Alternative Challenges by Dismissed Employees: Claims of Retaliation, Discrimination, or Violation of First Amendment Rights

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Practical Advice from a Litigator

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Most states in this country give public school teachers job protections through tenure statutes or something like them. Typically, a teacher who has passed through his probationary period can only be terminated, or have his contract non-renewed, for cause. Where states protect the jobs of tenured teachers, they also usually provide some formal mechanism that allows a dismissed teacher to challenge the decision. These mechanisms vary, but most commonly a teacher is entitled to a hearing before a state administrative agency, the local school board, or an arbitrator. From there, states often allow teachers to appeal decisions to an appellate court. Of course, probationary teachers or at-will employees can be terminated without cause. Accordingly, they do not have a way, granted by tenure laws, to challenge the grounds for a dismissal.

A teacher with tenure who has been dismissed may choose to file a civil rights lawsuit either instead of, or in addition to, taking advantage of whatever mechanism a tenure law provides to challenge terminations or non-renewals. Meanwhile, probationary teachers or at-will employees, who have no recourse to such mechanisms, have few choices but to file a civil rights lawsuit in order to challenge a termination.

In their particulars, a civil rights lawsuit does not duplicate the protections that are available under tenure laws. Whatever review of a dismissal is provided by tenure laws is supposed to answer the question of whether a teacher was properly and actually dismissed for cause. A civil rights lawsuit, on the other hand, ostensibly answers whether a termination (or an adverse employment action short of a termination) was done for an illegal reason. The remedies, too, are different.

But in a broader sense, any civil rights lawsuit over a termination is a challenge to the termination made by someone who disagrees with it, or is generally unhappy with it. Viewed this way, civil rights laws are just another way for a tenured teacher to challenge a termination or non-renewal besides whatever is provided for by tenure laws. And they are the only way for a probationary teacher, or an at-will employee, to challenge a termination.

There are many reasons a tenured teacher might eschew these mechanisms, or at least supplement them with a civil rights lawsuit. For

example, a teacher might have missed the time limit he has within which to challenge a dismissal. These time limits typically measure in days, whereas the statute of limitations on a civil rights claim can measure in years. More likely, though, is that a civil rights lawsuit is easier and potentially more lucrative.

A review of a dismissal by an administrative agency usually has two features a teacher may want to avoid. The first is that the agency is reviewing a teacher's performance or behavior that led to a just-cause determination. A teacher may not be eager for an agency to make its decision based strictly on whether the performance or behavior a school cites for a termination satisfies a for-cause standard. If a school actually took what, for a public employer, is the drastic step of termination, then the teacher's performance is likely to be demonstrably deficient, or his behavior demonstrably egregious.

As discussed more below, a civil rights lawsuit filed over that same termination is not even ostensibly about deciding whether a teacher was properly terminated for cause. Even if a teacher's performance and behavior have their part to play in a lawsuit, that part has less emphasis. In the end, poor performance or bad behavior is no impediment to asserting a successful civil rights claim, which is probably contrary to many employers' instinctive reaction to these kinds of claims.

The second feature of an agency's review that a teacher would probably like to avoid is that it will be done by someone who is a professional versed in the subject and the process, like an administrative law judge. Such professionals are likely to base their decisions on the objective criteria which are supposed to control the outcome. One of the reasons poor performance or bad behavior have proven to be no impediment to success in a civil rights lawsuit is that they are ultimately decided by juries (at least in the relatively rare instance a suit proceeds that far).1 More on this below, but a jury tends to make its decision based on what it thinks is fair, and there is no contradiction in a jury thinking that an employer treated even a poor-performing employee unfairly. This phenomena, moreover, is aided by the tailwind of popular sentiment in favor of individual employees against employers and, in particular, governmental employers.

