workplace justice lab

RUTGERS–NEW BRUNSWICK School of Management and Labor Relations

Northwestern

Investigating Immigration-Related Retaliation: Best Practices for State and Local Labor Standards Enforcement Agencies

By Melanie Stratton Lopez

The incoming Trump administration's threats of mass deportations, workplace raids, and revocation of birthright citizenship will create a climate of fear that will impact workers and worker protection agencies' ability to enforce labor and employment laws. Some scofflaw employers will exploit that fear and attempt to silence immigrant workers through retaliation, including by weaponizing workers' immigration statuses. Therefore, state and local labor enforcement agencies must address immigration-based retaliation head-on. This brief outlines how immigration-based threats fit into the legal framework of retaliation, as well as steps state and local labor enforcement agencies can take to vigorously enforce their anti-retaliation provisions.

1. RETALIATION: THE LEGAL FRAMEWORK

A. The Prima Facie Case.[1]

Generally, workplace retaliation occurs when an employer, through a manager, supervisor, administrator, or other agent, takes any type of adverse action against an employee because they engaged in a protected activity. The basic elements of a legal claim of unlawful retaliation are: (1) the employee engaged in protected activity; (2) the employee suffered an adverse action; and (3) there was a causal connection, or "nexus," between the protected activity and the adverse action.

a. Protected Activity

The scope of protected activity is determined by the language of the statute's anti-retaliation provisions at issue. Generally, protected activity involves a worker inquiring or complaining about, or taking other action regarding, their legal rights (such as their right to minimum wage or overtime, sick leave, a safe workplace, or to be

[1] Prima facie is a Latin term that means "at first sight" or "based on first impression." A prima facie case exists when there is enough initial evidence to suggest the legal elements are met, while a full investigation is still needed to obtain and assess all relevant evidence.

treated without discrimination based on race or sex), as well as cooperating with a labor agency's enforcement activity regarding the employer. Examples of protected activity, depending on the scope of the statute or ordinance at issue, may include:

- Making a complaint to a manager, employer, or the labor enforcement agency, about the employee's rights, or another employee's rights under the law;
- Taking any action to initiate a labor agency investigation;
- Participating or assisting in a labor agency investigation;
- Requesting payment of wages;
- Refusing to return back wages to the employer;
- Exercising rights or attempting to exercise rights, such as requesting certain types of leave;
- Informing another person about their rights;
- Filing a lawsuit against the employer.

b. Adverse Action

> "Sick days are for people with papers. Undocumented people don't get sick days."[2]

Generally speaking, an adverse action is one which would dissuade a reasonable person from engaging in protected activity. It includes harming or penalizing, or threatening to harm or penalize, an employee because that employee has exercised rights under the law. Because an adverse action can be subtle, such as excluding employees from important meetings, it may not always be easy to recognize. Immigration-based adverse actions against an employee may include requiring re-verification of work status, making explicit threats of deportation, or initiating other action with immigration or police authorities.[3]

[2]Mar Martinez, and organizer with the Garment Worker Center Los Angeles reported that an employer made this statement to a worker when the worker requested sick leave. See https://bettzedek.org/los-angeles-times-reports-immigration-related-retaliation-on-the-rise-for-los-angeles-low-wage-workers-seeking-fare-wages-and-workplace-rights/.

[3] Other forms of adverse actions that are not directly linked to immigration status may include: Firing, laying off, or demoting; failing to rehire after a seasonal interruption of work; denying overtime, promotion, or benefits; disciplining; intimidation, threats, or harassment of the employee or their family; reassignment, or threat of reassignment, to a less desirable assignment, position, shift, or location; and/or reducing or changing pay or hours.

Because immigrant workers may not have work authorization, unscrupulous employers may exploit that vulnerability by, for example, coercing workers into working for below minimum wage or the previously agreed upon wage. This, in and of itself, is not an adverse action. However, where an employer takes an immigration-related action against an employee, then that could be an adverse action. For example, an adverse action could be threatening to call the police, immigration authorities, or the government unless an employee works additional hours without overtime pay

"Let me share something with you, not only am I [an ex]-sheriff, my family are all in the police department . . . You want to come to my job & create a issue, I will handcuff you take you into custody & wait for I.C.E to come take you in for felony threats."[4]

c. Nexus

Unlawful retaliation requires a causal connection between the adverse action and the individual's protected activity. As a threshold matter, the employer must have actual or inferred knowledge, meaning the employer could reasonably deduce that the worker engaged in protected activity. The degree of causal connection needed to prove an unlawful retaliation will vary, depending on the language of the anti-retaliation provision in the statute being enforced, and the views of the courts interpreting that language.

