

Alleged Protected Activity Unrelated to Discharge, California Court Finds, Reverses \$3 Million Verdict

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Reversing a \$3 million jury verdict in favor of a former human resources executive on his wrongful termination claim, the California Court of Appeal has ruled that the executive failed to establish that the employer's decision not to continue his employment following a corporate acquisition was retaliatory. *Winston v. Countrywide Financial Corp. et al.*, No. B232823 (Cal. Ct. App. Feb. 19, 2013) (unpublished). The Court declined to apply the "cat's paw" doctrine, which permits the improper motive of a non-decision maker to be imputed to the decision maker in certain circumstances. Here, the executive offered no evidence that the decision maker knew about the executive's prior protected activity or that the executive's former supervisor had any influence in the employer's decision not to continue his employment.

Background

Michael Winston began working for Countrywide Financial Corporation in 2005 to assist Leora Goren, the director of human resources, in executive leadership development and succession planning. In 2006, Winston was promoted to Managing Director and Enterprise Chief Leadership Officer responsible for executive and leadership training.

Alleged Retaliation

Winston maintained that during his employment, he was retaliated against on two occasions. First, Winston claimed that in July 2006, Goren reassigned some of his reports to another employee after Winston had filed a complaint with California's Division of Occupational Safety and Health ("Cal-OSHA") regarding an alleged chemical exposure in the workplace. Second, Winston asserted that in December 2006, Countrywide's executives threatened to terminate him after he refused to change an audit report to a rating agency to present the company's succession planning practices in a manner more favorable than Winston believed they were. Goren advised senior management against terminating Winston at that time, stating that it would not be in the company's best interest.

Bank of America Acquisition

In January 2008, Bank of America announced plans to acquire Countrywide. As part of the acquisition, Brian Fishel, senior vice president of enterprise executive development for Bank of America, evaluated Winston for employment. Fishel interviewed Winston in June 2008. Before the interviews began, Fishel met with Goren. At trial, Fishel denied that Goren had said anything negative about Winston or informed him of Winston's Cal-OSHA complaint or report to the ratings agency. Ultimately, Fishel decided not to hire Winston because his position was equivalent to Winston's, and Winston's base salary exceeded Fishel's. Fishel also testified he found Winston to be arrogant during the interview and did not believe he would fit well with Bank of America's corporate culture.

Winston subsequently sued Countrywide and Bank of America for wrongful termination. A jury entered a verdict in his favor, awarding him \$3,828,166 in damages. Countrywide and Bank of America appealed.

Applicable Law

To prevail on a cause of action for wrongful termination resulting from retaliation, an employee must

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show (1) he or she engaged in protected activity, (2) the employer discharged the employee, and (3) a causal link existed between the protected activity and the discharge (e.g., the employer harbored a retaliatory motive against the employee that led to the discharge). See *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042 (Cal. 2005). As one California court stressed, “Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.” *Morgan v. Regents of Univ. of California*, 88 Cal.App.4th 52, 69-70 (Cal. Ct. App. 2000).

Wrongful Termination Claim Rejected

Winston argued that Bank of America failed to continue his employment because it knew about his Cal-OSHA complaint and the ratings agency report. However, the appellate court found that Winston offered no evidence supporting his argument. Indeed, the Court noted that Fishel decided not to hire Winston for “legitimate and nonretaliatory” reasons, including that there were no open position for an executive with Winston’s expertise as Fishel held the equivalent position.

Winston also argued that the Court should apply the cat’s paw doctrine to impute Goren’s retaliatory motive to Fishel. The Court declined to do so. It observed that Bank of America’s acquisition of Countrywide “did not revolve around Winston or his colleagues in the human resources division.” Rather, Bank of America acquired Countrywide for its loan portfolio. Indeed, the Court added, Bank of America did not hire any of the executives who reported to Goren. Because Winston did not establish any causal link between the alleged retaliation he experienced and the decision not to hire him, it reversed the judgment.

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