
Downsizing And Discrimination:

AN ILLEGAL COMBINATION

A Reduction In Force Or Company
Reorganization Is No Excuse For Illegal
Employer Retaliation Or Discrimination

A WHITE PAPER PRESENTED BY

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You spent years and countless late nights climbing the corporate ladder, and at long last your hard work finally pays off — you become an executive at one of California’s many companies, your dream job. Sadly, though, this dream comes to an abrupt end when your boss tells you that you are losing your job because of a company reorganization and/or reduction in force.

You ask yourself, what went wrong? You were always a model employee. Every year you had an exemplary performance review. In your frustration, you rack your brain trying to figure out why you were fired when so many other less-qualified employees were spared.

Then it hits you — could this have something to do with the complaint I filed with human resources six months ago?

At the time, they thanked me for making the report, but now, a half-year later, I’m out of a job. Are the two connected? Or, could this have something to do with the fact that I’m the oldest person in my department?



A BAD ECONOMY DOES NOT MAKE EMPLOYER RETALIATION OR DISCRIMINATION OK

In today's cutthroat business world, it can be nearly impossible to make it, especially if you are a woman, disabled, a minority or someone nearing retirement age. To make matters worse, some companies use downturns in the economy — and the subsequent reorganizations, reductions in force (RIF) and department mergers — as an excuse to illegally discriminate or retaliate against employees.

Fortunately, however, while California is an at-will employment state — meaning your boss can typically terminate your job for no reason at all — there are still several state and federal laws that prohibit employers from firing or demoting employees for retaliatory or discriminatory reasons, including:

- ✓ **California's Fair Employment and Housing Act (FEHA)**¹
- ✓ **California's Labor Code whistleblower protection statute**²
- ✓ **Age Discrimination in Employment Act (ADEA)**³
- ✓ **Title VII of the Civil Rights Act of 1964**⁴
- ✓ **Americans with Disabilities Act (ADA)**⁵

This means your boss cannot use a reorganization as an opportunity to fire you as punishment for reporting certain illegal conduct in the workplace — otherwise known as retaliation — or illegally terminate you for some other completely discriminatory reason, such as your age, disability, sex, sexual orientation or race, just to name a few.

In fact, the Supreme Court of California made its opinion regarding downsizing and discrimination quite clear in the often-cited case *Guz v. Bechtel*:

“An employer’s freedom to consolidate or reduce its work force, and to eliminate positions in the process, does not mean it may ‘use the occasion as a convenient opportunity to get rid of its [protected] workers.’ [Citations]. [The] right to downsize does not resolve whether the employer had a discriminatory motive for cutting back its work force, or engaged in intentional discrimination when deciding which individual workers to retain and release.”⁶

ARE YOU A MEMBER OF ONE OF THESE GROUPS? IF SO, YOU MAY BE A ‘PROTECTED EMPLOYEE.’

Whether you are dealing with federal or California law, there are several different types of protected employees. For instance, the ADA protects disabled employees, the ADEA protects older employees and Title VII protects employees from discrimination based on race, color, religion, sex and national origin.⁷

While the protections offered under federal law are significant, California’s FEHA actually provides additional protection to several other classes of employees, including employees discriminated against due to their “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.”⁸

Five Commonly Discriminated-Against Employees

DO ANY OF THESE APPLY TO YOU?

1. OLDER EMPLOYEES:

Has your boss been asking when you plan on retiring? Just because you are nearing retirement age doesn't mean your employer can fire you and keep less-qualified, younger employees.

2. PREGNANT EMPLOYEES:

Were you fired after taking pregnancy-related disability leave or requesting a modified assignment due to your pregnancy? You may be able to file a claim.

3. MINORITY EMPLOYEES:

Whether you are being targeted because of your race, religion, ancestry or national origin, your employer needs to be held accountable.

4. LGBT EMPLOYEES:

Were you fired after your boss discovered your sexual orientation? That simply isn't right — or legal in California.

5. WHISTLEBLOWER EMPLOYEES:

Both federal and various California state laws provide you protection from employer retaliation if you file a discrimination complaint, testify in a related proceeding or complain to management or the government about illegal activity. In fact, in addition to California's general labor whistleblower protection law, there are specific statutes that protect employees who report potentially dangerous working conditions and doctors and nurses who report suspected unsafe patient conditions.⁹

HOW DO I PROVE ILLEGAL DISCRIMINATION OR RETALIATION DURING A COMPANY REORGANIZATION?

In California, discrimination cases following a company reorganization or reduction in force typically involve two types of claims:

DISPARATE IMPACT CLAIMS

A disparate impact claim is where there is no direct evidence that a layoff was motivated for discriminatory reasons, but the policies or procedures used to select the employees for termination nevertheless have a disproportionately negative impact on members of a certain protected class.¹⁰ In many instances, disparate impact cases are proven using statistical evidence.

