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Looking for liability in all the right places

A look at common causes of action in employment cases, and the potential benefits of including such claims

Most clients appear at an employment lawyer's office feeling that they have been wronged, but not knowing the legal basis for their claims. The perceived unfair treatment that brings the client to the employment practitioner's office may not be the action that has the biggest potential for legal liability by the employer. Often, the client has many more potential claims against the employer than may appear at first glance, each with its own advantages. It is important in the initial client interview to ask broad questions and delve more deeply into the client's work environment in order to try to uncover all potential claims. This article focuses on some of the common causes of action that may be applicable in employment cases, and the potential added benefits of including such claims.

Wrongful termination

One of the most common actions that lands a client in an employment lawyer's office is that employee's termination from his or her employment. Inevitably, the client will describe his or her firing as a "wrongful termination."

In California, employment is presumed to be "at will," which means that an employer can terminate an employee at any time, with or without a good reason. (Lab.Code, § 2922; *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 335.) However, one limitation on at-will employment is that the employer's true reason for the termination may not be one that violates public policy. (*Green v. Ralee Eng'g Co.* (1998) 19 Cal.4th 66, 71.) California, like the majority of states, recognizes that an at-will employee can maintain a tort action against his or her employer "when he or she is discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn." (*Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1090 *overruled on other grounds in Green v. Ralee Eng'g Co., supra,* 19 Cal.4th at 80, n. 6. See also, *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 666-667.) (affirming that a tort action lies where an employer discharges an employee in contravention of the dictates of fundamental public policy).) The policy must be "one which inures to the benefit of the public at large rather than to a particular employer or employee." (*Foley v. Interactive Data Corp., supra,* 47 Cal.3d at 669. See also *Gantt v. Sentry Ins., supra,* 1 Cal.4th at 1104.) Moreover, the policy violated must be set forth in the constitution, a statute or a regulation. (*Green v. Ralee Eng'g Co., supra,* 19 Cal.4th at 71.)

A terminated employee should be questioned at length about not only the stated reason for his or her termination, but what unstated conditions may have contributed to the termination. Did the employee, for example, protest unsafe working conditions at the workplace? (See *Barton v. New United Motor Mfg., Inc.* (1996) 43 Cal.App.4th 1200, 1205 (An employer who fires an employee in retaliation for protesting unsafe working conditions violates fundamental public policy, and the terminated employee may bring an action for wrongful termination in violation of public policy).) Did the employer demand payment of all of his or her wages and get fired as a result? (See *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 571; *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1147-1148 (failure to pay wages due or to avoid paying wages violates a fundamental public policy of this state).) Did the employee oppose illegal practices by the company, even if only internally? (See e.g., *Green v. Ralee Eng'g Co., supra,* 19 Cal.4th at 71 (wrongful termination cause of action upheld where aircraft parts inspector was terminated after complaining internally about employer's practice of shipping defective airplane parts); *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1433-1434 (manager terminated after reporting to his boss the company's unlawful overbilling of government).) In short, any protest by the client of an unlawful action by the employer which then results in the employee's termination may support a claim for wrongful termination in violation of fundamental public policy.

Discrimination and retaliation may also form the basis of a tort action alleging a public-policy violation. (See *Rojo v. Kliger* (1990) 52 Cal.3d 65, 82 (holding that the Fair Employment and Housing Act does not preempt common law claims for wrongful termination, including wrongful termination in violation of public policy); *Carmichael v. Alfano Temporary Personnel* (1991) 233 Cal.App.3d 1126, 1132.)

Thus, where the underlying reason for the termination is found to be unlawful discrimination or retaliation in violation of the Fair Employment and Housing Act, the employee may also be able to state a separate claim for wrongful termination in violation of public policy. The benefit of adding this claim is that there are no administrative prerequisites that must be satisfied, unlike with a claim brought under the Fair Employment and Housing Act.

Wrongful demotion

The prohibition on terminating an employee in retaliation for protesting unlawful activities also applies to demotions. An employer may not demote an employee in retaliation for that employee's reports of illegal activity. (*Scott v. Pacific Gas & Elec. Co.* (1995) 11 Cal.4th

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454, 465.) Such conduct could give rise to a cause of action for wrongful demotion in violation of fundamental public policy.

