An Employee’s Refusal To Obey A Supervisor’s Order May Be Considered “Protected Activity” In A Retaliation Claim

By Sandra L. Smith*

In Yanowitz v. L’Oreal USA, Inc., the California Supreme Court made it easier for employees to bring retaliation claims and more difficult for employers to get the cases dismissed before trial. Yanowitz, a regional sales manager for L’Oreal USA, Inc., had received good performance reviews and sales awards. She was ordered by a male supervisor to terminate a female sales associate because the female sales associate was not sufficiently attractive. Although Yanowitz insisted that her supervisor provide her with “adequate justification” before she would terminate the associate, the supervisor did not give her any other reason. Yanowitz never told her supervisor that she believed his order was discriminatory. Yanowitz claimed that after she refused to fire the sales associate, she was subjected to heightened scrutiny and increasingly hostile treatment.

Yanowitz contended that she refused the order because she believed it was based on the sales associate’s gender; because her supervisor had never ordered the termination of any unattractive male associates. The Court held that a trier of fact could find that the supervisor knew that Yanowitz’ refusal to comply with the order to terminate the associate was based on Yanowitz’ belief that the order constituted sex discrimination, even though Yanowitz did not explicitly say so. An employee’s conduct alone may constitute protected activity for purposes of the Fair Employment and Housing Act’s (“FEHA”) anti-retaliation provision.

This case is troubling in light of the standards for prevailing in a retaliation claim. Under prior case law, in order to establish a case of retaliation based on the FEHA, a plaintiff had to show:
• 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.

Usually, employers consider protected activity an affirmative act such as filing a complaint, either verbal or written, or at least stating that one has a grievance. But in Yanowitz, the Court’s ruling allows an action as obscure as refusing a directive to be considered the requisite protected activity for stating a case under the FEHA.

The Court raised a question about whether the result might have been different if there was evidence that the order to terminate was based on the sales associate’s performance, or if the company had a general policy requiring male or female cosmetic sales associates to be physically or sexually attractive. In other words, with such evidence, Yanowitz’ refusal to terminate despite known policies may not have been considered protected activity.

* Sandra L. Smith is an attorney with the law firm of Kay & Stevens.
Because an employee’s refusal to follow a supervisor’s directive may be considered “protected activity” in a retaliation claim, a supervisor should ask an employee to state a reason for refusing an order before taking adverse action against the employee.

The employer should notify the employee of any supporting policies that render the order reasonable.

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1 Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028, 32 Cal.Rptr.3d 436.
2 California Government Code Section 12900, et seq.
4 Government Code Section 12940(h).

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*CALPELRA President: Kevin Boylan; CALPELRA Editor: Madge Blakey; and CALPELRA Reporter: Allison Picard*

For further information contact: CALPELRA c/o Kay & Stevens
545 Middlefield Road, Suite 180, Menlo Park, California 94025; (650) 327-2672
calpelra@calpelra.org; http://www.calpelra.org

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