LESSONS LEARNED FROM *YANG v.* [redacted]

By V. James DeSimone

They say you learn more from your losses and I unfortunately know that can be true, but when justice strikes in a Courtroom like it did in the recent *Yang v.* [redacted] case, the learning experience can be just as valuable. The jury's award of $7.394 million, including $5 million in punitive damages, was a resounding blow to a corporation's deliberate indifference to its employees' right to a safe workplace.

This was a case I almost persuaded my client to settle modestly early on, but it became clear he was too greatly harmed to do so. One lesson learned is not to take selective offerings of evidence pre-litigation to dissuade you from filing a lawsuit if you have a case which has merit. After sending a Labor Workforce Development Agency letter, [redacted]'s attorney sent me a response including a couple of emails showing its Human Resources Manager believed the Federal Aviation Administration (FAA) was requesting our client be removed from the government contract taking the termination decision out of its hands. Faced with this evidence, I wondered if we had a winnable case.

Our gut instinct was that it was wrong to fire an employee who is the victim of threats and violence especially where, as here, my client said he did nothing to fight back. He loved his job so much he said he would rather have been beaten up than lose his job. But if the FAA forced the Defendant's hand, how could we prove that the termination was in violation of public policy?

Then, it finally dawned on me! We could use Civil Code Sections 52.1 and 43 to hold [redacted] accountable for the acts of its assailant employee made in the course and scope of his employment. Since this dispute arose out of a complaint against my client for the noise he made while at his desk and over who was going to have to move cubicles, the assault was in the course and scope of employment based on a whole line of California cases.

In the ruling on the Motion to Dismiss, we enjoyed the serendipitous moment when the judge cited to our published decision in *Xue Lu v. United States of America* stating, "During the hearing, the parties discussed whether Plaintiff's habits of chewing ice and placing soda cans in the freezer were actually work-related habits and whether the instant case was analogous to *Xue Lu v. Powell,* 621 F.3d 944 (9th Cir. 2010). ... While Xue Lu encompasses factual distinctions, the Court believes that its holding is applicable to the instant action. .... Comparing *Xue Lu* to this matter, [redacted]'s liability can hinge on Mr. Tymony's assault because his wrongful conduct was in connection with Plaintiff's habits at work, i.e. within the scope of employment. ... As such, "California law makes [[redacted]] bear the costs of [Mr. Tymony's] conduct, unauthorized but incidental to the [information technology workplace]." Id. at 950." The trial court replaced the defendant United States in *Xue Lu* with defendant [redacted] in our case!

Defendants also persuaded the judge that ratification needed to be shown based on the Labor Code Section 3602(b). However, [redacted] never investigated the incident and then fired the Mr. Yang while acknowledging in an email that it sounded like he was a "complete victim." We argued the termination of Yang ratified the wrongful conduct of Tymony. (See, e.g., *Fisher v. San Pedro Hospital* (1989) 14 Cal. App. 3d 590, 621, rev. den. (1990).)

Discovering Our Story

It has also been said that a case will never look as good as the first day your client walks into your office. But that is not always true. Pursuing and obtaining discovery can often supply the evidence that our clients need to prevail. Here, the Defendants produced an FAA Spot report in which FAA special agents spoke with two eyewitnesses and Yang and Tymony and produced a written report confirming that it was Tymony that threatened to kill Yang, choked him briefly, and then destroyed his cubicle. In fact, Tymony was handcuffed and cited for assault, but those facts were kept out of evidence by Judge Birotte on a motion *in limine* (MIL).

Not only was there an FAA report but there was an email from an employee complaining that a prior outburst by Tymony at a meeting in which he cursed at Yang was not the first time he had seen this type of behavior, and that Yang felt picked on but did not want to complain. The employee concluded the email by requesting a safe work environment. But the supervisor he sent it to was no longer with the company at the time of the assault and had apparently never forwarded the email to HR. The supervisor was not deposed, but the Defense called him to testify he never received this damning email. However, the complaining employee resent the email shortly after the altercation so the decision makers in our case received it while they were considering whether Yang's termination should be rescinded. Yang's co-employee's testimony as the second witness at trial helped set the tone for our case, especially after the first witness established Yang was attacked and merely cursed in response to this crazy situation. Critically, the lack of an investigation was doubly appalling in light of the evidence that there was a history of bullying.