Constructive termination

Often, a client who resigned his or her position seeks counsel. Merely because the employee resigned rather than was fired does not mean that he or she has no claim. A constructive discharge occurs when an employer deliberately causes or allows the employee's working conditions to become so intolerable that the employee is forced to resign involuntarily. (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 513.) In order to establish a constructive discharge, an employee must prove that "the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.) Thus, where an employee has resigned, counsel should carefully delve into the reasons for resignation and determine whether the working conditions were such that a reasonable person in the employee's position would have felt compelled to resign. If so, the employee may still have a viable cause of action.

Violations of FEHA

The Fair Employment and Housing Act ("FEHA") prohibits discrimination and harassment against an employee based on that employee's race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation. (Gov. Code, § 12940(a) & (j)(1).) FEHA also prohibits retaliation against an employee who protests such discrimination or harassment. (Gov. Code, § 12940(h).) Clients should be questioned about any differences in treatment that they received at work, and on what those differences may have been based. An added benefit of a viable claim for violation of the FEHA is the ability to recover attorney's fees. (Gov. Code, § 12965(b).)

While the length of this article does not allow a detailed discussion of every possible claim based on a FEHA violation, there are some areas which may be less obvious and should be highlighted.

Termination is not a prerequisite

The maintenance of a hostile work environment is sufficient to establish liability against an employer, even where the hostile work environment did not result in the employee losing his or her job.

Hostile work environment harassment is the deprivation of the right to work in an environment free from discriminatory intimidation, ridicule and insult, whether directed at the victim or within his or her observable environment. (*Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 58-59; *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 517; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 611.) The critical test in these cases is whether or not the harassment is sufficiently severe *or* pervasive. (*Meritor Savings Bank v. Vinson, supra,* 477 U.S. at 67.) The harassment need not be both severe and pervasive; either will suffice. (*Sheffield v. Los Angeles County* (2003) 109 Cal.App.4th 153, 161.)

Moreover, an adverse employment action short of termination may also lead to liability under the FEHA where that adverse action was taken in retaliation for a complaint of discrimination or other protected activity. An adverse employment action is any action or combination of actions that substantially and materially affects the terms and conditions of the plaintiff's employment and is reasonably likely to deter employees from engaging in protected activity. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455; *Ray v. Henderson* (9th Cir. 2000) 217 F.3d 1234, 1243.)

If the employee has not been terminated, but has experienced material changes affecting the terms or conditions of his or her employment, counsel should delve further to uncover potential reasons for the changes and whether those could be found to constitute actionable adverse employment actions. A reduction in compensation is one example of conduct that may qualify as an adverse employment action. (See *Little v. Windermere Relocation, Inc.* (9th Cir. 2002) 301 F.3d 958, 970 (holding that a reduction in base monthly pay was an adverse employment action even though with commissions and bonuses it might have equaled the same net pay). A warning letter or negative review also can be considered an adverse employment action. (*Yartzoff v. Thomas* (9th Cir. 1987) 809 F.2d 1371, 1376 ("Transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions –'").) A transfer to another job of the same pay and status may also constitute an adverse employment action. (*St. John v. Emp. Dev. Dept.* (9th Cir. 1981) 642 F.2d 273, 274.) The dissemination of an unfavorable job reference may also qualify as an adverse employment action, even where the poor reference does not prevent the plaintiff from obtaining a new job. (*Hashimoto v. Dalton* (9th Cir. 1997) 118 F.3d 671, 676.)

Associational harassment

FEHA makes it an unlawful employment practice for an employer to harass or otherwise discriminate against an employee because of that employee's association with an individual who is in a protected classification. (Gov. Code, § 12926(m).) Thus, where the employee is treated differently because, for example, he or she is married to someone of a different race, has a child with a disability, or is otherwise associated with an individual within a protected class that, too, is a violation of the FEHA.