Generally, the causal link required to be shown will be one of the following:

"But for" causation (the toughest standard)	Must show "by the preponderance of the evidence" or it's "more likely than not" that the complainant would not have been subject to the adverse action but for or because of a retaliatory motive.
"Motivating factor" causation (the intermediate standard)	Must show that the protected activity was a motivating factor or a substantial factor in the adverse action
"Contributing factor" causation (the least onerous standard)	Must show that the employee's protected activity "contributed in any way" to the adverse action. There is no requirement

[4]See Los Angeles Times, *Immigration-Related Retaliation on the Rise for Los Angeles Low-Wage Workers Seeking Fair Wages and Workplace Rights*, Bet Tzedek (Jan. 7, 2025), https://bettzedek.org/los-angeles-times-reports-immigration-related-retaliation-on-the-rise-for-los-angeles-low-wage-workers-seeking-fare-wages-and-workplace-rights/.

	that it be the sole or even predominant cause of the adverse action.

Some anti-retaliation statutes provide that if the adverse action happened within 90 days of the protected activity, a presumption of retaliation arises. Under these statutes, close proximity in time creates a presumption of a causal connection, which then shifts the burden to the employer to prove by "clear and convincing evidence" ("far more likely to be true than false") that the employer's adverse action was taken for a legitimate, non-retaliatory reason. These presumption of retaliation provisions provide the strongest protections for workers.

B. Burden-Shifting Analysis

Generally, claims of retaliation include a burden-shifting analysis associated with the law's causation standard. For investigators who are new to retaliation investigations, applying this analysis in real-world cases can be challenging. Below we provide an overview of the burden shifting standards to help investigators understand these frameworks and discuss with their managers and agency attorneys how to apply the relevant standard in their cases.

- But-for causation is the most restrictive standard and is associated with the burden-shifting scheme from *McDonnell Douglas*.[5] For example, the anti-retaliation provision of the Fair Labor Standards Act is examined under the three-part burden-shifting analysis articulated in *McDonnell Douglas*. If a prima facie case is presented, then ***the burden shifts to the employer*** to state legitimate, non-discriminatory reasons for the adverse employment action. If the employer presents such reasons, ***then the burden shifts to the worker*** to establish that the stated reasons are pretextual. Some states and localities follow this framework.

- A motivating factor is a substantial factor in causing an adverse action. If the complainant shows that the protected activity was a motivating factor in the adverse action, the ***burden shifts to the employer.*** Generally, if the employer proves by a preponderance of the evidence ("more likely than not") that it would have taken the same action in the absence of the protected activity, the claim for unlawful retaliation fails.

[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

- Under the contributing factor standard, the plaintiff need only demonstrate that their protected activity contributed in any way to the adverse action, with no requirement that it be the sole or even predominant cause of the adverse action. Under this test, once the plaintiff has established that the protected activity contributed to the adverse action, ***the burden again shifts to the employer/defendant.*** It can escape liability only if it can provide clear and convincing evidence ("far more likely to be true than false") that it would have taken the same action absent the protected activity. The clear and convincing evidence standard requires that, based on the evidence gathered in the investigation, it is highly probable or reasonably certain that the employer would have taken the same action if the protected activity had not occurred.

C. Legitimate Non-Discriminatory Reason

State and local enforcement agencies must determine what an employer's stated reason was for taking the action it did against an employee. Legitimate, non-discriminatory reasons for employment actions may include violations of company policy, excessive lateness, unacceptable job performance, failure to follow directions and mismanagement. Legitimate, non-discriminatory reasons must be analyzed and assessed in the investigatory phase because state and local agencies would not want to learn that an employer had a legitimate reason for its actions after litigation has commented. **In the context of immigration-based retaliation, an employer may claim that it fired an employee in order to comply with federal immigration laws or in response to an I-9 audit. These kinds of claims should be carefully vetted.** The employer may also argue that the employee's immigration status had nothing to do with their actions and they fired them for some performance-based reason. It is imperative that the agency ascertain the reason for the employer's actions and then analyze whether those actions are pretextual.