The result of a successful challenge to a termination under tenure laws is reinstatement, often including an award of back pay. The remedies available under civil rights laws vary. Under some laws, reinstatement is theoretically possible. But practically speaking, the remedy to be gained by a civil rights lawsuit is money damages (though money may be sometimes awarded as an equitable remedy rather than a legal remedy). At one end of the spectrum are civil rights laws that allow a successful claimant to recover whatever damages he can prove

1 There is the occasional employment law which mandates a bench trial.

were caused by illegal conduct. The damages, or what an employer might otherwise have to pay, include wage-based damages, like past and future lost income and benefits; non-wage damages, like damages for all the varieties of allegeable emotional distress, or injury to reputation; and others, like punitive damages, liquidated damages, injunctive relief, statutory penalties, interest, and attorney fees and costs.

Data suggests that, over time, juries have become more likely to find in favor of employees in employment claims, and that jury awards in employment claims have grown by a surprising amount. One proprietary statistical review, for example, placed the average compensatory award in employment cases decided in federal court at almost $500,000, which is a 45 percent increase since 2000. (And in most years, governmental entities represent the largest type of employers who are defendants in employment claims that reach a verdict.) Not surprisingly, employment lawsuits have risen by 400 percent in the past 20 years.

It is safe to assume that the rise in awards given to teachers, and the number of lawsuits filed by teachers, is at least somewhat proportional to the numbers as a whole. Anecdotal evidence, at least, suggests that the increase in jury awards and the number of employment claims filed has come with a corresponding decrease in teachers challenging terminations through tenure laws. In 2015, for example, the Oregon administrative agency tasked by tenure laws with reviewing terminations or non-renewals reported that only four had been appealed to it. This is down from numbers seen in years past.2

For these reasons, a teacher with tenure, a probationary teacher, or an at-will employee is more likely than ever before to file a civil rights lawsuit if a school dismisses them. Most commonly, these lawsuits allege that a school dismissed them for an illegal discriminatory or retaliatory reason. These kinds of lawsuits are problematic.

1 The types of employment claims

An employment claim under a civil rights law requires the employee to first show that he is someone who, or that he did something which, is protected by a civil rights law. An incomplete list of classes protected by various federal, state, or municipal employment laws follows: race, color, sex, age, religion, national origin, gender presentation, sexual orientation, pregnancy, disability, marital status, etc. While everyone might not be pregnant, everyone has a race and a sex, for example. In short, everyone belongs to many protected classes.

The categories of protected conduct are far more numerous than the categories of protected classes. Most laws which prohibit

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2 Fair Dismissal Appeals Board - List of Cases, ode.state.or.us/search/page/?id=3796.

discrimination because someone belongs to a protected class also prohibit an employer from retaliating against an employee because he complained about being treated in a way he perceived to be discriminatory. There are laws which protect against merely associating with anyone in a protected class, or who engaged in protected conduct. Medical and family leave laws prohibit an employer from retaliating against an employee for taking medical or family leave, and for inquiring about it. Whistleblower laws protect employees who have reported illegal activity, or gross mismanagement, or the like, though, in practice, "whistleblowing" tends to get defined downward until it means "complaining about something, anything."

Well-known are laws that protect against sexual harassment which creates a hostile work environment, including a hostile work environment that may or may not lead to an alleged constructive discharge. But laws don't just protect against sexual harassment. They also prohibit an employer from subjecting an employee to a hostile work environment because of his membership in any protected class, or his engagement in any protected activity.

Case-law, meanwhile, has allowed employers to be liable for terminations even when the person who actually made a termination decision did not do so—and was not alleged to have done so—with an illegal, discriminatory or retaliatory motive. Here, a plaintiff merely need show that some other employee duped the employer into terminating the plaintiff so that the he could enact his discriminatory or retaliatory motive. These kinds of claims can be especially problematic for school districts. Normally, a termination or non-renewal requires board action. But, normally, a board will take whatever action is recommended by the administration.

There is also the inescapable fact that school employees, as employees in the public sector, enjoy constitutional protections that their counterparts in the private sector do not. These include claims under the Equal Protection Clause of the Fourteenth Amendment, and claims under the First Amendment.

A claim made by a public employee under the Equal Protection Clause is a discrimination claim, basically, though it is one in which the employee must show, as a prerequisite, that he belonged to a group that was treated differently from another group (and without sufficient justification). However, the Equal Protection Clause does not define the groups that it protects. Rather, it guarantees people "equal protection of the laws." This allows a plaintiff to get creative in alleging which group he belonged to, and then was treated differently for belonging to it. The possibilities are endless.