An employer is required to take all reasonable steps

The FEHA expressly imposes on employers an obligation to take immediate and appropriate corrective action to prevent discrimination or harassment. (Gov. Code, § 12940(j); see also 2 Cal. Code Regs. § 7287.6(b)(3).) Effective action must satisfy the twin purposes of ending the current harassment and

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deterring future harassment by the same offender or others. (See, e.g., *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882) This affirmative obligation also extends to the prevention of retaliation. (*Taylor v. City of Los Angeles Dept. of Water & Power* (2007) 144 Cal.App.4th 1216, 1240, *overruled on other grounds in Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1174). Failing to take such reasonable steps constitutes a separate unlawful employment practice for which the employer can be held liable. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026.)

The benefits of including a failure to prevent cause of action are potential broader discovery rights and broader presentation of evidence at trial. Defendants inevitably try to limit discovery only to the plaintiff's claims of discrimination and the employer's response thereto. However, where the employer's failure to take reasonable steps to prevent discrimination is at issue, it is easier to establish why the plaintiff should be entitled to discover all complaints of discrimination against a particular employer and all actions, or lack thereof, taken by the employer in response to show that the employer failed to meet its affirmative obligation to prevent discrimination and harassment in the workplace.

Claims relating to disability discrimination

When an employee is terminated due to a physical or mental disability, he or she may have a valid discrimination claim under the FEHA. (Gov. Code, § 12940). In addition to the claim for disability discrimination, however, there may be other applicable claims. For example, where the employer failed to engage in an interactive process with the employee to try to determine effective reasonable accommodations for the employee's disability, the employee may also be able to allege a cause of action for failure to engage in the interactive process. This should be separately plead. (See Gov. Code, § 12940(n).). Similarly, if there was a reasonable accommodation available, yet the employer refused to provide it, the client may also be able to state a cause of action for failure to provide a reasonable accommodation for the disability. This, too, should be separately plead. (See Gov. Code, § 12940(m).).

Violation of the California Family Rights Act

California's Family Rights Act makes it unlawful for an employer to deny an employee's request for leave to care for the employee's own serious health condition, the serious health condition of a parent, spouse or child, or the birth or adoption of a child. (Gov. Code, §12945.2) To qualify for the leave, an employee must have worked for the employer for one year and have 1250 hours of service during the 12-month period immediately preceding the leave. (*Id.* See also, 2 Cal. Code Regs §7297.0(e).) Thus, it is important when interviewing a new client to determine whether he or she took or was entitled to protected leave and whether the use of that protected leave was a motivating factor in the employer's decision to terminate the employee.

Negligent hiring/retention

An employer may be held liable for negligently hiring, supervising or retaining an unfit employee. (See, e.g., *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 836.) Thus, for example, where the company has hired or retained a supervisor known for a propensity to engage in sexual harassment, and that supervisor sexually harasses an employee, the employee may have a viable claim for negligence.

The benefit of including such a negligence claim is that it may trigger insurance coverage where none might otherwise exist.

Defamation

Civil Code Section 46(3) defines slander as:

> a false and unprivileged publication, orally uttered which — [t]ends directly to injure [any person] in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the — occupation peculiarly requires, or by imputing something with reference to his — profession, trade or business that has a natural tendency to lessen its profits.

(Civ. Code, § 46(3).)

The definitions set forth in Civil Code section 46 "have been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation..." (*Washer v. Bank of America* (1943) 21 Cal.2d 822, 827, disapproved on other grounds in *MacLeod v. Tribune Publishing Co., Inc.* (1959) 52 Cal.2d 536, 551.)

Thus, criticism of work performance or ethics can be defamation per se. For example, an employer's statement that an employee made a $100,000 mistake in estimating a bid was found to be defamatory, since it tended to impute to the employee incompetence in his trade. (*Gould v. Maryland Sounds Ind., Inc., supra,* 31 Cal.App.4th at 1154.) Statements that conveyed that an employee was "dishonest," an "unsatisfactory" worker, "inefficient" and "insubordinate" were also found to be defamatory per se as they related to the plaintiff's qualifications as an employee. (*Washer v. Bank of America, supra,* 21 Cal.2d at 828-829.) Similarly, the statement that a businessman was "out for a fast buck" in describing a businessman of questionable ethics was held to constitute slander per se. (*Cameron v. Wernick* (1967) 251 Cal.App.2d 890, 894.) A corporate officer who was accused of being "a black sheep," "unscrupulous," "proud, snobbish and vain" and "irresponsible" and using "lies and hypocrisies," was also able to state a claim for defamation per se. (*Correia v. Santos* (1961) 191 Cal.App.2d 844, 854.) It is important when interviewing a new client to find out what people are saying about him or her and the reasons being given for his or her termination.