DISPARATE TREATMENT CLAIMS

Disparate treatment claims — which are far more common than their disparate impact counterparts — involved the “intentional discrimination against one or more persons on prohibited grounds.”¹¹ Since California and federal discrimination laws are so similar, California courts have adopted the three-part McDonnell Douglas test for analyzing discrimination cases based on disparate treatment.¹² Importantly, this same test is employed by California courts when assessing claims of employer retaliation.¹³

The McDonnell Douglas Test

THE THREE STEPS FOR PROVING EMPLOYER DISCRIMINATION OR RETALIATION

STEP ONE:

The employee must present evidence that creates the presumption of unlawful discrimination or employer retaliation. This step, which is legally known as “establishing a prima facie case,” is typically achieved by satisfying one of the following two tests:



EMPLOYER DISCRIMINATION

- ✓ The employee was a member of a protected class.
- ✓ The employee was competently performing his or her job before the reorganization.
- ✓ The employee suffered an adverse employment action; i.e., he or she was terminated during the reorganization.
- ✓ Circumstance or evidence exists that suggest the employee’s termination was motivated by discriminatory reasons. ¹⁴

EMPLOYER RETALIATION

- ✓ The employee was engaged in a protected activity, such as filing a discrimination complaint or reporting other illegal workplace activities.
- ✓ The employer subjected the employee to an adverse employment action; i.e., he or she was terminated during the reorganization.
- ✓ A causal link exists between the protected activity and the employer’s decision to fire the employee. ¹⁵

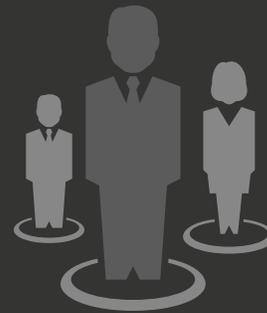
STEP TWO:

Once the employee establishes a prima facie case, the employer is given the chance to offer legitimate, nondiscriminatory/non-retaliatory reasons for firing the employee during the company reorganization.¹⁶



STEP THREE:

If the employer produces seemingly legitimate reasons for the employee's firing, the employee is given another opportunity to attack these reasons and show that they are, in fact, pretextual — meaning that the real reasons for the termination were actually discriminatory or retaliatory in nature.¹⁷



QUESTIONS YOU NEED TO ASK YOURSELF IF YOU THINK YOU ARE THE VICTIM OF DISCRIMINATION

What was the selection process for who was eliminated during the reorganization?



Was this process truly objective, or was an employer's bias reflected in the final decisions?

If the process was seemingly objective, were the criteria actually applied equally to everyone?



Did your employer keep less-qualified, non-protected employees, even though you were fired?

Did your manager or supervisor make discriminatory/derogatory comments about you specifically or your protected class before you were let go?



Did you make a complaint to human resources or management about illegal conduct during the months leading up to the reorganization?

Were you treated differently in any way from other employees?



ENFORCING YOUR RIGHTS — AND GETTING THE DAMAGES YOU DESERVE

Under both federal and California law, you may be entitled to significant compensation if you are the victim of employer retaliation or discrimination during a reorganization, including damages to cover your lost wages, emotional distress and attorney fees. In some cases, you may even be able to recover punitive damages, which are designed to punish and deter your employer for his or her illegal actions.

It is important to keep in mind, however, that California’s FEHA is typically more favorable to employees than most federal laws such as the ADEA, ADA and Title VII of the Civil Rights Act of 1964. In fact, not only does FEHA not cap or limit your damages, but the legal burdens required to prove your case are often less restrictive than those imposed under federal law.¹⁸

HOW MUCH DO JURIES AWARD IN DISCRIMINATION CASES?*

Five Recent Multimillion-Dollar Verdicts Obtained By Victims Of Workplace Discrimination/Retaliation In California:

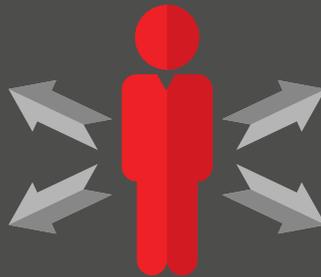
\$185,872,720	\$8,516,000	\$7,396,432	\$7,137,391	\$26,107,328
verdict in a gender/pregnancy discrimination case ¹⁹	verdict in an age/gender discrimination case ²⁰	verdict in a gender discrimination case ²¹	verdict in an age/disability discrimination case ²²	verdict in an age discrimination case ²³

**The verdicts listed above are for illustrative purposes only, and therefore are not a guarantee or representation of what your case may actually be worth. Also, these are jury verdict amounts only, and do not reflect any changes/modifications to the actual awards due to subsequent appeals, negotiations, hearings, motions, etc.*

WHAT IF MY BOSS OFFERS ME A SEVERANCE PACKAGE?