Claims by public employees under the First Amendment typically allege an infringement on the right to free speech or free association. While a claim under the Equal Protection Clause is basically a discrimination claim, a claim by a public employee under the First

Amendment is basically a retaliation claim. In that regard, it is akin to a claim for whistleblower retaliation. There are, of course, some important differences.

On the one hand, speech retaliation claims by a public employee against a public employer nominally have higher hurdles than a claim for whistleblower retaliation. Public employees only have limited speech rights considering that public employers must be able to manage their workforce. Thus, an employee's speech that owes its existence to his job duties is not protected. And if the alleged speech does not owe its existence to the employee's job duties, then it must have been on a topic of sufficient public interest. (And even then, an employer can prevail by showing that its interest in taking the challenged disciplinary action outweighed the employee's interest in exercising his speech rights.) *See generally Garcetti v. Ceballos,* 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

On the other hand, whistleblower laws are supposed to protect employees who try to bring to light something that is wrong with their employer, like gross mismanagement, corruption, or other illegal behavior. Claims under the First Amendment don't have this limitation. While speech retaliation claims are often made for conduct that can be classified as whistleblowing (and are often made alongside claims for whistleblower retaliation), they are just as often not. The salient point is that while an employee making a speech retaliation claim has a challenging burden of proof, the First Amendment does broaden the possible range of conduct on which an employee can base a retaliation claim.

The Due Process Clause is also another common constitutional source of employment claims. The Due Process Clause entitles public employees, like tenured teachers, who have a property interest in their job with procedural protections that must be observed, namely, pre-termination "notice" and a "meaningful opportunity to respond" to the charges that have been leveled against them. *See generally Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 389 U.S. 306 (1950).

The Due Process Clause can also be used by employees who do not have a property interest in their jobs because the Due Process Clause also protects a person's liberty interests from being deprived without due process. One recognized liberty interest is the right to pursue one's chosen profession. A governmental employee can use comments his employer might make in the course of a termination, and which become publicized, to claim that the employer infringed on this liberty interest.

A claim under the Due Process Clause is not, of course, a claim for discrimination or retaliation per se. But note that due process claims often accompany discrimination and retaliation claims that stem from a

termination. Among other things, an employee may allege that a pre-termination opportunity to respond was not "meaningful" because those who heard it held discriminatory or retaliatory animus.

The above is far from a complete list of the kinds of discrimination or retaliation claims a teacher or other school employee could make. If, impossibly, a teacher or other school employee doesn't find himself to be a member of a protected class, or to have engaged in a protected activity, he can always make a tort claim, like wrongful discharge, over his termination.

2 Challenges in defending against employment claims

2.1 *Summary judgment*

Motions for summary judgment are difficult from an employer's perspective even if it is true that summary judgments, or partial summary judgments, are granted at higher rates in employment claims than in other kinds of claims. Aside from the fact that the non-moving party is always given the benefit of the doubt on motions for summary judgment, the process of resolving employment claims at the summary judgment stage is designed to help employees. The result is that an employee can survive summary judgment without ever producing direct evidence that the person who made a termination decision was motivated by discriminatory or retaliatory animus.

In federal court, at least, employment discrimination and retaliation claims are resolved in the same, mechanistic way at the summary judgment stage. (State court practices vary, though the end results are the same, if not more plaintiff-friendly on average.)

To prevail on an employment discrimination or retaliation claim, a plaintiff must ultimately prove by a preponderance of evidence that an employer was motivated by the plaintiff's protected status (race, for example) or protected activity (whistleblowing, for example) when it subjected the plaintiff to an adverse employment action. So if a plaintiff establishes that he was a member of a protected class or engaged in protected activity and that an adverse employment action was taken against him, he can survive summary judgment if he produces sufficient "direct evidence" that an employer was motivated by discriminatory or retaliatory animus when it took the alleged adverse employment action. Direct evidence is simply evidence "which, if believed, proves the fact of discriminatory animus without inference or presumption." *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1094–95 (9th Cir. 2005).