In response to a defamation claim, the employer will inevitably argue that the slanderous statements are privileged. A publication is privileged where made:

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In a communication, *without malice*, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

(Civ. Code, § 47(c) (emphasis added).)

The privilege afforded by Civil Code Section 47(c) is a conditional privilege which is lost if the privilege is abused, or if the publication was motivated by malice. (*Deaile v. General Tel. Co. of Calif.* (1974) 40 Cal.App.3d 841, 847; *McMann v. Wadler* (1961) 189 Cal.App.2d 124, 129.) Thus, in order to overcome or eliminate any conditional privilege, a plaintiff need only show some evidence of either malice or abuse of privilege. (*Ibid.*)

The existence or nonexistence of malice is a question of fact for the jury. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 944-945, disapproved on other grounds in *White v. Ultramar* (1999) 21 Cal.4th 563, 574 (factual issue whether publication was motivated by hatred or ill will towards the plaintiff); *Larrick v. Gilloon* (1959) 176 Cal.App.2d 408, 416, disapproved on other grounds by *Field Research Corp. v. Superior Court* (1969) 71 Cal.2d 110, 114 ("the question of whether a publication was inspired by actual malice is essentially and peculiarly a question of fact.")) Malice may be evidenced by showing:

That the defendant bore a long-standing grudge against the plaintiff, that there were former disputes between them, that defendant had formerly been in the plaintiff's employ, and was dismissed for misconduct. Any previous quarrel, rivalry or ill-feeling between plaintiff and defendant – in short, almost everything defendant has ever said or done with reference to the plaintiff – may be urged as evidence of malice.

(*Larrick v. Gilloon, supra,* 176 Cal.App.2d at 415-416.)

If the employee can show any ill will, this will defeat the conditional privilege. At the very least, the issue of whether the employer harbored ill will towards the employee should go to the jury for its determination and is unlikely to be adjudicated at the summary judgment stage.

The employer will also likely argue that any defamatory statements published about the employee were statements of opinion, rather than fact. The statements should be carefully examined to determine if they are statements of fact or opinion. Often, apparent expressions of opinion imply an assertion of fact and are therefore actionable. (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 999.) The issue of whether the statement is fact or opinion is then one for the jury. (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 154.) Moreover, a statement in the form of an opinion may be actionable if it is implied that it is based on some undisclosed defamatory facts. (*Baker v. L.A. Herald Examiner* (1986) 42 Cal.3d 254, 266.)

The employer may also try to argue that the defamatory statements were internally published within the company, and that there was therefore no publication. Publication of defamation can be completely internal, that is, published and received solely by other employees of the employer. (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 284-285.) Thus, the fact that the defamatory statements may have been made by one employee of the employer to another does not bar the plaintiff's defamation claim.

Moreover, even where the statements were published only to the employee and not to any third party, the defamation may be actionable under the theory of compelled self publication, i.e., that the employer had reason to know that the person defamed would be under a strong compulsion to disclose the defamatory statement to a third person. (*Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71, 75.)

The seminal California case dealing with compelled self publication in the employment context is *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787. In *McKinney*, the Court of Appeal held that the originator of the defamatory statement regarding the reasons for the plaintiff's termination could be held liable for republication by the employee to prospective employers, where it was foreseeable that the plaintiff would have a strong compulsion to republish wrongful grounds stated for his termination to prospective employers. (*Id.* at 797-798. See also, *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1285 (Theory of compelled self publication applies where an employee must explain a derogatory statement in his or her personnel file to subsequent employers who will surely learn of it if they investigate his or her past employment.))

Thus, in addition to determining whether the employer published defamatory statements to third parties, counsel should also determine whether the employee felt compelled to relay defamatory reasons for his or her termination to a prospective employer in the course of a job interview.

There are several benefits to a defamation claim. First, juries take harm to reputation very seriously and even conservative juries who may have difficulty awarding a plaintiff damages for wrongful termination or discrimination may have an easier time awarding damages for harm to reputation. Second, defamation can be asserted against the individual who published the statement. Where counsel wants to include a local individual defendant in the complaint for purposes of destroying diversity of citizenship, a defamation claim provides a vehicle for this. Finally, inclusion of a defamation claim may trigger insurance coverage.

