] The high court focused on the fact that the employee had been terminated shortly after his fiancée's complaint and, in effect, agreed with the EEOC's position that Title VII prohibits retaliation against someone so closely related to or associated with the complaining party that it would deter the complaining party from protecting his or her rights. In other words, the Court focused on the adverse employment action and its nexus to a protected activity, but did not require that the employee who was fired be the same person who raised the complaint.[49]

Along those same lines, a California court extended protection against retaliation to an employee who was perceived as being a potential witness in a coworker's State Personnel Board and Department of Fair Employment and Housing (DFEH) complaints. In *Steele v. Youthful Offender Parole Board*,[50] the

president of the defendant's board of directors tried to kiss the plaintiff during an off-site bikini contest.[51] The plaintiff did not object to the conduct but told two coworkers, who reported it to their manager. One of the coworkers later filed complaints with the State Personnel Board and the DFEH. When the plaintiff resigned her employment in the midst of job performance criticisms, the manager effectively forced her to sign two documents in which she denied the kissing incident.

Affirming the plaintiff's jury award, the court rejected the defendant's contention that the plaintiff had not engaged in protected activity because she had not yet been listed as a potential witness when she resigned.[52] The court held that FEHA protects employees against preemptive retaliation, and that the evidence showed that the defendant feared the plaintiff was a potential witness or claimant.[53]

Practical Implications of Post-*Yanowitz* Retaliation Decisions

FOR EMPLOYEES:

Employees who believe their employer's directives are unlawful should *explicitly object*, rather than leaving it to a court or jury to later determine whether they engaged in protected activity.

Employees should follow their employer's complaint procedures and request that their employer conduct an investigation.

Be truthful, clear, detailed, and cooperative during any internal investigation.

FOR EMPLOYERS:

Employers should take all complaints seriously, recognizing that most employees fear their careers will be ruined if they complain about harassment or discrimination.

Employees are often in a very emotional state when they initially complain and may not be clear and concise. Employers need to carefully review complaints, which may necessitate multiple interviews of the complaining party to flesh out the details of the allegations.

Before taking action for an employee's insubordination, employers should gather background information to ensure that the manager's directives were appropriate.

Employers should guard against retaliation once an employee has complained of perceived unlawful conduct or participated in an internal investigation or other proceeding by carefully reviewing proposed adverse actions, educating supervisors that retaliation is prohibited, taking prompt action if retaliation occurs, and encouraging employees to come forward with complaints.

ENDNOTES

1. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005).
2. Cal. Gov't Code § 12940(h); Cal. Code Regs. tit. 2, § 7287.8.
3. *Yanowitz*, 36 Cal. 4th at 1035.
4. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1093-94 (9th Cir. 2008); *Yanowitz*, 36 Cal. 4th at 1028.
5. *Yanowitz*, 36 Cal. 4th at 1038-39.
6. *Id.*
7. *Id.*
8. *Id.* at 1046.
9. *Id.* at 1047, *citing Wirtz v. Kansas Farm Bureau Servs., Inc.*, 274 F. Supp. 2d 1198, 1212 (D. Kan. 2003) and *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 560 (D. Kan. 1995).
10. *Id.*
11. *Id.* at 1048. In his strong dissent, Justice Chin pointed out that Yanowitz merely asked for justification for the firing order but in no way informed her employer that she believed it was discriminatory and that placing the burden on employers to attempt to find out whether an employee believes an action is discriminatory does not further the purpose of the anti-retaliation provisions of FEHA. *Id.* at 1070.
12. 555 U.S. 271 (2009).
13. *Id.* at 277, *citing McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996).
14. *Id.* at 273.
15. *Id.* at 278-79. The Court did not reach the question of whether the participation clause is limited to external investigations into Title VII complaints.
16. 131 S. Ct. 1325, 1335 (2011).
17. *Id.* at 1335.
18. *Morgado v. Regents of the Univ. of Calif.*, 2013 U.S. Dist. LEXIS 73489 (N.D. Cal. 2013).
19. *Scotch v. The Art Inst.*, 173 Cal. App. 4th 986 (2009).
20. *Thompson v. City of Monrovia*, 186 Cal. App. 4th 860 (2010). *Cf. Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) (where plaintiff objected to one racially derogatory comment by a coworker about another coworker, the court held that a single act may constitute an unlawful employment practice if it is an act of the employer, but a single unauthorized act of discrimination by a coworker did not justify "opposition").
21. 220 Cal. App. 4th 635 (2013).
22. 2011 U.S. Dist. LEXIS 79407.
23. *Id.* at *21-22, noting a split in the circuit and district courts addressing the issue.
24. *Yanowitz*, 36 Cal. 4th at 1043.
25. *Id.*
26. 532 U.S. 268 (2001).
27. *Id.* at 270-71.
28. *Id.*
29. *See Shadoan v. Napolitano*, 2012 U.S. Dist. LEXIS 142650 (S.D. Cal. 2012) (where a combination of racial and sexual comments, although not blatantly offensive, were held sufficient for opposing harassment) and *Day v. Sears Holdings Corp.*, 2013 U.S. Dist.

LEXIS 41052 (C.D. Cal. 2013) (where employee's complaints regarding another manager's unprofessional behavior, including excessive drinking and extramarital affairs, were held insufficient for opposing gender discrimination, but complaints about the manager's salacious remarks were held sufficient for opposing sexual harassment and hostile environment).

30. 581 F.3d 951 (9th Cir. 2009).
31. *Id.* at 964.
32. *Id.*
33. 196 Cal. App. 4th 191 (2011).
34. *Id.* at 209.
35. *Id.*, *citing Mogilefsky v. Superior Court,* 20 Cal. App. 4th 1409 (1993) and *Singleton v. United States Gypsum Co.,* 140 Cal. App. 4th 1547 (2006).
36. 202 Cal. App. 4th 1207 (2012).
37. *Id.* at 1222-24, *citing Richey v. City of Independence*, 540 F.3d 779 (8th Cir. 2008) (where employee-plaintiff was terminated for knowingly making false complaints of sexual harassment by a coworker following an investigation) and *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000) (where employer terminated employee for lying during an internal investigation because one of her allegations of sexual harassment was not corroborated; rejecting EEOC's argument that an employee's complaint of harassment should be protected unless the employee actually lied, rather than simply that the employer reasonably believed the employee lied, noting that the decision to fire an employee for lying is a business decision that courts will not "second-guess as a kind of super-personnel department").
38. 212 Cal. App. 4th 1510 (2013).
39. *Id.* at 1516.
40. *Id.* at 1526.
41. *Id.* at 1527, *citing Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990), among others.
42. *Id.*
43. *Id.* at 1528.
44. *E.g., EEOC v. Cal. Psychiatric Transitions, Inc.,* 725 F. Supp. 2d 1100, 1107 (E.D. Cal. 2010).
45. *Keenan v. Shinseki*, 2012 U.S. Dist. LEXIS 179826, *7 (E.D. Cal.).
46. *Id.* at *15-16.
47. *Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863 (2011).
48. *Id.* at 869.
49. *Id.*
50. *Steele v. Youthful Offender Parole Bd*, 162 Cal. App. 4th 1241 (2008).
51. *Id.* at 1245-50.
52. *Id.* at 1254.
53. *Id.* at 1255.