

legal issues



By Richard S. Rosenberg

THE WHISTLE THAT DIDN'T BLOW

The California Supreme Court wants employers to bone up on their mind-reading skills before dealing with insubordinate workers.

Under a decision handed down last year, the court ruled that employees complaining about workplace discrimination need not actually say they believe the action to be illegal to gain protection under the anti-retaliation provisions of the state's tough job-bias laws. Instead, all they have to do is resist carrying out an employer's personnel order, and the employer has to be aware that the employee's resistance is tantamount to a complaint that the order is discriminatory—or else.

At the very least, the ruling in *Yanowitz v. L'Oreal U.S.A., Inc.*, does away with the notion that an employee must actually voice a complaint before being able to avail himself or herself of the protections that state law offers to whistleblowers in such circumstances. At worst, because the ruling gives employers no clear guidelines for dealing with silent whistleblowers, it opens employers to new and potentially disastrous liability claims from disgruntled employees.

THE STORY BEHIND THE RULING

In 1997, Elysa Yanowitz, a female regional sales manager with L'Oreal, resisted an order by her supervisor, a man, to fire an associate and replace her with someone "hot" because, in the supervisor's eyes, the associate was not "good-look enough." Yanowitz asked the supervisor to justify the order but did not say that she thought it discriminatory and at no time took her complaint to her company's human resources department.

She did not, in other words, blow the whistle to invoke protection under California's tough anti-discrimination law, which prohibits employers from retaliating against an employee who refuses to follow an illegal personnel order.

Yanowitz is not good news for employers. California law already protects employees who blow the whistle based on a reasonable belief that the action in question is illegal, even when it turns out that the employee was wrong. In plain English, this means that employers can't retaliate against a whistleblower who balks at carrying out a perfectly lawful personnel order if the employee can show that her or she had a reasonable, though mistaken, belief that something was amiss.

But now under Yanowitz, the Supreme Court has expanded the umbrella of the state's anti-discrimination law even further to protect employees who never blow the whistle at all, regardless of whether a wrong has been done.

The Yanowitz ruling also holds that "retaliatory" actions taken against the silent whistleblower, with each action considered by itself, need not be illegal

to open the umbrella of the anti-discrimination laws, if in their totality they affect the conditions of an individual's employment.

WHAT DOES ALL THIS MEAN?

Following Yanowitz's tussle at L'Oreal, her superiors began questioning her subordinates, apparently probing for evidence that she was not a good manager. They also criticized her management style and audited her travel and expense reports. On one occasion a supervisor screamed at her in front of staff over some missteps in the handling of a particularly important account. After this and more, Yanowitz took a disability leave, claiming stress, and filed suit.

Clearly, L'Oreal got it coming and going. According to the Supreme Court, the company should have guessed that Yanowitz was invoking the state's anti-discrimination laws, and it should have guessed that its criticisms against Yanowitz constituted retaliation.

That's a lot of guessing. For employers, the only way to limit exposure of this nature is to train managers and supervisors in the basics of employment law as they affect daily decision-making. Otherwise, employers give the advantage to employees who may or may not blow the whistle, not to mention judges who may conjure up new liabilities where none previously existed.

In all likelihood, Yanowitz's supervisor stepped over the line, irrespective of whether she blew the whistle. So, too, will the supervisor who, when an employee comes to ask for some family leave, responds by worrying out loud about getting some urgent project done in the employee's absence. The supervisor may have legitimate worries about that project, but if he or she even brings the subject up, the employee can claim discrimination based on sex or interference with the employee's right to federal- and state-mandated family leave.

To be sure, the Yanowitz decision gives employers yet another worry—namely, how to guess the intent of the employee who doesn't say what's on his or her mind. But the reality is that the imperative remains where it always was under California's anti-discrimination law: Employers must train their managers and supervisors to know the basics of discrimination law and see to it that they don't step over the line in their daily communications and interactions with employees.

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Yanowitz v. L'Oreal U.S.A., Inc. may lead to disastrous liability claims from employees if stricter attention isn't paid to learning and teaching discrimination laws

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