

When Can An Employee Make Retaliation Claims?

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Generally, an employee can bring a claim for retaliation where the employee engaged in a protected activity and then was subjected to an adverse employment action as a result of engaging in the protected activity. Employers must be especially vigilant now against such claims in light of the recent case of *Yanowitz v. L'Oreal USA, Inc.*, where the California Supreme Court seems to have expanded an employee's ability to bring such claims.

The plaintiff Elysa Yanowitz began working for the predecessor of L'Oreal USA, Inc. ("L'Oreal") in 1981, and her positive performance reviews resulted in her being promoted in 1986 to regional sales manager. where she continued to receive positive performance reviews. Jack Wiswall supervised Yanowitz' supervisor.

In the fall of 1997, Wiswall and Yanowitz toured the Macy's in the Valley Fair Shopping Center in San Jose. After the tour, Wiswall asked Yanowitz to fire a female sales associate because the associate was not sufficiently physically attractive. He told Yanowitz to "[g]et me somebody hot". Wiswall told Yanowitz that she should be replaced with "a young attractive blond girl, very sexy." Yanowitz refused to fire the sales associate because the associate was among the top sellers of men's fragrances in the Macy's West chain. Yanowitz never complained to the human resources department about Wiswall asking her to fire the sales associate, and she never told Wiswall she thought his order was discriminatory.

Yanowitz contends that L'Oreal then retaliated against her for engaging in what she claimed was a protected activity. As a result of this retaliation, she claimed she was forced to terminate her employment with L'Oreal.

The question was whether L'Oreal treated Yanowitz poorly as a result of her refusing to fire the sales associate. The Court considered whether refusing to fire the unattractive female sales associate was a protected activity. The Court concluded that employees are not required to use any "buzz" words or special language when they are protesting discrimination. Additionally, employees can claim retaliation even if the activity they are protesting is not discrimination, so long as the employee reasonably and in good faith believed that the activity they were protesting was discriminatory.

With regard to whether an adverse employment action could be comprised of more than one action, L'Oreal argued that each individual action it took against Yanowitz should be

considered separately, and that each action was too minor to be considered an adverse employment action. The Court disagreed and held that a series of subtle injuries could constitute adverse employment action; there is no requirement for one swift blow.

As a result of this case, employers should take special care in documenting the reasons for all discipline to ensure that discipline is taken based upon performance and is not retaliatory in any way.