Where there is no direct evidence of discriminatory or retaliatory intent—and there rarely is—courts considering an employer's motion for summary judgment proceed under the so-called "*McDonnell Douglas* burden-shifting framework." *See Diaz v. Eagle Produce Ltd. Partn.*, 521 F.3d 1201, 1207 (9th Cir. 2008). Under this burden-shifting framework, a plaintiff must first make a *prima facie* case.

To make a *prima facie* case for employment discrimination a plaintiff must generally establish that: 1) he belongs to a protected class or he engaged in protected activity; 2) he suffered an adverse employment action; and that 3) similarly situated persons who are outside his protected class were treated more favorably. *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 658 (9th Cir. 2002) (en banc).

To make a *prima facie* case for retaliation, a plaintiff must generally establish that: 1) he engaged in protected activity; 2) he suffered an adverse employment decision; and that there is 3) a causal link between the protected activity and the adverse employment action. *Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 785 (9th Cir. 1986). While an employer's knowledge that an employee engaged in the alleged protected activity is necessary to establish a causal link between the protected activity and any alleged, retaliatory adverse employment action, *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982), that mere knowledge, in and of itself, is not sufficient, *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 751 (9th Cir. 2001). An employee must also produce evidence which shows, for example, that the protected activity and the adverse employment action were sufficiently close in time, or that the employer expressed some kind of opposition to the protected conduct. *Id*. at 751–52.

In sum, the plaintiff's task to establish a causal link, and thereby complete his *prima facie c*ase, is light. Generally, he only needs to produce evidence that the employer expressed some kind—any kind—of opposition to the protected activity or, as is more common, that the adverse employment action merely came after, but not too long after, the protected activity.

If a plaintiff establishes his *prima facie* case, he creates a presumption that his adverse employment action was taken with a discriminatory or retaliatory intent. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000). The burden of production—but not the burden of persuasion—then shifts to the employer "to articulate some legitimate, non-discriminatory [or non-retaliatory] reason" for his challenged employment decision. *Id*. If the employer successfully rebuts the plaintiff's *prima facie* case by articulating such a reason, then the "presumption of discrimination [or retaliation] drops out of the picture." *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006). The plaintiff can then only prevail if he produces sufficient circumstantial evidence that the employer's articulated non-discriminatory or non-retaliatory reasons were merely pretextual and that they were not the true reasons. *See Coleman*, 232 F.3d at 1281.

An employee will almost never have direct evidence that he was terminated for an illegal reason. (And if he did, a lawsuit would probably never have reached the summary judgment stage, having already settled.) A defense attorney would say this is because few

employers these days—especially public employers—would ever terminate someone for an illegal reason. But a plaintiff's attorney would say there is usually no direct evidence because an employer is at least savvy enough to not leave any. Regardless of who is right, the burden-shifting framework was devised with the idea that it is very difficult for an employee to prove that an employer terminated him for an illegal reason precisely because an employer will not broadcast any illegal reasons. This is why the last part of the analysis on summary judgment—the part that decides so many summary judgment motions—is dedicated to circumstantial evidence.

A plaintiff can generally show pretext through two different kinds of circumstantial evidence. The first is evidence that the employer's "proffered explanation [for the adverse employment action] is unworthy of credence because it is internally inconsistent or otherwise not believable." *Noyes v. Kelly Servs*., 488 F.3d 1163, 1170 (9th Cir. 2007). The second is evidence which shows that the employer held discriminatory or retaliatory animus, and therefore that such animus "likely motivated the employer." *Id*. If a plaintiff can demonstrate pretext in either of these ways, he creates a question of fact about whether an employer took a challenged adverse employment action for an unlawful reason.

Keep in mind what this means. An employee will usually be able to make out his *prima facie* case, and an employer will almost always be able to at least give some valid reason for a termination decision. Thus, in practice, discrimination and retaliation claims at the summary judgment stage more often than not come down to whether circumstantial evidence creates a question of fact, sufficient to survive summary judgment, that the employer terminated (or took some other adverse employment action) the employee for an illegal reason. And between the two, general categories of circumstantial evidence, the one more likely to decide summary judgment is any circumstantial evidence that goes toward establishing pre-text.

