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Finally! Something That's Not "Protected Activity" in California

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Executive Summary: It turns out that "protected activity" sufficient to make out a retaliation claim in California is not as broad as it may sometimes seem. On November 9, 2016, the Court of Appeal affirmed summary judgment for the employer in *Dinslage v. City and County of San Francisco* (A142365). The Court held that an employee can only state a prima facie case for retaliation under California's Fair Employment and Housing Act when the protected activity is directed at an unlawful *employment* practice.

Background

Dinslage worked for San Francisco's Recreation and Parks Department organizing programs for the disabled. Later the Department changed its focus to inclusive programming rather than segregated programming for the disabled community. Dinslage's position was discontinued and reclassified. Dinslage believed the reorganization discriminated against the public and spoke out about his belief in public forums. He applied for the new position, made it to the second round of interviews, but ultimately was not offered the job.

Court of Appeal Rejects Retaliation Claim

After his employment ended, Dinslage sued the Department for age discrimination, retaliation, and harassment in violation of the FEHA (Cal. Gov. Code §12940, subds. (a), (h), and (j)). Dinslage argued that his employment was terminated, in part, because of his opposition to Department actions that discriminated against people with disabilities. The trial court found, and the appellate court agreed, that he had not engaged in protected activity under the FEHA because he "spoke in public forums regarding his concern that the … Department's reorganization would cause layoffs and the potential negative effects the reorganization would have on members of the public who have disabilities."

The Court of Appeal held that Dinslage's opposition to Department policies and practices he viewed as discriminating against disabled members of the general public is not protected activity because his opposition was not directed at an unlawful employment practice. Thus, Dinslage could not reasonably have believed the practices he opposed were prohibited by the FEHA.

The Court made clear: "For protection under the 'opposition clause,' an employee must have opposed an employment practice made unlawful by the statute." An employee's "conduct may constitute protected activity…not only when the employee opposes conduct that ultimately is determined to be unlawfully discriminatory under the FEHA, but also when the employee opposes conduct that the employee reasonably and in good faith believes to be

discriminatory, whether or not the challenged conduct is ultimately found to violate the FEHA." The critical factor is the employee must reasonably believe the practice was prohibited by the FEHA.

Quoting language from a decision by a federal court in New York, the Court of Appeal noted, "Neither the 'unlawful practice' nor the 'good faith belief' requirement is satisfied where the practice complained of was not directed at employees but, instead, was directed to individuals who are not in an employment relationship with the defendant." (citing *Taneus v. Brookhaven Memorial Hosp. Medical Center* (E.D.N.Y. 2000)). The Court held that Dinslage could not "reasonably have believed his actions constituted protected activity, because there is no dispute his opposition was not directed at the Department's *employment* practices."

Employers' Bottom Line: This case clarifies not only what constitutes protected activity to state a claim for retaliation under the FEHA but also that the employee's belief that he or she is opposing a discriminatory practice under the FEHA must be reasonable.

If you have any questions regarding this decision or other labor or employment related issues impacting California employers, please feel free to contact the authors of this Alert, Daniel Waldman, dwaldman@fordharrison.com, who is a partner in our San Francisco and New York City offices, or Catherine Hazany, chazany@fordharrison.com, who is a senior associate in our Los Angeles office. You may also contact the FordHarrison attorney with whom you usually work.

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