

'L'Oreal' Permits Retaliation Claims That Employers Know Nothing About

Employment Column

By Karen L. Gabler

In the rapidly changing environment of sexual-harassment and discrimination lawsuits, claims for retaliation typically have received more limited attention from courts and commentators. In light of a controversial 2005 retaliation decision by the California Supreme Court, with the federal courts in flux on the topic and with the U.S. Supreme Court's decision to address the issue in 2006, that may be about to change.

To support a claim for retaliation, an employee typically must demonstrate three elements: the plaintiff engaged in a protected activity; the employer subjected the plaintiff to an adverse employment action; and a causal link existed between the protected activity and the employer's action.

State and federal courts have differed on what constitutes "protected activity" and what qualifies as an "adverse employment action." Judges of the same court have disagreed as to an appropriate analysis under the law.

On Aug. 11, 2005, the California Supreme Court issued its divisive opinion in *Yanowitz v. L'Oreal USA Inc.*, 36 Cal.4th 1028. In that case, Elysa Yanowitz alleged that she had been ordered by a male supervisor to terminate a female worker solely because the male supervisor believed the female worker was "not sufficiently sexually attractive or 'hot.'"

Yanowitz alleged that when she failed to carry out the termination, she was subjected to "heightened scrutiny" and "an increasingly hostile treatment that undermined her relationship with the employees she supervised." Such hostile treatment included negative performance evaluations, public criticism of Yanowitz, refusal to allow her an opportunity to respond to unwarranted criticism, refusal of her repeated requests for assistance and solicitation of negative feedback from staff about Yanowitz's performance.

Significantly, Yanowitz never told the manager that she thought the termination order was discriminatory. She also did not complain to her supervisor, the human resources department, or anyone else with authority at L'Oreal.

Ultimately, Yanowitz filed a lawsuit against L'Oreal, asserting unlawful retaliation under California's Fair Employment and Housing Act.

L'Oreal took the position that Yanowitz could not demonstrate she engaged in "protected activity," a required element of a retaliation claim, because she never specifically stated to any company personnel that she believed the termination order was discriminatory or that she had refused to follow it on that basis. The California Supreme Court agreed with L'Oreal that a claim for retaliation could not be supported merely by an employee's unexpressed belief that her employer had engaged in discriminatory conduct.

The court's majority opined, however, that a retaliation claim could be supported by a showing that the employee's communications to her employer somehow conveyed to management the employee's concerns that the employer's conduct was discriminatory.

Because Yanowitz made numerous requests to her manager for some adequate justification for the termination and then refused to actually carry out the termination, the court held that Yanowitz had sufficiently conveyed to the male supervisor that she found the termination order to be discriminatory.

The court's majority found that Yanowitz's refusal to follow the management directive qualified as "protected opposition," which constituted the requisite "protected activity." The court then opined that the various adverse treatment alleged by Yanowitz "materially affected the terms, conditions and/or privileges of employment," demonstrating a sufficiently adverse employment action to survive L'Oreal's claim for summary judgment.

Justice Ming Chin, criticizing the decision in a minority opinion, observed that "no evidence existed that L'Oreal knew [Yanowitz] was engaging in [protected activity]." One cannot "retaliate against someone for activity the person does not know about." Chin opined that the plaintiff who does not say anything about unlawful conduct until after the lawsuit is filed encourages "the generation of stealth lawsuits" and "distorts the retaliation cause of action beyond all recognition."

The California Supreme Court acknowledged that retaliation had indeed occurred based upon the adverse treatment allegedly suffered by Yanowitz. This opinion is in line with the 9th U.S. Circuit Court of Appeals, which generally has held that action by an employer likely to deter employees from engaging in protected activity is a sufficiently adverse employment action to support a claim for retaliation.

The 5th Circuit, on the contrary, has held that a cause of action for retaliation must be supported by a specific action such as a pay cut, demotion, refusal to promote, termination or other similar adverse employment decision. *Hockman v. Westward Communications*, 407 F.3d 317 (C.A.5 (Tex.) 2004) (in determining whether a defendant's action constitutes an adverse employment action, the court is concerned solely with ultimate employment decisions such as hiring, granting leave, discharging, promoting and compensating).

The 8th Circuit has followed a similar standard. See *Baucom v. Holiday Cos.*, 428 F.3d 764 (C.A.8 (Minn.) 2005) (adverse employment action must produce a material employment disadvantage; minor changes in duties or working conditions that cause no materially significant disadvantage are not sufficient).

The 6th Circuit typically has fallen between these extremes, generally holding that an employee must show that there has been some "materially adverse change in the terms and conditions of employment." The court has found that it is not sufficient to show a mere alteration of job responsibilities or authority, a bruised ego or mere inconvenience.

In the case of *Burlington Northern Santa Fe Railroad Co. v. White*, the 6th Circuit considered the company's appeal of a jury verdict in favor of White. Finding that White suffered retaliation at the hands of her employer, the jury in the trial below awarded her more than \$40,000 in damages, plus attorneys' fees.

White was hired with Burlington Northern in 1997 and was assigned to operate a forklift. White soon complained about inappropriate comments by her supervisor, alleging that he claimed women should not work on a railroad and that he engaged in other harassing and inappropriate conduct. The supervisor was disciplined by the railroad company, but the company also transferred

White to a more physically demanding position.

White filed a complaint for discrimination and retaliation with the Equal Employment Opportunity Commission, and the company promptly suspended her without pay for "engaging in insubordination." She ultimately was reinstated to her position but pursued her lawsuit, losing her discrimination claim but succeeding on her retaliation claim. The company appealed the jury verdict to the 6th Circuit.

The 6th Circuit considered whether White had suffered an adverse employment action sufficient to support the jury verdict for retaliation. On review, the majority applied the 6th Circuit "middle ground" standard requiring a materially adverse change in the terms and conditions of employment.

The minority urged that the 9th Circuit standard be applied instead: Any action likely to deter employees from engaging in protected activity is sufficient to support a retaliation claim. The panel ultimately found that the alleged wrongful conduct in White's suit (that is, the transfer and the suspension) was sufficiently adverse employment action under either standard, making it unnecessary to address fully the split of opinion.

Burlington Northern then appealed the case to the U.S. Supreme Court, asking that the court review whether a sufficiently adverse employment action existed. The court granted certiorari on Dec. 5, 2005, and is expected to issue a ruling within the next six months.

In considering an appropriate retaliation analysis, the court is expected to shed some light on the question of what level of conduct would constitute an adverse employment action sufficient to support a retaliation claim. The court may choose to skirt the issue by agreeing with the 6th Circuit that the adverse action alleged by White is sufficient wrongful conduct under any applicable standard. Such a decision would resolve the case, but the lingering confusion surrounding the opinions of the various federal circuits would remain.

Regardless of the outcome of the U.S. Supreme Court's decision, employers can anticipate receiving some direction from the nation's highest court as to when they might risk a viable retaliation action. In the meantime, the Yanowitz v. L'Oreal decision leaves California employers at a loss as to how to protect their workplace from "unknown" retaliation.

It is easy to find that an employee who refuses her supervisor's order to terminate an insufficiently "hot" employee, and suffers adverse employment action as a result, is the victim of retaliation. The broader concept that naturally flows from the court's ruling is that employees may claim retaliation even when the company was unaware and uninformed that unlawful conduct was occurring. In this way, the landscape of retaliation claims in California grows ever closer to the heavy hammer of harassment law, leaving employers exposed to extraordinary liability.

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