It is not possible to list all the manner of circumstantial evidence of pretext that might allow a discrimination or retaliation claim to survive summary judgment. But it could be something as innocuous as an employer providing, at different points in time, only slightly varying explanations for a termination. Or it could be something like an employer not adhering to its own, internal polices, or disciplining the employee in this one instance where another employee, in some other somewhat analogous situation, was not disciplined. Or that it just doesn't seem like the punishment fit the crime. Or that it seemed like the employer was over-monitoring the employee's performance, as if he was trying to catch him up. Hopefully one can see from these examples that an employee has a range of possible circumstantial evidence to choose from in demonstrating pretext, and thus surviving summary judgment.

2.2 *Trial*

Summary judgment may be difficult, but it's worth an employer pursuing because it can win on claims whereas the employee can only lose. At trial, the employer cannot only lose, of course, but statistics show that an employer's chance of losing are, depending on the type of claim, as high as two-thirds and no lower than about half. And these are claims which the employer took to trial because it believed them to be defensible. Even without the grim numbers, it's probably conventional wisdom, at least among lawyers, that the outcome of trials is uncertain, and therefore that trials are something to be avoided. This is why only a small percentage of employment claims are ever resolved by juries.

There is not much need to belabor the point here. Still, trials have at least one important lesson to teach which is useful. And that is, in the end, jurors will do what they think is fair, or right, and what a juror thinks is fair or right does not have much to do with a rigorous application of the evidence to the law. This has a downside and an upside. The downside is, as mentioned above, that jurors naturally favor employees over employers because of the inherent power imbalance between the two. The upside, though, is that an employer can increase its chances by recognizing that jurors make decisions based on fairness. Thus, when making employment decisions, the goal is: be fair.

3 Reducing the chance of employment claims

If the only barrier to a claim of employment discrimination or retaliation is the will to make such a claim then, assuming a severance is not an option, the employer's goal should be to avoid fueling that will. A person's identity, and a good part of his life, is wrapped-up in his job. This is not to mention that people need to make money to survive. Any termination is therefore bound to be inherently volatile. When someone gets fired, he is often hurt, has his ego damaged, or feels betrayed, diminished, scared, stressed, mad, surprised, indignant, self-righteous, wronged, and so on. These are the emotions that motivate employment lawsuits, not the bare desire to vindicate a civil right. If these are the emotions that drive lawsuits, then it follows that forestalling them, or mitigating them, could prevent at least some lawsuits. As a bonus, many of the things an employer can do to minimize how volatile a termination can be are also helpful in winning employment claims both during summary judgment and at trial.

Perhaps the overriding thing an employer should strive for is fairness. Fairness, though, does not necessarily mean that an employer should do what the employer thinks is fair. Fairness refers to what the *employee* is likely to think is fair. The goal, then, is overwhelming fairness; fairness that goes above and beyond what an employer would normally think fulfills its obligation. Some advice rendered in bullet points:

- *Notify employees of performance issues*. This applies to behavioral issues, too. The point is, even performance or behavior which may warrant discipline should not be grounds for discipline if an employee has not been notified in the past that this same kind of performance or behavior was deficient or will not be tolerated.
- *Give honest evaluations*. Along these same lines, if an employee has some kind of performance issue, document it in any formal evaluation, or explain it in any informal evaluation. This advice especially applies to schools, where formal, annual teacher evaluations are often mandated by law. Too often, and for whatever reason, every teacher, every year, has every single "exceeds expectations" box checked. What happens when a teacher with, say, 20 years' worth of "exceeds expectations" is terminated? What happens when those evaluations are trotted out at trial?
- *Give employees time to improve*. If an employee has performance issues notify them *and* give them a chance, or chances, to improve. If an employee has a problem with conduct, notify them *and* give them a chance, or chances, to stop it. If an employee has been given notice and chances, the problems persist, and *then* he faces discipline, maybe he will accept it.
- *Be consistent*. This goes towards avoiding evidence of pre-text more than anything, but employees will inevitably compare their situation with others. If an employee sees that he has been treated in the same way as another employee with similar issues, he is more likely to accept it. If he sees that he is being treated differently, then he is less likely to accept it. Make sure that an employee with more serious problems did not suffer lesser consequences. Also, is some proposed discipline inconsistent with the employer's previous treatment of the employee? For instance, has the employer recently given the employee a promotion or merit-based pay increase?
- *Avoid surprises*. In one sense, the bullets above also get to one point: do not surprise an employee with discipline.
- *Consider alternatives*. Employment problems are frequently the result of interpersonal relationships that have gone bad and festered for years, or simple personality conflicts. For this reason and others, offering to transfer an employee should be considered if it's possible.
- *Be straightforward.* This is similar to much of the advice above, but is meant to extend to all aspects of an employment relationship, not just evaluations or performance deficiencies. The continual process of sparing feelings can lead to discipline that surprises an employee. What seems to be the last straw for an employer might not seem to be from the employee's perspective. The employer should ask itself, what does the employee know about what it, the employer, thinks of his performance so far?
- *Be respectful.* Even when it's not deserved.
- *Terminations*. Are sometimes necessary. When it comes to

actually firing an employee, be candid. Do not withhold any reason for the termination to spare the employee's feelings, or for any other reason, including if the reason is embarrassing for the employee, or the employer. If an employer gives a straightforward answer for why the employee was terminated during litigation that was not given when the employee was terminated, this calls into question why the straightforward answer was not given in the first place.

4 Increase the chance of winning employment claims

The advice above is general. To borrow from Tolstoy, happy employment relationships are all alike; each employment relationship that disintegrates does so in its own way. So despite an employer's best efforts, a certain number of terminations will inevitably result in claims of discrimination or retaliation.

If a jury decides these claims primarily on whether it perceives a termination as fair, then all the advice about decreasing the chance of an employee filing a suit over a termination applies equally here. But also:

- *Document performance issues*. If the goal is to defeat supposed circumstantial evidence that the reasons given for some discipline were pretextual, then the best defense is a trail of evidence which supports those given reasons. This evidence can also be important in establishing the correct timeline of events, which is often critically important. Document each violation of employment policy, including giving a specific description of the violation, and how it violates any policy.
- *Document communications*. For the same reason that an employer should document performance issues, and even if there is no expectation that a termination is a probable outcome. The goal, again, is to leave a trail of evidence that shows the employer has been completely consistent in how it treated the employee, including from the first moment the employer notifies the employee he has not met expectations, through the moment of termination if it comes to that, and at all times afterward.
- *Follow policy*. Employer policies cannot hope to cover every situation. But where a policy does cover a situation, follow it, especially if it spells out the employer's obligations. Straying from policy might be the most commonly cited circumstantial evidence of pretext.
- *Independent evaluation*. Depending on circumstances, an employer may not want to rely exclusively on an employee's supervisor's termination recommendation. An independent verification that the recommendation is warranted cannot hurt.
- *Terminations*. Same as above. Always give the real reasons for a termination. Be careful, though, with statements made in a termination notice, for example, and post-termination statements like a response to a state unemployment compensation office. Often an employer feels

compelled to over-justify a termination decision, and to embellish the reasons for it. The result is often a laundry-list of performance problems or conduct, some of which were either not previously documented, or not conveyed to the employee, as a reason for the termination. Giving post-termination additional reasons for a termination can successfully be used by an employee to demonstrate pretext.

- *Post-termination*. Similarly, never come up with post hoc justifications for a termination decision, whether in a post-termination letter, or during the course of litigation, or at any other time, that were not previously given to the terminated employee, both in the events leading up to the termination, and during the termination itself. In other words, be entirely consistent, throughout the whole process, about the reason for the termination.
- *Pretext*. It cannot be emphasized enough that everything an employer does surrounding a decision to discipline an employee should be done with an eye toward pre-text, and whether some act or omission can possibly be cited as evidence of pre-text.

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