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No Protected Activity? No Problem

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The law regarding retaliation in the workplace has expanded rapidly in several respects during the last few years. The United States Supreme Court's recent unanimous decision in Thompson v. North American Stainless, LP, discussed below, demonstrates how far the law may be stretched in this area.

What is Unlawful "Retaliation"?

Most laws and the courts interpreting those laws define retaliation as an "adverse action" taken against an individual because he or she engaged in a "protected activity." An adverse action could be anything from changing pay or job duties, to termination of employment. It could even include post-termination actions such as providing inaccurate job references about an ex-employee because she engaged in protected activity.

"Protected activity" can include complaining that an employer has violated the law, participating in an investigation, filing a complaint with a government agency, or even requesting a protected leave of absence or reasonable accommodation.

The basic definition of retaliation above is undergoing some revisions as courts issue new decisions. The Supreme Court in Thompson expanded the potential plaintiffs who may assert retaliation claims. Other courts have issued decisions stretching the causation element and the types of conduct that can constitute retaliation.

Retaliation Claims: The Danger
Retaliation claims are dangerous for several reasons. First, there is often a viable claim for retaliation even when the initial complaint does not constitute unlawful harassment or discrimination. As long as an individual has a reasonable and good faith belief that he is complaining of illegal conduct, he is engaging in protected activity. In practice, courts may dismiss underlying claims of harassment and discrimination, while allowing a retaliation claim to survive and ultimately be heard by a jury.

Second, the burden of proof may make it difficult to overcome a retaliation claim without a trial. The employer's burden is especially steep when negative actions follow protected conduct because the employee may argue that retaliation motivated the negative action, even though the employer may have had a lawful reason for taking it. For example, the closer in time that adverse action follows protected conduct, the stronger a presumption of retaliation. Also, although negative action usually follows a protected activity in retaliation cases, such as a complaint about perceived discrimination, that is not always so. In one case, Steele v. Youthful Offender Parole Board, the court of appeal held that taking action in anticipation of a complaint also may be unlawful retaliation. Of course, there is no retaliation where an employer does not know about a protected activity. This lack of knowledge is the easiest way to break the causal link.

Third, retaliation claims often lead to the highest employment-related verdicts and settlements. Between July 1996 and October 2010, out of 148 reported verdicts and settlements, the plaintiff prevailed more than 60 percent of the time. The average award was $1,207,056.23.

Increased Risk Given Legislative and Enforcement Agency Priorities

One reason retaliation claims are growing is that the "protected activities" and anti-retaliation laws are expanding. For example, state lawmakers recently amended the California Labor Code to require that employers with 15 or more employees grant paid leave to employee organ and bone marrow donors. These same amendments expressly prohibit retaliation against employees who exercise their right to this leave.

Even non-employment laws now contain anti-retaliation provisions protecting workers who report violations. The federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) provides protection for whistleblowers in the financial services industry. Dodd-Frank actually goes beyond most anti-retaliation provisions by providing

whistleblowers with a "bounty." People who report violations of the law to the Securities and Exchange Commission stand to gain 10 to 30 percent of any amount over $1,000,000 that the SEC recovers.

The Food Safety and Modernization Act, another new law, is not an anti-discrimination law but it contains significant anti-retaliation provisions. There are literally hundreds of similar laws that their anti-retaliation provisions, extend directly into many of our workplaces.

Enforcement agencies are equally focused on this issue. Retaliation is now the most common type of charge filed with the federal Equal Employment Opportunity Commission (EEOC). For Fiscal Year 2010, 36% of all charges filed by employees with the EEOC contained a retaliation claim. In fact, the period of Fiscal Year 1997 through 2010 saw a 99% increase in retaliation claims filed with the EEOC.

Additional Developments Fueling the Explosion of Retaliation Claims

Many of our civil rights and anti-discrimination laws, like Title VII of the Civil Rights Act of 1964, expressly prohibit retaliation. Other key civil rights laws do not. Nevertheless, in cases like Gomez-Perez v. Potter and CBOCS West, Inc. v. Humphries, the United States Supreme Court has established that employees are protected from retaliation even where laws like the Age Discrimination in Employment Act of 1967 and Section 1981 of the Civil Rights Act do not expressly prohibit retaliation.

The United States Supreme Court's decision in Thompson v. North American Stainless, LP broadens anti-retaliation provisions by permitting employees to sue even when they do not personally engage in protected conduct.

North American Stainless, LP (NAS) employed Eric Thompson and his fiancée, Miriam Regaldo. Regaldo filed a charge with the EEOC, alleging that NAS discriminated against her in violation of Title VII. NAS fired Thompson for alleged performance issues just three weeks after it received notice of Regaldo's EEOC charge. Thompson sued NAS, alleging that NAS fired him in retaliation for his fiancée's complaint.

Both the district court and the court of appeals found that Title VII's anti-retaliation provisions did not protect Thompson because he had not engaged in the protected activity. But the Supreme Court disagreed. In a unanimous decision, the Court held that NAS's discharge of Thompson, as motivated by his fiancée's filing of a charge of discrimination under Title VII, entitled him to file his own retaliation charge under the statute.

The Court reasoned that "Title VII's anti-retaliation provision prohibits any action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." In Thompson, it was "obvious" that a reasonable worker might be discouraged from engaging in protected activity if she knew her fiancée would be fired.

After Thompson, does the complaining party have to be a spouse, a close-friend, or simply an acquaintance of the person that suffers the adverse action? Does the adverse action have to be termination, or is some lesser discipline sufficient?

Unfortunately, the Supreme Court refused to answer these important questions. It expressly refused to "identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet [the standard], and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that, we are reluctant to generalize. The significance of any given act of retaliation will often depend upon the particular circumstances." In other words, each case will be evaluated on its own facts, resulting in more litigation.

Minimizing Future Risk

Employers can take several steps today to minimize risk of future retaliation claims. To begin, employers should institute formal anti-retaliation policies and complaint procedures. Such polices should also address how the employer will respond to a complaint, as well as a desire to know about any alleged retaliation following the initial complaint.

Having a policy is not enough, though. Employers must overcome employees' reluctance to come forward by ensuring that complaint procedures are flexible and accessible. Additionally, retaliation often comes at the hand of resentful supervisors and managers. Therefore, the employer must train these leaders regarding the policies and expectations of the organization.

When there is a complaint, employers must respond appropriately. At a minimum, a response must include some sort of inquiry into the complaint. Whether that inquiry is a quick phone call to verify a fact or a full blown investigation will depend on the situation.

An effective response must also include specific steps to prevent retaliation against both the complaining party and, in light of Thompson, other persons associated with the complaining party. Employers would be wise to anticipate possible retaliation against employees who make complaints or request accommodations for disabilities. Managers and supervisors must understand that retaliatory conduct is prohibited and consequences for violating the anti-retaliation policy will be severe.

Finally, some employees will bring frivolous claims in anticipation of legitimate discipline. The law does not protect that conduct. Neither complaining parties nor their associates receive a "get out of jail free card" by filing a complaint. In Chen v. County of Orange, a California appellate court expressly recognized that employees sometime seek refuge from discipline by making protected complaints of discrimination and harassment without a good basis for doing so.

Good management practices will help prevent "defensive" claims of retaliation based solely on timing. he best way to demonstrate that a negative decision is legitimate is to document poor performance and enforce policies consistently during employment, not merely after an employee makes a complaint. o matter how legitimate and real those performance issues may be, post-complaint documentation looks a lot like retaliation.

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