D. Pretext

Because employers will argue that they had a legitimate reason for their action, the investigation must test the credibility of the stated reason by determining whether the provided reason was "pretextual." This means the investigator must determine whether "a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence."[6]

Facts indicating a pretextual reason may include:

[6] *Rea v. Martin Marietta Corp.*, 29 F.3d 1450 (10th Cir. 1994).

- An employer's shifting explanations for its actions; for example, one reason given to the employee, another to the labor agency;

  For example, the employer told the employee that they needed to stop complaining and get back to work but then told the labor agency that the employee was fired for poor performance.

- Closeness in time between the protected activity and the adverse action; (but note that while closeness in time may be evidence of retaliation, it is not required for there to be a finding of retaliation);

  For example, did the employer make immigration threats before or after the employee engaged in a protected activity (e.g. complained about wages)?

- Inconsistent application of an employer's policies against the employee compared with others who are similarly situated and who didn't engage in protected activity;

  Did the employer follow its own progressive discipline policies? Did the employer treat another worker, who was not undocumented, more favorably (e.g. excused a U.S. citizen worker's repeated tardies but applied harsher discipline to the undocumented worker)?

- A change in the employer's behavior toward the employee after they engaged, or were suspected of engaging, in protected activity; and

  Was the worker subject to discipline before or after they engaged in a protected activity?

- Other demonstrations of hostility toward protected activity generally, or this protected activity specifically

  For example, racial slurs or anti-immigrant animus.

In the case of immigration-based retaliation, there may be lawful and unlawful reasons for the adverse employment action. This is called a "mixed motive" case. In these situations, if your state or local law follows a but-for causation standard, the burden of persuasion would likely shift to the employer to demonstrate that the challenged action would have been taken even in the absence of the unlawful motivation.[7]

[7] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Retaliation Investigation Exercise

This hypothetical provides a factual setup for examining how immigration-related retaliation may fit within the retaliation frameworks under the laws you enforce. Review the facts below and then apply the facts to the questions below. Include your answers in the worksheet found in Appendix A.[8]

An employee calls out of work (for a reason not covered by any paid leave law) but does not follow the company policy of calling out with at least 24 hours' notice. A week later, the same employee lodges a complaint with HR stating that the company is not complying with the minimum wage law you enforce and she is owed back pay.

The next day the employee is late to work. The employee's manager speaks to her after her shift and gives her a verbal warning for calling out and being late. The manager continues, saying that he knows that she needs this job and it would be a shame if HR needed to look more closely at her I-9 paperwork. The manager ends the conversation by telling the employee to stop complaining about her paycheck and to follow company policies. The manager places a note in the employee's file noting that he gave her a verbal warning for being late and not following the company's call-out policy.

A week later, the employee is late for a second time and the company fires her. The company's policy is to fire an employee after three unexcused tardies.

- *What is the protected activity?*
- *What is the adverse action? Is it the manager's immigration threat or the company firing the employee?*
- *What is the causation standard of your state or local law? Does your law include a rebuttable presumption of retaliation? Based on your jurisdiction's causation standard and/or rebuttable presumption, are you able to make out a prima facie case?*
- *If you are able to make out a prima facie case, does the burden shift to the employer to articulate a legitimate non-discriminatory reason for its actions? Based on the facts, what do you think those reasons would be?*
- *If the employer can articulate a legitimate non-retaliatory reason based on the facts, what happens next? What evidence would you be able to put forth arguing that the employer's reasons are pretextual?*

[8] Model answers follow based on your jurisdiction's causation standard in Appendices B, C, D, and E.

2. INVESTIGATIVE TIPS AND STRATEGIES FOR RETALIATION CASES

A. Prioritize Retaliation Cases

State and local agencies should act quickly when they learn of immigration-based retaliation, including by giving high priority to complaints of immigration-based retaliation. Some employers may attempt to weaponize an employee's immigration status as a way to keep illegal business practices from coming to light. Such behavior is illegal and in some cases may irrevocably harm workers and their families, and state and local labor enforcement agencies should use all their tools to stop employers from making immigration-based threats or actions.

