

Beyond the Smoking Gun: Settling Subtle Retaliation Claims

By Daniel Ben-Zvi, Esq.

Retaliation claims under FEHA can present some of the most nuanced disputes in the workplace. Retaliation occurs when an employer takes adverse action against an employee for engaging in a protected activity — such as reporting discrimination, requesting an accommodation, or participating in an investigation. While some retaliatory acts are obvious, such as termination or demotion, others are far more subtle.

Employees frequently describe shifts in treatment after speaking up: a suddenly critical performance review after years of strong ratings, unexpected schedule changes that disrupt family life, or heightened micromanagement that feels punitive rather than constructive. Each of these actions may appear minor in isolation, but when viewed through the lens of workplace dynamics, they may signal underlying retaliation.

The challenge under FEHA is that proving a legal violation requires establishing both that the action was materially adverse and that it was caused by the protected activity. This causal link can be difficult to demonstrate when employers provide legitimate, performance-based explanations.

This is where mediation plays a critical role. Unlike litigation, mediation does not require rigid proof to move forward. Instead, it creates a confidential space for employees to express how the

changes have affected them and for employers to reflect on the broader impact of their actions, intentional or not. Through facilitated dialogue, parties can negotiate settlements that address the emotional and professional harm perceived by the employee while allowing the employer to be heard and resolve the dispute without prolonged conflict.

In this way, mediation acknowledges gray areas of subtle retaliation. Even when the “smoking gun” of causation is elusive, the process restores communication and often leads to resolutions that support dignity, fairness, and closure for all involved.

Daniel Ben-Zvi, Esq. has 20 years of experience as a multi-state trial lawyer which instilled him with persistence and creativity to resolve complex disputes. Mr. Ben-Zvi's extensive experience in employment, civil rights, business, personal injury and real estate matters, among others, makes him a prime choice for all cases.