You just found out you are being laid off due to a reduction in force, and to make matters worse your company offers you a lowball severance package — much lower than you actually deserve.

Despite the fact that you believe you are being fired for discriminatory reasons, you consider accepting this inadequate severance package. After all, you have bills to pay, and every little bit helps. But, before you do, you need to consider what you may be giving up.



The sad reality is that many severance packages will only offer you chump change in exchange for giving up a wide range of rights under California and federal law, including your right to bring claims for workplace discrimination, among others.

Unfortunately, though, your employer knows you may need the money since you no longer have a job — meaning your employer is essentially extorting you to release your potential legal claims. This despicable practice is quite common in many industries in California, including the banking and entertainment industries.

While you may feel like you have no choice, you must remember that your employer's illegal discrimination or retaliation is not excused simply because he or she offers you a severance package.

You do have legal options available, which is why it is always a good idea to speak with an experienced attorney to learn more about your rights and how to protect them before you accept a severance package.

TIME MAY BE LIMITED — YOU NEED TO ACT NOW

Depending on whether your claim involves federal or California law, there may be specific time limits for filing your claims, meaning you should take action as soon as possible, or risk not being able to bring your claim at all.

Your livelihood should never be put at risk simply because your employer decides to use a company reorganization or reduction in force as a cover for discrimination.

Fight back and get the justice — and compensation — you deserve.

¹ Cal. Gov't Code § 12940, et seq.

² Cal. Lab. Code § 1102.5

³ 29 U.S.C.A. § 621, et seq.

⁴ 42 U.S.C.A. § 2000e, et seq.

⁵ 42 U.S.C.A. § 12101, et seq.

⁶ *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 358 (2000).

⁷ 42 U.S.C.A. § 12112, 29 U.S.C.A. § 623, 42 U.S.C.A. § 2000e-2.

⁸ Cal. Gov't Code § 12940(a).

⁹ Cal. Lab. Code § 1102.5, Cal. Lab. Code § 6310, Cal. Health & Safety Code § 1278.5

¹⁰ *Guz*, 24 Cal. 4th 317, fn. 20.

¹¹ *Id.*

¹² *Id.* at 354.

¹³ *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1042 (2005).

¹⁴ *Guz*, 24 Cal. 4th at 354.

¹⁵ *Yanowitz*, 36 Cal.4th at 1042.

¹⁶ *Guz*, 24 Cal. 4th at 355–56.

¹⁷ *Id.* at 356,

¹⁸ Cal. Gov't Code § 12940, et seq.

¹⁹ *JUAREZ v. AUTOZONE STORES INC.*, JVR No. 1412040011 (Nov. 17, 2014) (available at 2014 WL 7017660).

²⁰ *TORRES v. B.E. AEROSPACE INC.*, JVR No. 1606300035 (Jun. 2, 2016) (available at 2016 WL 3552983).

²¹ *JAFABODDEN v. CHOUDHURY; BIKRAM'S YOGA COLLEGE OF INDIA L.P.; BIKRAM INC.; BIKRAM CHOUDHURY YOGA INC.*, JVR No. 1602260049 (Jan. 26, 2016) (available at 2016 WL 795831).

²² *SIMERS v. LOS ANGELES TIMES COMMUNICATIONS L.L.C.*, JVR No. 1511060032 (Nov. 4, 2016) (available at 2015 WL 6780849).

²³ *NICKEL v. STAPLES CONTRACT & COMMERCIAL INC.; STAPLES INC.*, JVR No. 1409050049 (Feb. 26, 2014) (available at 2014 WL 4658322).

ABOUT ATTORNEY MICHAEL J. BONONI

As one of the leading employment law attorneys in Southern California — not to mention the founding partner of the Bononi Law Group, LLP — I, attorney Michael J. Bononi, have dedicated my practice to helping clients navigate a wide range of complex employment law issues. With clients ranging from individual employees to Fortune 50 companies, I have handled it all, including claims involving whistleblowing, wrongful termination as well as workplace discrimination claims based on age, race, sexual orientation, gender, sex, national origin, pregnancy and disability.



Not only do I have nearly 30 years of legal experience, but I have also been selected for inclusion in the *California Super Lawyers* list every year for the past 13 years, from 2005 to 2017. Only 5 percent of lawyers in the state are selected for this list each year.

While I spent several years at the multinational law firm of Latham & Watkins after graduating magna cum laude and receiving my law degree from Cornell University, in 1994 I decided to start my own law firm: the Bononi Law Group, LLP. I am also a current and former member of multiple trade organizations, including the Los Angeles County Bar Association and the American Business Trial Lawyers Association.

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