B. Investigation Best Practices

For a complete overview of best practices for conducting a retaliation investigation, please Workplace Justice Lab's Labor Standards Enforcement Toolbox resource, specifically, Tool 11: The Nuts and Bolts of a Retaliation Investigation: Part I and Part II.[9]

a. Issue Cease and Desist Letters to Obtain Voluntary Compliance

Whenever possible, it is better to prevent immigration-related retaliation than to try to rectify it after the fact. State and local enforcement agencies should make use of cease and desist letters where there is early evidence of retaliation, including workers expressing specific fears of retaliation. The cease and desist process can lay the foundation for injunctive relief and can also serve to stop a retaliatory employer in their tracks before their actions escalate. Additionally, where a state or local enforcement agency suspects that an employer may engage in immigration-based retaliation during an open investigation, investigators should counsel the employer, or their attorney, about your jurisdiction's applicable anti-retaliation provisions. Such counseling should be memorialized in writing and included in the investigation file. If the agency later needs to seek injunctive relief, written evidence of conversations about your jurisdiction's anti-retaliation provisions will likely be helpful in seeking injunctive relief or a temporary restraining order.

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[9] *See Workplace Justice Lab, Retaliation: Nuts and Bolts, Workplace Justice Lab Toolbox, https://smlr.rutgers.edu/sites/default/files/Documents/Centers/WJL/Toolbox_Tool11_Retaliation_Nuts_and_Bolts.pdf.*

Additionally, a Cease and Desist letter can also be used to secure early compliance. For example, an agency may agree to close its anti-retaliation investigation in exchange for certain actions, including:

- Agreement to stop and remedy the retaliatory behavior;
- Reading of know-your-rights statements in all applicable languages;
- The provision of written know-your-rights information and the names and phone numbers of local legal services organizations, as well as the contact information for your labor enforcement agency;
- Withdraw retaliatory lawsuits, if any; and
- Other relief you would seek in a temporary restraining order.

b. Work with Your Attorneys to Explore Seeking Early Injunctive Relief to Protect Investigations and Other Workers.

While it is imperative to remedy retaliation for the aggrieved persons, such remedies come at the conclusion of the investigation. In the meantime, those who suffered retaliation still bear the consequences. Additionally, the chilling effect of ongoing retaliation during an investigation can limit worker cooperation such that investigators cannot establish the true extent or nature of the violations. Depending on your law and the facts of the case, you may be able to immediately intervene and obtain a temporary or preliminary injunction to halt retaliatory behavior like threats to call immigration authorities or requiring an employer to read an affirmative statement of rights to employees, for example. to Such injunctions mitigate the impact of retaliation, preserve the integrity of the investigation, and help to maintain the status quo pending a final judgment.

Questions:

- **Do your laws give you the authority to obtain temporary or preliminary injunctions?**
- **Do you have a process or protocol for working with your attorneys to do so?**
- **Is your intake process for retaliation investigation responsive and efficient so as to address retaliation in a timely manner?**

c. Seek Broad Relief

State and local agencies should analyze their statutes to determine the scope of the type of relief and damages the agency can seek. Many anti-retaliation statutes provide for injunctive relief and other equitable relief, including reinstatement, back pay, and

reasonable attorney fees. However, in a case called *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, the Supreme Court held that a worker who is undocumented could not recover the remedy of back pay under the National Labor Relations Act (NLRA).[10] This means that for undocumented workers, state and local agencies may not be able to require back pay or reinstatement. Because state and local agencies may have fewer avenues of relief for undocumented victims of retaliation, it is important for agencies to always consider additional forms of make-whole relief, including:

- Employer sponsorship of work authorizations;
- Ordering payment by an employer of backpay equivalent to what it would have owed an undocumented worker who suffered retaliation and that such backpay could be paid into a fund, which could be used for various purposes including making other workers whole in cases where the agency is unable to collect back pay from violating employers;
- Notice readings and publication of the notice in newspapers and/or other forums,
- Training for employees on their rights under the relevant law;
- Training for supervisors and managers on compliance with relevant laws/regulations;
- Provide union or worker center access to employee contact information;
- Consequential damages;
- Instatement of qualified referred candidates, and "[a]ny other remedies that may be appropriate in a particular case; and/or
- Other remedies that would prevent an employer from being unjustly enriched by its unlawful treatment of undocumented workers.

