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One Minute Memo®

Court Extends Protections To "Silent Whistleblowers"

By Jeffrey A. Berman and Jonathan L. Brophy

Employers, although contractually free to terminate the employment of at-will employees for any reason, at any time, cannot dismiss an employee in violation of public policy. A prime California public policy is that employers cannot retaliate against whistleblowers—individuals who have reported suspected unlawful employer conduct. In January 2014, the Legislature expanded the general whistleblowing statute, Labor Code section 1102.5, to prevent employers from taking retaliatory action in a belief that "the employee disclosed or may disclose" relevant information.

On November 21, 2014, in *Diego v. Pilgrim United Church of Christ*, the California Court of Appeal clarified that Section 1102.5, even in its pre-amended version, forbids employers to terminate "perceived whistleblowers," even if that belief is mistaken.

The Facts

Cecilia Diego worked as an assistant director of Pilgrim United's preschool. Diego claimed that a coworker had contacted the Licensing Division of the California Department of Social Services to report a foul odor in a classroom and inadequate sand beneath the playground equipment. The Licensing Division then conducted an unannounced inspection, but found no violations and issued no citations. Diego claimed that her supervisor then asked Diego why she had made the reports. Diego understood that her supervisor believed that she had been the source of the anonymous complaints to the Licensing Division, even though this was not the case.

Shortly after the inspection, Diego failed to appear at a meeting her supervisor had scheduled for her. Pilgrim United then discharged Diego for insubordination.

When Diego sued Pilgrim United, claiming that her termination was retaliatory and in violation of California public policy, the trial court granted summary judgment against her claim. The trial court found that Diego had failed to identify a significantly important public policy that was implicated by constitutional or statutory authority: Diego had failed to cite "any case holding that an employer's mistaken belief that the employee reported a violation can support a claim for wrongful termination in violation of public policy."

The Appellate Court Decision

The Court of Appeal reversed the trial court. It held that California's public policy "applies to preclude retaliation by an employer not only against employees who actually notify the agency of suspected violations but also against employees whom the employer suspects of such notifications." The Court of Appeal reasoned that the policy embodied by former Labor Code section 1102.5 (which did not expressly address an employer's belief about whistleblowing) was not limited to

employees who actually reported violations, because such a limitation would discourage employees from reporting violations in the first instance.

In addition, the Court of Appeal found that the alleged "insubordination" was not so well established, for purposes of summary judgment, to withstand Diego's proof that the employer's assertion of insubordination was a mere pretext for unlawful retaliation in the belief that Diego had been a whistleblower.

What *Pilgrim United* Means For Employers

California Labor Code section 1102.6 already provides that if an employee proves that the employee's protected activity was "a contributing factor in the alleged prohibited action," then the employer must show by "clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in [protected] activities." *Pilgrim United* reinforces the point that employers should document performance issues and disciplinary decisions to help support later decisions to discipline an employee.

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