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PERSPECTIVE

California courts continue their assault on the at-will doctrine

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By now, California employment law practitioners should be well aware of the Jan. 1, 2014, amendment to California Labor Code Section 1102.5(b), which contains language expressly prohibiting employers from retaliating against employees believed to have filed reports to government or law enforcement agencies — even if the employee did not in fact make such a complaint. In *Diego v. Pilgrim United Church of Christ*, 2014 DJDAR 15586 (Nov. 21, 2014), the 4th District Court of Appeal went a step further and reversed an order granting summary judgment for the defendant employer, Pilgrim United Church of Christ, who had in 2011 allegedly fired plaintiff Cecilia Diego for whistleblowing when she in fact had never done so.

A unanimous three-judge panel clarified that even before the Legislature added the express language, there was a well-established California public policy that prohibits the retaliatory discharge of these perceived whistleblowers. Specifically, the court ruled that even though former Section 1102.5(b) does not include language protecting perceived whistleblowers, Diego can recover for wrongful termination in violation of public policy if she can demonstrate her termination was due to Pilgrim's mistaken belief she was a whistleblower.

Diego was employed as the assistant director of Pilgrim's preschool. An anonymous complaint was made by another employee to the Community Care Licensing Division of the California Department of Social Services based upon a foul odor in one of the classrooms and inadequate sand beneath the playground equipment. As a result, licensing made an unannounced inspection at the preschool on Aug. 19, 2011. Licensing found no violations and issued no citations.

However, Diego claims her supervisor, the director of the preschool, contacted her four days after the inspection and made statements that suggested the director believed Diego had complained. Diego was fired on Aug. 26, one week after the unannounced inspection. Diego sued, alleging that Pilgrim's termination was retaliatory in violation of public policy. The trial court granted summary judgment for Pilgrim, reasoning that Diego had failed to meet her burden of establishing a significantly important public policy that affords whistleblower protections to employees merely believed to have engaged in protected activity.

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The court first discussed the elements of wrongful termination in violation of public policy. To be actionable, a discharge must violate a policy that is (1) delineated in either constitutional or statutory provisions; (2) "public" in the sense it "inures to the benefit of the public" rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) "substantial" and "fundamental."

The public policy behind former Section 1102.5(b), the court said, was to encourage employees to report suspected violations of law. Since there was no authority on point, the court found guidance in *Lujan v. Minagar* 124 Cal. App. 4th 1040 (2004), which ruled that Labor Code Section 6310 protects employees against *preemptive* retaliation by an employer that believes an employee *might* file a workplace safety complaint, on the ground that such firings discourage the filing of such complaints. Similarly, the court reasoned, "[t]he result should be no different for employees suspected of actually filing a complaint."

The court rejected Pilgrim's focus on the language of former Section 1102.5(b), ruling that an employer's "precise act" need not be specifically prohibited for the public policy to apply — all that is required is that the law "sufficiently describe the type of prohibited conduct to enable an employer to know the fundamental public policies that are expressed in that law." Public policy is far broader than what a statute states, and the court can interpret the public policy intended by the statute broadly.

Interestingly, in this de novo review, the court apparently found no relevance to the fact that Pilgrim had committed no violation. Even though the "foul odor" and "inadequate sand" reports might have been made falsely (or even maliciously), the court did not seem to consider this in its analysis. Rather, to create an issue of fact regarding retaliation, the only evidence offered was Diego's "many years of employment, including promotions" and a recent favorable review, the timing of the termination (within a week of the surprise inspection) and an ambiguous phone discussion that made Diego think that she was suspected of making the anonymous complaint. Although there was evidence of a legitimate reason to terminate (i.e., Diego missing meetings), for some inexplicable reason the court reasoned this was not a strong enough showing.

The *Diego* case reflects a continuing trend by California courts to chip away at the at-will doctrine of employment. While the amendment to Section 1102.5(b) extends *statutory* protections to perceived whistleblowers, *Diego* confirms there is a well-established public policy against the retaliatory termination of such employees which predates the amendment and can sustain a wrongful termination cause of action. California employment litigators should be aware of these developments in evaluating existing and potential whistleblower retaliation claims.

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