d. Maximize Deterrence By Fully Leveraging Penalties

Analyze your jurisdiction's laws and regulations to determine how to maximize penalties for retaliation. For example, are punitive damages available? If so, does your law require a heightened level of knowledge? Are you, considering any additional legal thresholds when conducting your investigation? Other damages you may also consider depending on your law include:

- Consequential Damages

[10] For a discussion on the impact of *Hoffman Plastics*, *see* Amy Sugimori, Rebecca Smith, Ana Avendaño and Marielena Hincapié, *Assessing the Impact of the Supreme Court's Decision in Hoffman Plastic Compounds v. NLRB on Immigrant Workers and Recent Developments*, Nat'l Immigr. L. Ctr. & Nat'l Emp. L. Project, https://www.nilc.org/wp-content/uploads/2016/04/Hoffman_NELP_NILC_FINAL.pdf (last visited Dec. 6, 2024).

- Emotional Distress[11]
- Civil Money Penalties

e. Issue Press Releases

The cost of non-compliance should be a known deterrent to employers. With that in mind, state and local agencies should publicize actions against employers that threaten and retaliate against immigrant workers in violation of state and local law.

f. Make Referrals

Often, retaliation is a symptom of a workplace with additional labor and employment violations. While enforcement of workplace laws can be distributed across various enforcement agencies, workers experience compounding and intersecting violations. For example, while you may be tasked with solely investigating a retaliation claim, workers may be experiencing retaliation and wage theft. Therefore, investigators should be prepared to make appropriate referrals when they discover evidence of workplace violations even if it is outside their investigative authority.

For example, if you are a local municipal enforcement agency enforcing a local sick and safe regulation and discover that workers are being misclassified as 1099 employees and being paid straight time, then you could consider making a referral to the state wage and hour enforcement agency or tax enforcement agency. Similarly, if you are a state enforcement agency enforcing wage and hour violations of a group of agricultural workers and learn that several employees have passed out due to heat illness, you may consider making a referral to the Occupational Safety and Health Administration (OSHA) or the state plan equivalent depending on your state's safety and health enforcement scheme.

g. Partner with your Agency's Attorneys

Retaliation investigations are complex investigations. Immigration-based retaliation is an added layer of complexity to these cases. Therefore, agencies should work closely with their attorneys and solicitors "early and often" *throughout the administrative investigation.* The benefits are twofold. First, agency attorneys can provide advice and counsel *before* the case is ever litigated resulting in powerful settlements without the expense of litigation. Second, where settlement is not possible or strategic, early legal intervention allows agency attorneys to work with agencies to build powerful cases that

[11] If you plan to allege emotional distress, consider asking whether the employee has medical evidence supporting any claims of emotional distress. Emotional distress damages can be difficult to litigate and emotionally difficult for claimants.

are primed for impact litigation and sectoral change. Agency attorneys can work hand-in-glove with investigators to evaluate novel legal theories, including the prima facie retaliation case, an employer's non-discriminatory reason, and the strength of an agency's pretext evidence, if applicable. Moreover, attorneys can ensure the agency is fully leveraging its investigatory authority, and go to court to enforce warrants and subpoenas, evaluate final agency actions, like drafting citations or final orders, and support or participate in settlement negotiations.

If asked to certify a T Visa after immigration-based retaliation, consider whether the employer engaged in abuse of legal process.

Where an employer retaliates against an employee and the adverse action involves the employee's immigration status, state, and local enforcement agencies can consider certifying an I-914 T visa certification request under a theory of abuse of process. A severe form of trafficking is when a "trafficker engaged in a prohibited action by means of force, fraud, or coercion." Coercion can "include abuse or threatened abuse of the legal process, which means the use or threatened use of a law or legal process, including threats to call authorities to arrest or deport a worker." Additionally, states and local enforcement agencies may also consider recertifying a certification request as a matter of course, if a worker seeks recertification after six months. There may be additional avenues for certifying a T Visa, but abuse of legal process should be analyzed in cases of immigration-based retaliation.

There are some limited forms of immigration relief that state and local agencies can explore, including U/T Visas, S visas, and parole.

Appendix A: Retaliation Worksheet

Protected Activity?	
Adverse Action?	
Causation Standard?	
Prima Facie Case?	
Legitimate Non-Discriminatory reason?	
Pretext?	

