

EXHIBIT A

2505. Retaliation (Gov. Code, § 12940(h))

[Name of plaintiff] claims that *[name of defendant]* retaliated against *[him/her]* for *[describe activity protected by the FEHA]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* *[describe protected activity]*;
2. [That *[name of defendant]* *[discharged/demoted/[specify other adverse employment action]]* *[name of plaintiff]*];
[or]
[That *[name of defendant]* engaged in conduct that, taken as a whole, materially and adversely affected the terms and conditions of *[name of plaintiff]*'s employment;]
3. That *[name of plaintiff]*'s *[describe protected activity]* was a motivating reason for *[name of defendant]*'s *[decision to [discharge/demote/[specify other adverse employment action]] [name of plaintiff]/conduct]*;
4. That *[name of plaintiff]* was harmed; and
5. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]."

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32

Cal.Rptr.3d 436, 116 P.3d 1123].) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].) Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select “conduct” in element 3 if the second option or both options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee’s position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, replace element 2 with elements 4 and 5 of CACI No. 2402, *Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements*.

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Sources and Authority

- Government Code section 12940(h) provides that it is an unlawful employment practice “[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.”
- The FEHA defines a “person” as “one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.” (Gov. Code, § 12925(d).)
- The Fair Employment and Housing Commission’s regulations provide: “It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in

making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs.” (Cal. Code Regs., tit. 2, § 7287.8(a).)

- “Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action.” (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446, 472 [30 Cal.Rptr.3d 797, 115 P.3d 77].)
- “It 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 [102 Cal.Rptr.3d 431].)
- “Retaliation claims are inherently fact-specific, and the impact of an employer’s action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.” (*Yanowitz, supra*, 36 Cal.4th at p. 1052.)
- “Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase ‘terms, conditions, or privileges’ of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment

discrimination that the FEHA was intended to provide.” (*Yanowitz, supra*, 36 Cal.4th at pp. 1053–1054, footnotes omitted.)

- “Contrary to [defendant]’s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute.” (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)
- “Moreover, [defendant]’s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm.” (*Wysinger, supra*, 157 Cal.App.4th at p. 424, internal citations omitted.)
- “A long period between an employer’s adverse employment action and the employee’s earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection.” (*Wysinger, supra*, 157 Cal.App.4th at p. 421, internal citation omitted.)
- “Both direct and circumstantial evidence can be used to show an employer’s intent to retaliate. ‘Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.’ 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.” (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)
- “The employment action must be both detrimental and substantial We must analyze [plaintiff’s] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury [W]e do not find that [plaintiff’s] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events The other allegations . . . are not accompanied by facts which evidence both a substantial and detrimental effect on her employment.” (*Thomas v. Department of Corrections* (2000)

77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- “The retaliatory motive is ‘proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.’ ‘The causal link 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.” ’ ’ (Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)
- “[A]n employer generally can be held liable for the retaliatory actions of its supervisors.” (Wysinger, supra, 157 Cal.App.4th at p. 420.)
- “[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation.” (Jones v. The Lodge at Torrey Pines Partnership (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)
- “[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination.” (Miller, supra, 36 Cal.4th at pp. 473–474, internal citations omitted.)
- “ ‘The legislative purpose underlying FEHA’s prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints’ Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone ‘an absurd result’ that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer.” (Steele, supra, 162 Cal.App.4th at p. 1255, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

Chin, et al., California Practice Guide: Employment Litigation (The Rutter

Group) ¶¶ 7:680–7:841

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.)
Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements
Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights:
Employment Discrimination*, §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West)
§§ 2:74–2:75