Additionally, our client had written an email the day after the incident where he described what happened and then compared it to lying in bed and having someone stab you in the back. As with the FAA report and prior complaint evidence, the HR Manager just put Yang's letter in the file and failed to investigate. And there was our theme of the case. [redacted] didn't follow its own rules when they terminated Yang. An employer's failure to follow its own procedures raises an inference of unlawful motive. (*Porter v. Cal. Dep't of Corr.*, 383 F.3d 1018, 1026 (9th Cir. 2004) ["We find that this evidence is sufficient for purposes of demonstrating pretext. See *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1220 (10th Cir. 2002) (holding that deviations from an employer's regular procedures established pretext)"].) [redacted]'s policies stated an investigation was mandatory where there was a complaint of harassment or discrimination, but no investigation ever ensued.

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LESSONS
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I get by with a little from my friends

Sometimes in our practices, it is difficult to conduct all the discovery we need. We had a quick Federal discovery cut off and even though I had back to back trials scheduled in January of 2015, Littler refused to continue the discovery deadline so that we could take two remaining depositions. The Human Resources (HR) Manager and the HR Director both resided in Virginia. So I reached out to our NELA colleagues and David Wachtel stepped in to take the depositions. When it was established the HR Director wrote the policies contained in the company handbook and she approved the termination we had what we needed for a punitive damage claim.

Conducting Financial Discovery in Federal Court Punitive Damages

We didn't conduct any financial discovery or get Littler to agree to produce any documents as there is no Notice to Appear at Trial and Produce in Federal Court. So an important practice pointer in Federal Court is to conduct discovery on Defendant's financial condition and affirmatively produce financial documents pertaining to the Defendant in Rule 26 disclosures. We didn't do this and Judge Birotte granted a MIL excluding from evidence financial documents which were in the public domain. Then, he denied our motion to take judicial notice of information on www.usaspending.gov that [redacted] was awarded $397 million in government contracts in FY 2015. When he stated our request was an attempt to do an end run around the MIL ruling, I inquired whether his ruling was to prevent us from introducing any evidence of Defendant's revenue or net worth. He tacitly admitted that wouldn't be fair by ordering us to meet and confer on the issue. Littler agreed to produce a witness but would not identify who that was until the second week of trial.

After trial, Judge Birotte initially indicated I was out of time, and intimated I would not get any time to conduct the punitive damage stage of trial. When I told him all I would need was half an hour to cross examine the Defendant's Controller and then 20 minutes for closing argument, he relented. Defendant's counsel, Rebecca Aragon, shocked me when she said she needed more time because they were going to call the Human Resources Director again.

[redacted]'s failure to produce documents and to have its Controller testify from memory proved to be another undoing on their part as he was all over the board with the numbers and jurors remarked afterwards how unreliable his testimony seemed. I had the documents to anchor my cross-examination and I seemed to know more about their finances then he did. Then [redacted]'s threat to cut salaries and lay off employees backfired as we turned that around to show the jury that they just didn't get it, they were still going to blame and hurt innocent employees because of their own misconduct.

While going through all the factors contained in the CACI punitive damage instruction, I informed the jury that a full and fair punitive damage award on the facts of this case and the law was $5,000,000. The jury, having done all the hard work in the liability and the compensatory damage phase, was out less than half an hour before they came back with the whole cup of justice. My client's faith in rejecting the high six figure offer on the first day of trial and telling me "we are going all the way for the people" had been vindicated.

V. James DeSimone

After twenty-five years as a partner at Schonbrun DeSimone, Jim recently decided to carve out his own path by establishing V. James DeSimone Law, a California law firm located in Marina Del Rey, dedicated to representing individuals in civil rights and employment cases. In 2009, 2010, 2011, 2013. and 2014, he was named as one of California's Top Employment Lawyers by the Daily Journal. In 2013, he was honored as a Top 100 Superlawyer in Southern California. In 2014, DeSimone was named Civil Rights Lawyer of the Year by California Lawyer Magazine.

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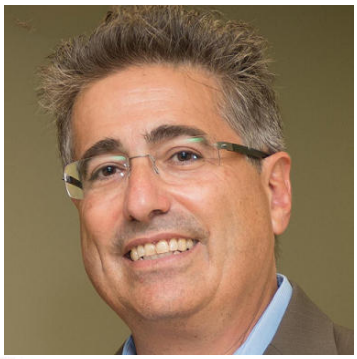

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