Appendix B: But For Causation

Protected Activity	Making complaint about wages
Adverse Action	Employee is fired
Causation Standard	**But For:** The employee must show "by the preponderance of the evidence" or its "more likely than not" that she would not have been fired absent (or but for) a retaliatory motive. Here, the retaliatory motive is shown by the manager's immigration threats after the employee complained about her wages. Nonetheless, this causation standard will be difficult for an enforcement agency to meet because of the employee's disciplinary history. The agency will have a difficult time proving it is more likely than not that the employee would not have been fired absent a retaliatory motive.
Prima Facie Case?	*Prima Facie Burden is not likely met and the case fails.*
Legitimate Non-Discriminatory reason	*Nonetheless, arguing that the prima facie case can be met, what is the employer's LNR?* Company fired her because she was late to work two times and did not follow the company's call-out policy and they would have fired her even if she had not complained about her wages.
Pretext	What is the argument for pretext? Comments about I-9 and not complaining about paycheck, and not following internal policy. *This is a close case with significant litigation.* What other facts would make it a stronger case? For example, is there comparator evidence about an employee who complained about their wages and violated company policies and was *not terminated?* *In this situation, the comparator should have work authorization. As such, investigators should work closely with their managers and legal counsel if this situation arises.*

Appendix C: Motivating Factor Causation

Protected Activity	Making complaint about wages
Adverse Action	Employee is fired
Causation Standard	**Motivating Factor** To meet this burden, the agency must show that the employee complaining about her wages was a **motivating factor** in her firing. The temporal proximity between her complaint and her firing (about a week) supports this theory. The manager's statements that he knows that “she needs this job and it would be a shame if HR needed to look more closely at her I-9 paperwork,” and to “stop complaining about her paycheck,” are indicia of animus.
Prima Facie Case?	Prima Facie case is met
Legitimate Non-Discriminatory reason	The burden would then shift to the employer to show that it was “more likely than not” that it would have fired the employee, even if she had not complained about her wages because she was late to work two times and did not follow the company’s call-out policy.
Pretext	What is the argument for pretext? The investigating agency would argue that the employee’s disciplinary record was put forward to hide the employer’s true motive of firing the employee for complaining about her wages. The agency can cite to: 1) temporal proximity between complaint and firing; 2) the manger’s I-9 threats and comment to stop complaining about paycheck; and 3) the company failed to follow its own policies and fired her after two absences instead of three. *This is a closer case with significant litigation risk.* What other facts would make it a stronger case? For example, is there comparator evidence about an employee who complained about their wages and violated company policies and was *not terminated?* *In this situation, the comparator should have work authorization. As such, investigators should work closely with their managers and legal counsel if this situation arises.*

Appendix D: Contributing Factor Causation

Protected Activity	Making complaint about wages
Adverse Action	Employee is fired
Causation Standard	**Contributing Factor** Agency must only show that the employee's protected activity "contributed in any way to the adverse action. There is no requirement that it be the sole or even predominant cause of the adverse action.
Prima Facie Case?	Prima Facie case is met
Legitimate Non-Discriminatory reason	Burden shifts to the employer. It can escape liability only if it can provide clear and convincing evidence ("far more likely to be true than false") that it would have fired the employee even if she had not complained about her wages.[12] It would be difficult for an employer to meet this standard here due to the manager's statements and the company's failure to follow its own internal policies. *Likely that that agency would prevail under this framework.*
Pretext	N/A under this framework.

[12] The clear and convincing evidence standard requires that, based on the evidence gathered in the investigation, it is highly probable or reasonably certain that the employer would have taken the same action if the protected activity had not occurred.

Appendix E: Rebuttable Presumption Analysis

Protected Activity	Making complaint about wages
Adverse Action	Employee is fired
Retaliation	Retaliation is presumed if, for example, the adverse action happened within a certain number of days as prescribed by the statute. Thus, there is no causation element.
Legitimate Non-Discriminatory reason	Employer can escape liability only if it can provide clear and convincing evidence ("far more likely to be true than false") that it would have fired the employee even if she had not complained about her wages.[13] It would be difficult for an employer to meet this standard here due to the manager's statements and the company's failure to follow its own internal policies. *Likely that that agency would prevail under this framework.*

[13] The clear and convincing evidence standard requires that, based on the evidence gathered in the investigation, it is highly probable or reasonably certain that the employer would have taken the same action if the protected activity had not occurred.