

Joaquin v. City of Los Angeles: Welcome Judicial Criticism of the “Motivating Factor” Language in the FEHA Retaliation Instruction

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Ever since the Judicial Council published the Civil Jury Instructions (“CACI”) in 2003, defense lawyers have been critical of the language used in the instructions for deciding discrimination and retaliation claims under the Fair Employment and Housing Act (“FEHA”). The CACI instruction for retaliation (number 2505) allows a jury to decide that retaliation occurred if the plaintiff’s protected act was “*a motivating reason*” for the subsequent adverse employment action.

Defense lawyers have argued that this standard is too plaintiff-friendly because a plaintiff should be required to establish that the employer did retaliate, not just that retaliation was possible. Many cases hold that a plaintiff must show that the adverse action was taken “*because of*” the plaintiff’s protected activity or that the plaintiff must show that the protected activity was a “*substantial motivating factor*” for the adverse employment action. (See *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 824; *George v. California Unemployment Insurance Appeals Board* (2009) 179 Cal.App.4th 1475, 1492.) However, until last week, none of these cases has publicly criticized the “motivating factor” language of the CACI instructions.

On January 23, 2012, the Second District Court of Appeal published an opinion which criticized the CACI jury instruction for retaliation as inadequately addressing the intent component of a retaliation claim. In *Joaquin v. City of Los Angeles* (2012 Cal.App. LEXIS 35), the plaintiff asserted that he had been retaliated against for filing an internal sexual harassment complaint against a supervisor. The defendant-employer alleged that it terminated the plaintiff after determining that the plaintiff’s complaint against his supervisor was fabricated. After being instructed with the CACI 2505 instruction, the jury found in favor of the plaintiff. The Court of Appeal reversed.

In the last section of its discussion, the Court stated that CACI instruction 2505 was inadequate. The Court specifically noted that “retaliatory intent is an essential element of a cause of action for unlawful retaliation under FEHA. However, that element is not identified in the CACI instruction.” Thus, the Court felt that the “motivating reason” language in CACI inadequately defined the intent component of a retaliation claim. The Court then “urge[d] the Judicial Council to redraft the retaliation instruction ... so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA.”

Whether the Judicial Council takes note of this case and modifies this instruction remains to be determined. However, for the first time defense lawyers have published case law criticizing the “motivating factor” language to support their arguments at trial that alternate instructions should be used.

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