Unpaid overtime

Another area of inquiry for the employment lawyer is the nature of the plaintiff-employee's duties and the number of hours worked. Often, employees are mischaracterized as exempt employees for whom no overtime is paid, while the majority of their duties are non-exempt.

An employer is required to pay overtime at the rate of one and one-half times the employee's regular rate of pay when the employee works more than eight hours in one day or 40 hours in one workweek. (Lab. Code, § 510(a).) Any work in

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excess of 12 hours in one day must be compensated at the rate of no less than twice the employee's regular rate of pay. (*Ibid.*) The exception to this is where an employee is deemed exempt by operation of law from the overtime provisions.

In California, exemptions from the overtime provisions are narrowly construed, and it is the employer's burden to establish that its employees fit plainly and unmistakably within the exemption's terms. (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794.) Moreover, the burden is on the employer to plead and prove the facts necessary to establish an exemption. (*Id.* at 794-795.)

A complete discussion of all exemptions and whether or not a particular employee qualifies for the exemption are beyond the scope of this article. However, it is important to look beyond the employee's title and focus on the specific duties performed by the employee, as well as the percentage of time devoted to such duties. Often, employees are misclassified as exempt, and the plaintiff could be entitled to recover unpaid overtime wages. This claim brings with it an entitlement to attorneys' fees. (Lab. Code, § 1194).

Battery

Where there has been any kind of offensive physical touching at work, there may be a viable claim for battery. To establish such a claim under California law, the employee must demonstrate that the employer intentionally subjected him or her to a harmful or offensive touching, which actually and proximately caused the employee to suffer injury. (*Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 46. See also CACI 1300.)

There may be tax benefits to including a battery claim. While generally damages recovered as part of a wrongful termination action are considered gross income, the Internal Revenue Code excludes from gross income the amount of any damages (other than punitive damages) received on account of personal physical injuries or sickness. (IRC § 104(a)(2).) Inclusion of a battery claim raises the potential for excluding some of the recovery from gross income, which could increase the client's net monetary recovery.

Claims based on fraud

Where the employer knowingly makes misrepresentations to an employee or potential employee that results in detriment to the employee, a fraud claim may lie. This is particularly true where a misrepresentation regarding the kind, character or existence of work, the duration of a job, or the compensation induces the employee to relocate his or her residence. (Lab. Code, § 970.)

The benefit of asserting a claim for violation of Labor Code section 970 is that a successful plaintiff is entitled to double damages resulting from such misrepresentations. (Lab. Code, § 972.)

Violations of the right to privacy

Article I, section 1 of the California Constitution guarantees individuals a right of privacy. An employee may have an actionable claim for invasion of privacy where the employee has a legally protected privacy interest and a reasonable expectation of privacy under the circumstances, and the employer has engaged in conduct constituting a serious invasion of the privacy interest. (*Hill v. Nat'l College Athletic Assn.* (1994) 7 Cal.4th 1, 25.) The right to privacy is violated, for example, where the employer secretly records the activities and communications of the employee, by videotape or audiotape. (Pen. Code, § 630, *et seq.*) Such a violation entitles the aggrieved employee to the greater of $5,000 or three times the amount of actual damages for each violation. (Pen. Code, § 637.2)

The right to privacy may also be violated, for example, when the employer discloses an employee's confidential medical information. (*Louis Pettus v. E.I. Dupont de Nemours & Co.* (1996) 49 Cal.App.4th 402, 440-441, (recognizing a protected privacy interest in medical records).) This conduct may also constitute a statutory violation of the Confidentiality of Medical Information Act ("CMIA"), codified at Civil Code section 56.20, *et seq.* Violation of the CMIA entitles the aggrieved party to recover punitive damages. (Civ.Code, § 56.35)

Conclusion

Do not be afraid to be nosy when interviewing a potential client in an employment related matter. By delving into all aspects of the employee's employment situation, many otherwise unknown claims can be discovered to add strength to the employee's liability case, to add possible recoverable damages, to add jury sympathy, and to maximize the client's overall potential recovery.

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