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Students take on new role in workplace retaliation cases

Employment clinic puts students to work for labor commish

By Laura Hautala

Six students took on an unusual role at Loyola Law School's new Employment Rights Clinic this past semester, helping the state labor commissioner's office address a backlog of retaliation cases.

One student, Daniel Spencer, works a day job at the Veterans Affairs health care system in Los Angeles, where he deals with labor issues from a management role. In the clinic, however Spencer was assigned to take a neutral view of two workplace retaliation claims.

"It's very easy to have a jaded perspective working on one side the entire time," Spencer said. "And to see employees who have legitimate issues with their employer, it really gives a different perspective."

'The process can be particularly crucial for low-wage workers, who are unlikely to bring claims in court because of the difficulty of finding counsel for low-value claims.' - Kevin Kish

Student Tatiana Toroyan, who has worked mostly as an advocate for employees, agreed. "It was great having to put aside my feelings," she said. "I did struggle with that a lot."

Spencer ended up recommending a settlement in a case in which retaliation seemed clear. In another case, he wrote a determination in favor of the employer, whom Spencer said documented employment decisions well.

Toroyan also facilitated a settlement in her case, and the rest of the students were similarly split in their decisions. The students worked exclusively on retaliation complaints in which employers are accused of taking adverse employment actions against workers who engage in legally protected activity, such as political protest or complaining about workplace safety violations.

Under California law, workers may file employment-related complaints to the state's Department of Labor Standards Enforcement, which is run by Labor Commissioner Julie Su and enforces California employment law through an administrative process. Typically a deputy labor commissioner will investigate the claim and make a finding.

Workers could sue directly in court, but they often have a hard time finding an attorney because the damages are low, said lawyer Kevin R. Kish, who directs the

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clinic.

Kish typically advocates for workers in his role at Bet Tzedek Legal Services in Los Angeles. But he said neutral investigations from the state agency are a vital service.

"The process can be particularly crucial for low-wage workers, who are unlikely to bring claims in court because of the difficulty of finding counsel for low-value claims," Kish said. "The process should work efficiently and fairly for everyone."

Su approached the law school with the idea for the clinic, in part to begin easing her department's case backlog. In 2011, her office accepted 1,266 retaliation complaints for investigation but had 342 cases left unassigned the end of the year, according to Department of Industrial Relations statistics.

And while Su's deputies are supposed to make a determination in 60 days, the average case currently takes more than a year to resolve, Kish said.

"Despite the best efforts of some committed [Division of Labor Standards Enforcement] staff, the process has just been broken for a number of years," Kish said.

Su said the clinic is part of a larger strategy to prevent the backlog from discouraging workers from making complaints.

She also said expedient investigations are important to maintain worker rights. Employers retaliate, she said, "often not just to punish a single worker for engaging in her rights - for engaging in protected activity - but to have a chilling effect on the workplace."

The clinic's students said they learned real-world applications of retaliation law, and many said the experience gave them the most practical knowledge of all their law school classes.

Student Cheryl Banares' case was hands-on from the start. After she traveled to the employee's worksite to sort out who was actually in charge at the telemarketing company, Banares interviewed the parties and discussed how to apply the law with Kish and her classmates.

"You don't really get that kind of experience at law school," Banares said.

Su has also reached out to UC Irvine School of Law and Stanford Law School about including the investigations as part of their curriculum.

UC Irvine's Professor Sameer Ashar said he's planning to include a couple investigations soon in his immigration law clinic, per Su's request.

"I think there's something different about an adjudicative role in an administrative agency that's supposed to be pro-worker but still owes due process to all parties," Ashar said.

laura_hautala@dailyjournal.com